

Teaming Agreements: A Look at the Inside Game

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TODAY'S OUTLINE

- **Purpose of Teaming Agreements**
- **Key Provisions of Teaming Agreements**
 - Recitals
 - Scope of the Teaming Relationship
 - Proposal Preparation
 - Confidentiality & Intellectual Property
 - Award of Subcontract
 - Limitation of Liability
 - Breach & Dispute Resolution
 - General Provisions



PURPOSE OF TEAMING AGREEMENTS



WHAT TEAMING AGREEMENTS DO

- **Allocate:**
 - **Risk and Cost** of Proposal Development
 - **Roles and Responsibilities** of Proposal Development
 - **Future Leverage** Between Prime and Sub if the Team Received Award
- **Can alter the Competitive Landscape**



GOALS OF TEAMING AGREEMENT NEGOTIATION

- **Make sure:**
 - Risk and Cost are allocated fairly
 - Roles and Responsibilities are clearly identified
 - Future Leverage is allocated fairly
 - All key issues and terms are addressed



GOALS OF TEAMING AGREEMENT NEGOTIATION

- Most of the time, you are negotiating from a “model” or “template”
- REMEMBER: Teaming Agreements are NOT “One Size Fits All”
 - Must be tailored to the circumstances
 - Leverage in the relationship can limit or increase what you can get



KEY PROVISIONS OF TEAMING AGREEMENTS



RECITALS

- “Whereas....”
- Why they are Important:
 - *Used by a court to interpret the agreement*
 - *Sets forth context and purpose of the teaming agreement*
 - Explain the Deal
 - Contributions of the Parties
 - Expectations of the Parties



RECITALS

- **Recitals sets forth key definitions regarding the scope of the Team**
 - Who is the “Prime” and “Sub”
 - Who is the government “Customer”
 - What is the “RFP” or “Program”



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SCOPE OF TEAMING RELATIONSHIP

- **Why its Important:**
 - *Make Sure The Reach Of The Agreement Is CLEAR*
- Exclusive or not?
- Which specific government customer?
- Which specific program/RFP?
- How long does the relationship last?
- Who will be the “Prime” and who will be the “Sub”?



NATURE OF TEAMING RELATIONSHIP

- **Why its Important:**
 - *Avoid JV formation (tax consequences)*
 - *Avoid confusion*
- **Independent Contractors**
- **No Authority to Bind Each Other**
- **Non Assignment of Agreement**
 - Absent Consent of Other Party



PROPOSAL PREPARATION

- **Responsibilities of the Parties – Key Issues**
 - **Control** over proposal (usually prime)
 - **Authority to communicate** with customer (usually prime)
 - **Subcontractor review/approval** of proposal?
 - **Coordination and Cooperation**
 - Participation in **discussions, negotiations, or oral presentations**
 - **Proposal Revisions**



PROPOSAL PREPARATION

- **Responsibilities of the Parties**
 - **Subcontractor's** portion of technical and price proposal
 - Due dates
 - Submission of **subcontractor pricing data** to government
 - **Identification of subcontractor** in proposal?



PROPOSAL PREPARATION

- **Contributions of the Parties**

- Expenses of proposal preparation

- *Usually each party bears own expenses*

- Qualified personnel
- Best Efforts
- Expertise

- Engineering
- Management
- Technical
- Costing/Pricing



PROPOSAL PREPARATION

- **Protection of Proprietary Data Exchanged by Parties**
 - Confidentiality Provisions
 - Marking requirement?
 - Use Restrictions
 - Non-Disclosure Obligation
 - Equitable remedies for breach
 - Disposition after award
 - Survival



PROPOSAL PREPARATION

- **Ownership of Proprietary Data Exchanged by Parties**
 - Ownership of Intellectual Property
 - Licenses/Copyright
 - Trademarks
 - Patents
 - Joint Ownership?
 - New intellectual property created during teaming process



REPS AND CERTS

- **Organizational Conflicts of Interest**
- **Excluded Party List status**
- **No breach of other agreements**
- **Ownership of Key Intellectual Property?**
- **Control of Key Personnel?**
- **Small Business status?**
- **Compliance Program**



AWARD OF SUBCONTRACT



AWARD OF SUBCONTRACT

- Why its Important:
 - For the Sub: *The entire economic benefit of the TA depends on the award of the subcontract.*
 - *Subcontractors like certainty*
 - For the Prime: *The economic benefit of the TA depends on having the “right” sub perform at the “right” price*
 - *Prime contractors like flexibility*

AWARD OF SUBCONTRACT

- Legal Landscape

***Cyberlock Consulting, Inc. v. Info. Experts, Inc.*, 2013 WL 1395742 (E.D. Va. Apr. 3, 2013).**

- Subcontract award clause held unenforceable because it was merely an “agreement to agree” in the future.
- The agreement simply set out “a contractual objective and [an] agreed framework” for future negotiation - it did not manifest any firm intent for the parties to be bound. *Id.* at 8. “[A]greements to agree in the future” are “too vague and too indefinite to be enforced.”

AWARD OF SUBCONTRACT

- Legal Landscape

EG&G, Inc. v. The Cube Corp., (Fairfax, Va. Cir. Ct. Dec. 23, 2002).

- Subcontract award clause held enforceable because it was merely an “agreement to agree” in the future.
- The terms of the teaming agreement and the conduct of the parties evidenced the parties’ intent to be bound.
 - Proposal and letter subcontracts showed “meeting of the minds” on price, scope of work, duration, and place of performance.

AWARD OF SUBCONTRACT

- **Prime Friendly**

- No specificity on price or scope of work
- An “agreement to agree”
- 30-60 day period for good faith negotiations after award decision
- Failure to reach agreement is grounds for termination of teaming relationship
- Mandatory Flowdowns
- Small Business Issues

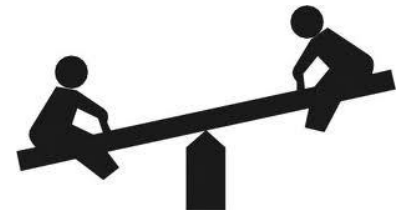
- *51/49 subcontracting limitation*



AWARD OF SUBCONTRACT

- **Subcontractor Friendly**

- Definitize subcontractor’s scope of work and price during proposal preparation
- Specify key subcontract terms in teaming agreement
- Prime “shall” award subcontract at definitized SOW and pricing pursuant to agreed scope of work
- EG&G: Subcontract provision is enforceable by injunction if there is a meeting of the minds of material terms



TERM AND TERMINATION

- **Why its Important:**
 - *Provides clarity on how long the parties are bound by the Teaming Agreement*
- **Duration (12 months?)**
- **Extension**
 - Unilateral or bilateral?
 - Automatic or by notice?
- **Discretionary Termination by Prime**
 - Failure to support pricing strategy?
 - Failure to perform satisfactorily? OCI concern?



TERM AND TERMINATION

- **Why its Important:**
 - *Helps the parties gain a quick and clear exit*
- **Automatic Termination**
 - Award to someone else (protest periods?)
 - Elimination from procurement process
 - Cancellation of the RFP
 - Government's failure to approve subcontractor
 - Suspension/debarment of a party
 - *Execution of a subcontract*
 - *Failure to negotiate subcontract within period*



TERM AND TERMINATION

- Survival Of Obligations After Termination
- Why its Important:
 - *What provisions do you need after the TA ends?*
- Confidential Information
- Non-Solicitation
- Limitations of Liability/Indemnification
- Dispute Resolution & Remedies



LIMITATION OF LIABILITY

- **Why its Important:**
 - *Allocates risk of loss if something goes wrong*
- Exclusion of Liability for Consequential Damages/Lost Profits
- Indemnification of third party claims?
- **Force Majeure (Excusable Delay)**



BREACH

- **Why Its Important:**
 - *Impacts how easy it is to get out of TA*
- **Identify “Material” Obligations?**
- **Notice Requirement**
 - Cure Period
- **Force Majeure (Excusable Delay)**
- **Remedies**
 - Termination for Cause?
 - Injunction to Enforce Exclusivity?
 - Injunction to Enforce Subcontract Award?



DISPUTE RESOLUTION

- **Why Its Important:**
 - *Impacts ability to enforce key obligations*
- **Pre-Litigation Procedure?**
- **Alternative Dispute Resolution?**
- **Choice of Law**
 - Virginia: EG&G Decision (Fairfax Circuit C
- **Forum Selection?**
- **Jury Trial Waiver?**



PROTESTS



GAO

Accountability * Integrity * Reliability

- Not a Common Clause, But it Should Be
- Why Its Important:
 - *After Award, protests put parties in limbo*
- Issues to Address
 - Who controls the protest decision?
 - Joint? Prime? Sub?
 - Who picks the protest forum?
 - Who picks legal counsel?
 - Who pays protest costs?
 - 50/50? 100% Prime?

GENERAL PROVISIONS



Why they are Important: *Key to the TA functioning well*

Provision	Why Its Important
Entire Agreement	Prevents parties from asserting “verbal” side agreements
Amendments	Prevents parties from asserting “verbal” changes to TA
Severability	Protects the TA in the event one provision is found to be unenforceable (i.e., the subcontract award clause)
No Waiver	Protects a party from losing rights if it chooses not to enforce them
Notices	Protects a party from “shenanigans” when providing notice of termination or breach (or other key notices)
Interpretation/Drafting	“Joint drafting” avoids ambiguities being construed against the party who drafted the agreement Order of precedence clause can make sense out of conflicting provisions
Counterparts	Allows the party to execute the TA by trading signatures over email or fax

SMALL BUSINESS SET-ASIDE CONSIDERATIONS



U.S. Small Business Administration

SMALL BUSINESS SET-ASIDE CONSIDERATIONS



- **Why this is Important:**
 - *SBA reviews size protests following awards of set-aside contracts; have your ducks in a row*
- **Ostensible Subcontractor Rule**
 - Small Business Prime is deemed “affiliated” with its subcontractor for size purposes if the subcontractor:
 - If the subcontractor performs the "primary and vital requirements" of the prime contract; or
 - the prime contractor is "unusually reliant" on the subcontractor.

SMALL BUSINESS SET-ASIDE CONSIDERATIONS



- **Limitation on Subcontracting**

Contract Type	Limitation on Subcontracting by Small Prime
Service Contracts	<p><u>Old rule</u>: Prime must perform at least 50 percent of the cost of contract performance incurred for personnel with its own employees.</p>
	<p><u>New rule (NDAA of 2013)</u>: Prime may not subcontract “more than 50 percent of the amount paid” under a contract; prime’s share includes “similarly situated entities.”</p>
Supply Contracts	<p><u>Old rule</u>: Prime must perform at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.</p>
	<p><u>New rule (NDAA of 2013)</u>: Prime may not subcontract more than 50 percent of the total “amount paid” under the contract (less materials); prime’s share includes “similarly situated entities.”</p>

SMALL BUSINESS SET-ASIDE CONSIDERATIONS



- **Mitigating Small Business Risk in Teaming Agreements**
 - **Draft Teaming Agreement to Avoid “Unusual Reliance” in Proposal Preparation**
 - *Make sure the Small Prime is in the Driver’s Seat*
 - **Include a Work Share Provision that Complies with the Subcontract Limitation**
 - At least 51% for the Small Prime
 - No more than 49% for the Large Sub

SMALL BUSINESS SET-ASIDE CONSIDERATIONS



- **Mitigating Small Business Risk in Teaming Agreements**
 - **Draft the Scope of Work to Minimize Ostensible Subcontractor Risk**
 - Allocate discrete tasks between Small Prime and Large Sub
 - *Reserve “primary and vital” tasks and “complex and costly” functions for Small Prime*
 - Key Personnel employed by Small Prime
 - Small Prime responsible for program management
 - Large sub performs lower level support functions with non-key personnel

SMALL BUSINESS SET-ASIDE CONSIDERATIONS



- **Joint Venture members are considered affiliated** with each other for the procurement in question unless an exception to affiliation applies.
- **Exemptions from Joint Venture affiliation for various programs**

SMALL BUSINESS SET-ASIDE CONSIDERATIONS



Small Business plus Small Business

- The JV is considered small as long as (A) each member meets the size standard for procurements exceeding (i) if revenue-based, half the size standard or (ii) if employee-based, \$10 million; or (B) it is a “bundled” procurement.
- Otherwise, the JV’s members in the aggregate must meet the size standard.

SMALL BUSINESS SET-ASIDE CONSIDERATIONS



Three Kinds of 8(a) JVs

- 8(a) plus 8(a)
- 8(a) plus Small Business
- Mentor-Protégé (8(a) plus Large/Small Business)

8(a) JV Agreements must be approved by SBA District Office and meet SBA requirements

- 8(a) member must be managing venturer and employ project manager.
- 8(a) member(s) must receive profits from JV commensurate with work share if unpopulated or 51% if populated.
- 8(a) member(s) must perform 40% of work in unpopulated JV.
- Limitations on Subcontracting - JV collectively.

Questions?

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