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 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”
SCOPE OF TEAMING RELATIONSHIP

• Why it’s 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”?  

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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
• 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*
• Legal Landscape


• 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


• 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 it's 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)

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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 Court)

• Forum Selection?

• Jury Trial Waiver?
PROTESTS

• Not a Common Clause, But it Should Be

• Why It's 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?

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# GENERAL PROVISIONS

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

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

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