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Legal Corner

Locking-up Your Team

An essential aspect of “positioning to win” is forming the right team. In some large procurements, teams begin to coalesce as long as two years before a solicitation is issued. The following is a short list of some of the legal issues that potential prime contractors and subcontractors should consider when negotiating a teaming agreement.

Do we really need a written teaming agreement?

YES!

For most purposes, an oral contract is just as legally binding as a written one. The main problem with an oral contract is that the parties tend to have different recollections of what terms they agreed to after a dispute arises. And disputes do happen. That is the why you should have a written teaming agreement.

A corollary to this is that each side should have an attorney involved in preparing the teaming agreement. Whether you are investing \$1,000,000 in the proposal process or only \$10,000, you hopefully are

applying your best available resources to winning. Competent contracts counsel is the best resource you can use to make sure the agreement says what you want it to say, protects your interests, and is legally enforceable.

Should the teaming agreement be exclusive?

When entering into a teaming agreement, each side needs to consider whether it is willing to team exclusively with the other member or whether it wishes to be free to team with others. (This writer has even seen situations where a prime on one team is a sub on another team.) Sometimes, a party with greater bargaining power may insist on exclusivity being one way. Whatever you decide, the general rule is that if an agreement is silent on exclusivity, a court will interpret it as not being an exclusive agreement.

What are each party's obligations for proposal preparation?

The agreement should spell out the roles, responsibilities, and rights of each team member vis-à-vis proposal

preparation. Prime contractors usually want to control the process and limit the subcontractor's access to the customer to the greatest extent possible. Subcontractors, on the other hand, are often concerned with protecting their confidential information from the prime contractor, who is often a potential competitor. Typically, the Government is willing to accept the proposed subcontractor's confidential cost information in a sealed envelope (or, increasingly commonly, in an electronic file uploaded by the subcontractor directly to a Government site). Whatever the arrangements, they should be spelled out in the teaming agreement.

What is the subcontractor being promised?

A teaming agreement that says, “In the event a prime contract is awarded to prime contractor, prime contractor may award a subcontract to subcontractor,” is worthless from the subcontractor's perspective. It promises nothing! Nevertheless, would-be subcontractors continue to enter into such agreements. (See

the point above about having your counsel review the agreement.)

Even an agreement that says the prime contractor will award a subcontract to the subcontractor can be relatively meaningless if it does not promise anything specific to the subcontractor or does not contain other material terms—for example, prices. When negotiating a teaming agreement, a would-be subcontractor should seek specific guarantees such as, “Prime contractor will award a subcontract to subcontractor for x% of the prime contract work,” or “Prime contractor will award a subcontract to subcontractor for any task issued by the Government that relates to Section 2 of the SOW.” From the prime’s perspective, the teaming agreement should generally lock in as many of the future subcontract terms as possible. For example, the subcontractor agrees to perform at the prices it submitted in its proposal (this is not automatic), and the subcontractor will accept certain flow-down clauses.

Protecting data rights, inventions, trade secrets and confidentiality

Depending on the nature of the procurement, the proposal process could potentially lead to the disclosure of a contractor’s most closely held secret—its crown jewels. And in some procurements, an offeror may actually invent something when preparing a proposal. If these secrets and inventions were developed with private funds such that they do not become Government-owned data, they not only should be protected from any assertion of ownership by the Government (through the use of appropriate proposal legends and reservations of rights), but the

teaming agreement should also spell out the prime’s and subcontractor’s respective rights to these secrets and inventions.

Non-solicitation of employees

Some small businesses’ greatest fear is that a large teaming partner will hire away the small business’ highly skilled employees. This would not only render the small business irrelevant as a potential teaming partner; it could also substantially limit the small business’ ability to function as a viable entity. This fear is addressed by a clause that prohibits one party from recruiting the other party’s workers. Note, however, that many courts frown on a clause that limits the workers’ freedom of movement. Therefore, the clause should contain an exception for employees who choose on their own to seek jobs with the teaming partner.

Small business issues

A procurement that is set aside for small businesses presents a whole set of unique issues when it comes to teaming agreements. When a disappointed bidder files a protest alleging that a small prime contractor is “unduly reliant” on (that is, merely a front for) a large business that will be the real party doing the work (a so-called “ostensible subcontractor”), the Small Business Administration will scrutinize the teaming agreement, among other documents, to help determine what the real deal is.

A final caution!

Finally, be exceptionally mindful that most teaming agreements are drafted to expire when the procurement is won and the team members enter into a subcontract. Therefore, any

provisions of the teaming agreement that are intended to survive should be repeated in the subcontract. To force the parties to follow through, teaming agreements should contain statements such as, “The subcontract shall provide that subcontractor will perform all tasks under Section 2 of the SOW.” If the teaming agreement merely says, “Subcontractor will perform all tasks under Section 2 of the SOW,” it may not be enforceable after the teaming agreement has expired.

All too often, a subcontractor complains that the prime contractor is not complying with a term that the subcontractor thought had been agreed to. An example might be a promise to give the subcontractor certain work—only to learn that there is no binding agreement in place that requires the prime contractor to do that. Too late, the disappointed teaming member learns how dearly it must pay for trying to save time or money during the teaming agreement negotiation.

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