



Teaming Agreements and Subcontracting

T.J. Crane

Overview

- Why Teaming Agreements or Teaming Arrangements?
- Teaming Agreement Diligence
- Subcontracting
- Flow-downs
- Best Practices

Agreements v. Arrangements

- Teaming agreements – A contract between a potential prime contractor and another company to act as a subcontractor under a specified USG contract.
- Other teaming arrangements. Two or more companies form a new legal entity to act as a potential prime contractor, by creating either:
 - a partnership; or
 - a joint venture.

(48 C.F.R. § 9.601.)

Benefits of Other Teaming Arrangements

- New company can potentially cover multiple solicitations and contracts.
- Separate entity can benefit from the combined capacity of its member companies.
- Liability can be limited to the new legal entity.
- Possibly avoid the high cost structure of its member companies, which is important if price is a major source selection criterion.



Downfalls of Other Teaming Arrangements

- Each member company may have liability for the obligations of the joint venture.
- Management issues may be difficult to manage, resulting in delayed decision making.
- Long term relationship
- Potentially considered “affiliated” for small business size calculations (*13 C.F.R. § 121.103*).

Benefits of Teaming Agreements

- Limit the parties' obligations to one another.
- Team members are able to tailor their negotiations to the specific solicitation
- Include a variety of termination provisions.
- Short-term; deliberate.
- Each entity responsible for their proposal preparation costs.
- If the entities comply with the limitations on subcontracting (48 C.F.R. § 52.219-14), the parties will not be considered "affiliates" for small business size calculations.

Drawbacks of Teaming Agreements

- Renegotiation for each solicitation.
- „Who says the parties will agree after contract award.
- „Prime is the only party in privity of contract with USG, and therefore bears the entire risk of performance.

Due Diligence Before Teaming

- Check System for Award Management (SAM) website.
- Consider the proposed teaming partner's past performance history.
- Financial position to perform; check 10-K or D&B; request financials.
- Likelihood of actually winning the contract.
- What IP does each party own or will own?

Why is This Important?

- Supply chain risk is a factor in certain procurements.¹
- DoD can exclude a contractor from *certain* procurements, without a bid protest before the GAO or federal courts.
- Need not disclose the reason
- Can withhold consent for a particular subcontractor
- ***Supply chain risk*** is defined as "the risk that an adversary may sabotage, maliciously introduce unwanted function, or otherwise subvert the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of a national security system...so as to surveil, deny, disrupt, or otherwise degrade the function, use, or operation of such system."

1. See DFAR Supplement: Requirements Relating to Supply Chain Risk, 80 Fed. Reg. 67,244 (Oct. 30, 2015).

Key Provisions

- Who's Prime? Who's Sub?
- Purpose
- Confidentiality
- What happens to IP?
- Who does what work?
- Termination
- Exclusivity

Avoid Unenforceability

- You can't have an agreement to agree
- To mitigate this risk, include:
 - Price/payment
 - Scope
 - "...will subcontract with..."
- Avoid "...will enter into good faith negotiations..."

Exclusivity

- Mutual.
- Prevent teaming with new party and individual bid by one of the parties.
- Survives termination.
- Severable from other provisions.

Subcontracting

- Updated scope – Is the prime what we thought it would be?
- Same key provisions as teaming agreement, plus:
 - Delivery/acceptance
 - Warranty
- Battle of the forms



FAR Flow-Downs

- Two-step analysis: 1) Is it a “subcontract?” 2) Is the flow-down mandatory?
- “Subcontract” means any contract as defined in entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders. ¹
- “Subcontractor” means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.
- FAR contains about 70 mandatory clauses that apply to noncommercial-item prime contracts.
 - Frequently, FAR mandates when the clause must be flowed down entirely or in substance.
- Can require extensive interpretation of other clauses or the underlying statute.
 - Requiring the flow-down of the clause to “all subcontracts subject to the Act”. ²
 - Requiring application of the clause to the specific circumstances.
 - Such as the requiring the contractor to insert FAR clause 52.219-8, “Utilization of small business concerns,” into “all subcontracts that offer further subcontracting opportunities”. ³
- Flowdown of Code of Business Ethics if \$5.5M or 120 days. ⁴

1. See FAR Subpart 2.1.

2. See FAR 52.222-41, “Service Contract Act of 1965”.

3. See FAR 52.219-9.

4. See FAR 3.1004, 52.203-13.

Conclusion

- Teaming is a great way to expand business
- Not without risk, but potentially great upside
- Be as clear and precise as early as possible
- Never assume the other side knows what you mean



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www.schwabe.com

TJ CRANE
SCHWABE, WILLIAMSON & WYATT
503-796-3727
TJCRANE@SCHWABE.COM