

CREATE A WINNING TEAM.

How to negotiate a successful teaming agreement.

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Important Note

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Team Arrangement

- FAR 9.601 uses the term “Team Arrangement”
- Describes two kinds of relationships:
 - Joint Venture: Two or more companies form a partnership or joint venture to act as potential prime contractor; or
 - Teaming Agreement: A potential prime contractor agrees with one or more other companies to have them act as its subcontractor(s) under a specified Government contract or acquisition program.

When to Team

- FAR 9.602 recognizes the benefits of teaming agreements —
 - Contractors complement each other's unique capabilities; and
 - Offer the Government the best combination of performance, cost, and delivery for the system or product being acquired.
- Particularly appropriate in complex research and development acquisitions
- Normally form team arrangement before submitting an offer
- To take advantage of a set-aside procurement

FAR Limitations

- Under FAR 9.604, team arrangements may not:
 - Violate antitrust statutes, or
 - Limit the Government's rights to:
 - Require consent to subcontracts;
 - Determine the responsibility of the prime contractor; or
 - Hold prime responsible for performance.

Small Business Issues

- Size standards
- Affiliation
- Ostensible subcontractor rule
- Minimum percentage of work requirements

SBA Size Standards

- Annual receipts: Total receipts of the concern over its most recently completed three fiscal years divided by three (13 C.F.R. 121.104); or
- Number of employees: The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months. (13 C.F.R. 121.106)

Affiliation

- In determining the concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit. (13 C.F.R. 121.103)

Affiliates (13 C.F.R. 121.103)

- SBA will consider the totality of the circumstances (factually intensive inquiry)
 - Control or power to control
 - Ownership, management, previous relationships
 - Affirmative or negative control

Affiliation in Teaming Arrangements

- Affiliation can be avoided in a Teaming Agreement when the prospective Prime and Sub enter into an arms length transaction
- Joint venturers are presumed to be affiliated with each other

Percentage of Work Requirements

For Small Business Set-aside, 8(a), WOSB, and EDWOSB:

1. Contract for Services (except construction): The small business concern (“SBC”) must Agree that it “will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees.”
2. Contract for Supplies or Products (other than procurement from a non-manufacturer in such supplies or products): The SBC must agree that it “will perform at least 50 percent of the cost of manufacturing the supplies or products (not including the costs of materials).”
3. Contract for General Construction: The SBC must agree that it “will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials).”
4. Contract for Construction by Specialty Trade: The SBC must agree that it “will perform at least 25 percent of the cost of the contract with its own employees (not including the cost of materials).”

Percentage of Work Requirements

For SDVOSBs:

1. Contract for Services (except construction): The SDVOSB “spends at least 50% of the cost of the contract performance incurred for personnel on the concern's employees or on the employees of other [SDVOSBs].”
2. Contract for General Construction: The SDVOSB “spends at least 15% of the cost of contract performance incurred for personnel on the concern's employees or the employees of other [SDVOSBs].”
3. Contract for Construction by Specialty Trade: The SDVOSB “spends at least 25% of the cost of contract performance incurred for personnel on the concern's employees or the employees of other [SDVOSBs].”
4. Contract for Supplies or Products (other than procurement from a non-manufacturer in such supplies or products): At least 50% of the cost of manufacturing the supplies or products (not including the costs of materials) will be performed by the SDVOSB prime contractor or other [SDVOSBs].

Percentage of Work Requirements

For HUBZones

1. Contract for Services (except construction): The HUBZone concern spends at least 50% of the cost of the contract performance incurred for personnel on the concern's employees or on the employees of other [HUBZone concerns].
2. Contract for General Construction: The HUBZone concern spends at least 50% of the cost of contract performance incurred for personnel on its employees or it may subcontract at least 35% of the cost of contract performance incurred for personnel to one or more qualified HUBZone concerns (but cannot subcontract more than 50% to a non-qualified HUBZone concern.)
3. Contract for Construction by Specialty Trade: The HUBZone concern spends at least 25% of the cost of contract performance incurred for personnel on the concern's employees or it may subcontract at least 25% to another HUBZone, but not more than 50% to a non-HUBZone concern.
4. Contract for procurement of Supplies (other than procurement from a regular dealer in such supplies): The HUBZone concern “spends at least 50% of the manufacturing cost (excluding the cost of materials) on performing the contract in the HUBZone. **One or more qualified HUBZone [concerns] may combine to meet this subcontracting percentage requirement.**” (emphasis supplied)

Ostensible Subcontractor Rule

- A prime will be considered an affiliate of its sub when sub performs primary and vital requirements of the contract or when a prime is unusually reliant on the sub (13 C.F.R. 121.103(h)(4)).

Ostensible Subcontractor Rule, cont.

- Historically, SBA has looked to the seven (7) factor test to determine whether a subcontractor is “ostensible.” *Size Appeal of Ideal Services, Inc.*, SBA No. SIZ-3317 (Aug. 2, 1990)
- More recently the SBA has said that “all aspects” of the contractor/subcontractor relationship should be examined.

Ostensible Subcontractor Rule, cont.

- The seven (7) factors are, as follows:
 1. who will manage the contract;
 2. which party possesses the requisite background and expertise to carry out the contract;
 3. which party “chased the contract”;
 4. what degree of collaboration was there on the bid or proposal;
 5. whether there are discrete tasks to be performed by each, or a commingling of personnel and material;
 6. the relative amount of work to be performed by each; and
 7. which party performs the more complex and costly contract functions.

Due Diligence

- Assess Teaming Partner's Resources, Capabilities, Past Performance and Responsibility
 - Quality of Past Performance Evaluations
 - Any Terminations for Default?
 - Claims from Past Projects
 - Prior Suspension or Debarment
- Strength of Team may be a Source Selection Factor
- Sub's "Responsibility" affects Prime's "Responsibility"

Key Teaming Agreement Issues

- Subcontractor's Work (how determined)
- Prime's Commitment to the Sub (and vice-versa)
- Subcontract Terms
 - Pricing
 - Scope of Work
 - Payment Terms
 - Bonding
 - Termination
- Failure to Agree on Subcontract (Consequences)

Key Teaming Agreement Issues, cont.

- Competitive Proposals (Exclusivity)
- Sub's Proposal (Cost and Technical)
- Term & Termination
- Sub's Proposal Obligations
- Prime's Proposal Obligations
- Control Over Customer Relationship

Key Teaming Agreement Issues, cont.

- Non-Solicitation
- Confidential Information
- Organizational Conflict of Interest
- Technology Transfer
- Disputes
- Assignment
- Publicity

1. Subcontractor's Scope of Work

Pro-Prime Teaming Agreement

- Scope conditional, subject to Prime's discretion, quality of Sub's proposal, Customer instructions, set-aside requirements, additional team members, etc.
- In all events, must comply with limitation on subcontracting rules (set-aside contracts)

Pro-Sub Teaming Agreement

- Scope non-conditional
- Specifically set forth the percentage, type or location of work to be awarded

2. Prime's Commitment to the Sub

Pro-Prime Teaming Agreement

- Reasonable best efforts to secure Customer's approval
- Subject to Customer's approval
- Prime may bring in additional team members to satisfy requirements
- Adjustments to Sub's Scope of Contract effort if needed for technical, cost or competitive reasons

Pro-Sub Teaming Agreement

- Prime shall propose Sub
- Prime shall award Subcontract unless Customer expressly objects
- Guarantee Sub's Scope of Work
- No adjustment to Sub's allocation of Contract effort without Sub's consent

3. Subcontract

Pro-Prime Teaming Agreement

- Shall use best efforts to negotiate a subcontract
 - or
 - Sub required to accept Subcontract in attached form
 - or
 - Sub required to enter into Prime's Standard form Subcontract
- Sub's proposal is firm and binding commitment
- Modification of Sub's Scope of Work permitted in Subcontract or Task Orders

Pro-Sub Teaming Agreement

- Prime shall award Subcontract in attached form
- No modifications of Sub's work without Sub's consent
- No Prime commitments which adversely affect Sub's technical or cost proposal

3A. Subcontract Pricing Terms

Pro-Prime Teaming Agreement

- Prime has right to approve Sub's pricing proposal
- Sub must enter into Subcontract based on its approved proposal
- Sub shall reduce costs as needed to meet Customer requirements

Pro-Sub Teaming Agreement

- Sub's proposed pricing shall not be altered without its written consent
- Sub shall exercise commercially reasonable efforts to reduce costs as requested by Customer in writing

3B. Subcontract Scope of Work

Pro-Prime Teaming Agreement

- Flexibility to alter scope of Sub's work effort based on:
 - Customer requirements
 - Additional Team members
 - Evaluation of Sub's technical proposal
 - Cost Considerations
 - Prime's set-aside requirements

Pro-Sub Teaming Agreement

- Sub guaranteed Scope of Work set forth in its proposal

3C. Subcontract Payment Terms

Pro-Prime Teaming Agreement

- Sub to be paid after Prime paid (“pay when paid” clause)

Pro-Sub Teaming Agreement

- 30-day or less
- Security Agreement
- Assignment of proceeds
- Escrow
- Lockbox

3D. Subcontract Bonding Terms

Pro-Prime Teaming Agreement

- Sub required to provide bonding support as required by the surety
- Joint and Several Liability on Indemnity Agreement
- Sub's rights under Teaming Agreement conditioned upon obtaining bid bond and contract bids

Pro-Sub Teaming Agreement

- Cross Indemnification by the Prime and Principals of the Prime
- Prime to reimburse bonding costs
- Sub required to exercise commercially reasonable efforts to obtain bonds

3E. Subcontract Termination Provisions

Pro-Prime Teaming Agreement

- Termination for Convenience
- Termination for Default
- Sub's cure rights strictly limited to timeframe Prime has to cure based on notice from Government (e.g., 5 days)

Pro-Sub Teaming Agreement

- No termination for convenience
- Robust notice and cure provisions (e.g., 30 days to cure)

3F. Subcontract Flow-Down Provisions

Pro-Prime Teaming Agreement

- Full flow-down of Contractor obligations (with acceleration of deadlines for submissions to the Government)

Pro-Sub Teaming Agreement

- Flow-down of Contractor rights relating to excusable delays, limitation of liability, etc.
- No flow-down of termination for convenience

4. Failure to Agree on Subcontract

Pro-Prime Teaming Agreement

- Prime given liberty to award Subcontracts to other companies if Subcontract not signed within thirty (30) days of contract award
- Liquidated damages payable by Sub for failure to conclude Subcontract
- Letter of Credit Secures Sub's Obligations

Pro-Sub Teaming Agreement

- Prime obligated to award Subcontract unless Customer expressly objects in writing
- Otherwise, no "out" for the Prime other than suspension/debarment of the Sub

5. Competitive Proposals

Pro-Prime Teaming Agreement

- Sub may not collaborate with another prime contractor or otherwise compete with the Prime in connection with the procurement
- Sub restricted from bidding to the Customer outside the team on separate but related procurement
- Sub to provide cost and technical proposal consistent with the requirements of the Solicitation

Pro-Sub Teaming Agreement

- Prime shall not solicit or accept any other proposals for Sub's work (unless Sub in default)
- Neither party restricted from marketing to the Customer outside the immediate procurement

6. Sub's Proposal

Pro-Prime Teaming Agreement

- Prime may cancel Teaming Agreement if Customer rejects or expresses dissatisfaction with Sub's cost or technical proposal
- Sub required to provide MFN pricing
- Sub required to provide pricing approved by the Prime
- Prime may require modified proposal if necessary to win Contract

Pro-Sub Teaming Agreement

- Prime must provide written evidence of Customer's disapproval to cancel Teaming Agreement
- Sub not required to give Prime detailed cost and pricing data
- Prime shall not make any proposal which adversely affects Sub's cost or technical proposal

7. Term & Termination

Pro-Prime Teaming Agreement

- Cancellation:
- If Customer rejects Sub or “expresses dissatisfaction”
- Customer modifications make the teaming effort commercially impractical
- Prime determines that Sub is not responsible

Pro-Sub Teaming Agreement

- Set forth minimum duration (tie to expected duration of Solicitation including modifications)
- Cancellation:
- If Customer disapproves Sub in writing without collusion by Prime

7. Term & Termination, cont.

Pro-Prime Teaming Agreement

- Cancellation (cont'd):
- Departure of key Sub employee or officer needed for Sub's performance
- Team can't compete in discretion of Prime
- Sub fails to cure breach within five (5) days

Pro-Sub Teaming Agreement

- Cancellation (cont'd):
- If Sub fails to cure breach within thirty (30) day cure period or longer cure period if necessary
- Mutual termination rights on bankruptcy, insolvency, debarment of the other party
- Sub may cancel if Prime loses set-aside status or fails to comply with requirements

8. Additional Sub Obligations

Pro-Prime Teaming Agreement

- Sub to respond within Prime's time limits to Prime's requirements for technical and cost information
- Sub to prepare or modify proposal as directed by Prime within Prime's time limits
- Sub to participate in negotiations and presentations with Customer when so requested by Prime

Pro-Sub Teaming Agreement

- Sub to respond reasonably
- Sub shall be entitled to participate in meetings with Customer
- Sub to reasonably assist Prime with presentations
- Limit on Sub's obligation for proposal costs

8. Additional Sub Obligations, cont.

Pro-Prime Teaming Agreement

- Sub to furnish firm prices when Prime directs
 - Most Favored Nation prices
 - Competitive pricing
 - Prime entitled to rely on prices
- Sub to pay its proportionate share of expenses

Pro-Sub Teaming Agreement

- Sub to exercise commercially reasonable efforts to furnish pricing satisfactory to the Customer

9. Additional Prime Obligations

Pro-Prime Teaming Agreement

- In a timely manner, furnish Sub with solicitation requirements for proposal
- “to extent practical” keep Sub reasonably informed

Pro-Sub Teaming Agreement

- Prime to furnish Sub with all solicitations and amendments in a timely manner
- Prime must keep Sub “fully informed”
- Prime to provide personnel and resources as reasonably necessary to submit a competitive proposal

10. Control Over Customer Relationship

Pro-Prime Teaming Agreement

- Prime to decide on all communications to Customer
- Sub not to communicate with Customer
- Sub not to make press releases
- Prime controls bid protest decision
- Sub required to share in protest costs

Pro-Sub Teaming Agreement

- Sub permitted to communicate with Customer on matters within its scope
- Sub permitted to respond to Customer inquiries
- Sub has role in protest decision
- Prime to bear cost of protest unless agreed by Sub

11. Non-Solicitation

Pro-Prime Teaming Agreement

- Sub, during the term and for two (2) years thereafter, not to perform for Customer or other contractor outside the team in connection with the procurement
- Restrictions on Sub soliciting Prime's employees and contractors
- Prime given right to injunctive relief

Pro-Sub Teaming Agreement

- Mutual non-solicitation of employees and contractors
- Mutual injunctive relief

12. Organizational Conflict of Interest

Pro-Prime Teaming Agreement

- Sub may be terminated if Customer asserts there is a conflict
- Sub to comply with criteria in the Solicitation for objectivity
- Appearance of impaired objectivity sufficient to terminate the Sub

Pro-Sub Teaming Agreement

- Either party may terminate if other party has a conflict of interest or Customer asserts there is a conflict that cannot be mitigated

13. Technology Transfer

Pro-Prime Teaming Agreement

- Sub shall disclose and license to Prime all technology, software and know-how necessary or helpful to Prime as the team leader or prime contractor
- If invention conceived solely by one party's employees, then that party owns the invention

Pro-Sub Teaming Agreement

- Inventions belong to the company whose employees invented it

13. Technology Transfer, cont.

Pro-Prime Teaming Agreement

- Prime and Sub to have a royalty-free non-exclusive license to use any invention or reproduce any copyrighted work to the extent necessary or helpful for the performance of the procurement

Pro-Sub Teaming Agreement

- Sub retains all rights to its inventions, trade secrets and other intellectual property
- If Sub's intellectual property disclosed to Prime, then Prime may not use or disclose for any other procurement and may not transfer to any party (including the U.S. government) without the Sub's consent

14. Disputes

Pro-Prime Teaming Agreement

- Exclusive forum selection clause
- Prime not liable for any special or consequential damages
- Mediation/Arbitration

Pro-Sub Teaming Agreement

- Exclusive forum selection clause
- Attorney fees provisions
- Potential for Injunctive Relief

15. Assignment

Pro-Prime Teaming Agreement

- Sub may not assign or delegate without Prime's prior written consent
- Prime may terminate if change in control of Sub

Pro-Sub Teaming Agreement

- Neither party may assign or delegate without the other party's written consent

16. Publicity

Pro-Prime Teaming Agreement

- Prime has prior approval over all publicity and advertising

Pro-Sub Teaming Agreement

- Mutual approval of all publicity

Teaming Agreement Cases

1. “Agreements to agree” are not enforceable Teaming Agreements.
 - a. W.J. Shafer Associates, Inc. v. Cordant, Inc., 254 Va. 514, 493 (Va. 1997) (teaming agreement merely an agreement to agree in the future).
 - i. No mutual commitments by the parties (no obligation on the Prime Contractor to sell the product or obligation of the Subcontractor to purchase, no agreed purchase price and no assurance product would be available when needed).

Teaming Agreement Cases

2. Failure to agree to a subcontract (“Specific Performance Remedy”)
 - a. EG&G Technical Services Inc. v. The Cube Corp., 63 Va. Cir. 634 (Fairfax County, 2002)
 - i. Court ordered “specific performance” or, in other words, directed the prime contractor to issue a subcontract to the subcontractor.

Teaming Agreement Cases

3. Failure to agree to a subcontract form prior to award
 - a. Cyberlock Consulting, Inc. v. Information Experts, Inc., No. 1:12 cv 396 (E.D. Va. June 6, 2012)
 - i. Motion to dismiss breach of teaming agreement lawsuit denied after prime contractor refused to agree to subcontract form prior to award

Teaming Agreement Cases

4. Teaming Agreements need not be in writing, but better practice is to have a written Teaming Agreement.
 - a. Cable & Computer Tech, Inc. v. Lockheed Sanders, Inc., 214 F.3d 1030, 1034 (9th Cir. 2000)
 - i. Subcontractor could seek to enforce an oral agreement to team with prime contractor on proposal to upgrade the computer system on the B-1 Bomber.

Unsigned Agreements

5. Probado Technologies Corp. v. SMARTnet, Inc., No. C-09-349, (S.D. Tex., Nov. 8, 2010)
 - a. The proposed agreement was missing terms and was never signed (price and distribution of workload not provided for in the agreement).
 - b. Subcontractor argued that the parties had “orally agreed” upon all material terms and that the parties’ actions showed there was an enforceable agreement.
 - c. The court disagreed and held that the parties never agreed on all the material terms.

Missing Material Terms

6. Clark Resources v. Verizon Business Network Services, Inc., No1:10-cv-1119, (M.D. Pa., Dec. 1, 2010)
 - a. Subcontractor asserted a claim for breach of the duty to negotiate in good faith in connection with a teaming agreement. Subcontractor presented a letter of intent to team that stated, “Upon notification of award from the Commonwealth for the above referenced Solicitation, Verizon agrees to enter into good faith negotiations with Clark Resources...in support of a prime contract.”
 - b. The “agreement” did not state the services to be negotiated, price terms for those services, or the scope of those services. Thus, the letter was insufficiently clear to support a claim for breach of the duty to negotiate in good faith.

Missing Material Terms- Identification of Prime Contract

7. Probado Technologies Corp. v. SMARTnet, Inc.,
No. C0-09-349, (S.D. Tex., June 2, 2010)
 - a. Under the FAR, a teaming agreement must be an agreement to pursue a *specific* contract. FAR 9.601 provides: “Contractor team arrangement,” as used in this subpart, means an arrangement in which—
 - i. Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
 - ii. A potential prime contractor agrees with one or more other companies to have them act as its subcontractors **under a specified Government contract or acquisition program.**

Does the Subcontract Incorporate the Teaming Agreement?

8. Stevens Aviation, Inc. v. DynCorp International LLC,
No. 4857, (S.C. Ct. App., June 22, 2011)
 - a. The Subcontract did not identify the Teaming Agreement with sufficient particularity to incorporate the Teaming Agreement as a whole.
 - b. The Subcontract used clear enough language to indicate that some terms were meant to be incorporated, but the Teaming Agreement was not included.