

Teaming Agreements & NDAs: A Look at the Inside Game



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TONIGHT'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 Receives Award
- **Can alter the competitive landscape**

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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 AGREEMENTS 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”**
- **Used to interpret ambiguities in 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
 - “Prime” and “Sub”
 - The government “Customer”
 - The “RFP” or “Program”



SCOPE OF TEAMING RELATIONSHIP

- **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

- **Independent Contractors**
- **No Authority to Bind Each Other**
- **No Assignment of Agreement**
 - Absent Consent of Other Party
- **Small Business Considerations**
 - Beware of Affiliation
- **Future Joint Venture?**

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PROPOSAL PREPARATION

- **Responsibilities of the Parties**
 - **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

- **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*

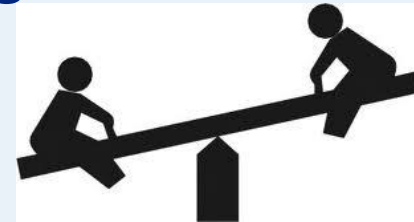
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AWARD OF SUBCONTRACT

- **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 all material terms



TERM AND TERMINATION

- **DURATION**

- **EXTENSION**

- **DISCRETIONARY TERMINATION**



TERM AND TERMINATION

• AUTOMATIC TERMINATION

- Award to someone else (protest periods?)
- Elimination from procurement process
- Cancellation of the RFP
- Execution of a subcontract
- Government's failure to approve subcontract
- Failure to execute subcontract
- Suspension/debarment of a party



TERM AND TERMINATION

- **SURVIVAL OF OBLIGATIONS AFTER TERMINATION**

- Confidential Information
- Liabilities



- Limitations of Liability/Indemnification
- Remedies

LIMITATION OF LIABILITY

- **Exclusion of Liability for Consequential Damages/Lost Profits**
- **Indemnification?**



BREACH

- **Material Obligation**
- **Notice Requirement**
 - Cure Period
- **Remedies**
 - Termination for Cause?



DISPUTE RESOLUTION

- **Pre-Litigation Procedure?**
- **Alternative Dispute Resolution?**
- **Choice of Law**
 - Virginia: EG&G Decision (Fairfax Cir. Ct.)
- **Exclusive Jurisdiction?**
- **Jury Trial Waiver?**



PROTESTS

- **Not a Common Clause, But it Should Be**

- **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

- Entire Agreement
 - Amendments
 - Severability
 - No Waiver
 - Force Majeure
 - Notices
 - Interpretation/Drafting
 - Counterparts
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QUESTIONS?

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