

Do's and Don'ts for Teaming Agreements & Subcontracts for 8(a) Contracts

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Overview

- Teaming Agreements & Subcontracts
 - What are they?
 - What provisions should you include?
 - What are the key considerations for primes?
 - What are the key considerations for subcontractors?
 - Are there special considerations for 8(a) contracts?
- Looming Changes: The Similarly Situated Entity Rule



Sequence of Events

- Identify requirements
- Find a teaming partner
- Negotiate the division of work
- Sign a teaming agreement
- Prepare and submit a proposal
- Contract award
- Negotiate and sign the subcontract



Teaming Agreements



What Is a Teaming Agreement?

- A temporary business arrangement involving two or more independent companies that join together for the specific business purpose of obtaining and performing a competitively bid contract
- Entered into between the prime and each teaming partner
- Addressed in FAR 9.6
- Types:
 - Two companies form a partnership or joint venture
 - A potential prime contractor agrees with one or more companies to have them act as subcontractor(s)



Sequence of Events

- It documents the companies' intentions, expectations, and responsibilities for a specific procurement
- The roles and the responsibilities of the prime contractor are clearly defined
- The roles and the responsibilities of the each teaming partner are clearly defined



Why Use a Teaming Agreement?

- Combine expertise or resources necessary to meet the government's needs
 - → enhance competitive posture
- Provide for exclusivity
- Confidentiality of business information
- Ensure participation in the proposal process
- Protect interests following contract award



Selecting a Teaming Partner

- Know the Rules
 - Are there affiliation concerns?
 - Is the requirement set aside for a specific program?
 - Is the prime small under the relevant size standards?
 - What are the performance of work requirements?



Due Diligence for a Teaming Agreement

- Screen prospective team members:
 - History of being a good teaming partner – references
 - Record of being fair, collaborative, and flexible
 - Attitude of mutual dependence and benefit
 - Unblemished reputation with the agency
 - Strong technical capabilities
 - Proven record of relevant past performance
 - Cost competitiveness
 - Financial capabilities
 - Proposal support resources



Due Diligence Issues for 8(a)s & Their Partners

- 8(a) eligibility
 - In good standing?
 - Meeting business mix targets?
- Up-to-date with reporting requirements
 - 8(a)
 - VETS 100
- Recertification
- Affiliation problems



Protect Your Interests

- Representations and Warranties
 - Organizational conflicts of interest
 - 8(a) eligibility
 - No affiliation issues
 - No negative past performance
 - Availability of key personnel
- Indemnification provision
- Bid and proposal costs
- Anti-assignment provision



Negotiating the Teaming Agreement

- Be as specific as possible
 - Cannot be “an agreement to agree”
 - Avoid ambiguities
- Division of work should address:
 - Type of work
 - Amount of work
 - Performance of specific SOW elements
 - Performance of min/max percentage of \$\$ value of the work
 - Base period and option years



Disputes

- Arbitration versus litigation
- Venue
- Applicable law
- Attorneys' fees
- Continued performance
- Injunctive relief



Enforcing a Teaming Agreement

- Agreement needs to be as specific as possible
- Must demonstrate an intent to be bound
- Strengthens case to attach the proposed subcontract to the teaming agreement
- A promise to negotiate in good faith is usually insufficient
- Get it in writing. Essential terms:
 - Price
 - Requirements
 - Workshare
 - Delivery schedule



Prime's Point of View

- Maintain flexibility
- Confidentiality/nondisclosure
- Subcontractor's commitment to participate in proposal process
- Subcontractor's commitment to be an exclusive teaming partner
- Control over proposal
- No commitment to award a subcontract
- Maintain ability to negotiate price and other essential terms
- No commitment to workshare



Subcontractor's Point of View

- Confidentiality/nondisclosure
- Prime's commitment to be an exclusive teaming partner
- Prime's commitment to identify sub as partner
- Ability to participate in all aspects of proposal preparation and negotiations
- Ability to provide pricing directly to the government
- Commitment for subcontract award
- Essential terms of subcontract
- Commitment on workshare
- Non-solicitation provision



8(a) & Small Business Considerations

- Limitations on Subcontracting
- Non-Manufacturer Rule
- Ostensible subcontractor rule
 - Unusual reliance on subcontractor
 - Lack of qualifications and relevant experience
- Maintaining program eligibility
- SBA approval of a teaming partner?



Subcontracts



How Is a Subcontract Different from a Teaming Agreement?

- The teaming agreement is used during proposal preparation
- The subcontract is the document for contract performance
- After the subcontract is signed, the teaming agreement is largely irrelevant



Payment

- Clearly define when payment is due
 - Paid when paid versus paid if paid
 - Progress payments
- Define invoice procedure
- Address travel and include the applicable per diem
- Right of audit
- Specify procedure if costs are disallowed
- Escrow accounts



Term & Termination

- Term
 - Co-extensive with prime?
 - Options clause flowed down?
- Termination for convenience (“T4C”)
- Termination for default (“T4D”)
 - Cure period?
 - Issues beyond subcontractor’s control?
 - Remedies?



Regulatory Considerations

- Prime contract flow down clauses
 - Termination
 - Labor laws
 - Intellectual property/data rights
 - Buy America Act
 - Commercial Items



Prime's Point of View

- Right to review and replace employees
- Right to inspect and reject goods and services
- Indemnification
- Payment
- Allocation of work



Subcontractor's Point of View

- Limit use of other subcontractors
- Mutuality
- Division of work
- Sponsorship of requests for equitable adjustment (“REAs”) and claims



8(a) & Small Business Considerations

- Eligibility of prime contractor
 - Affiliation
 - Reporting requirements
 - Recertification
 - Compliance
- Anti-assignment
 - Includes sale of ownership interest
- Subcontract approval by SBA?



The Similarly Situated Entity Rule



What Is the Similarly Situated Rule?

- Proposed by the SBA on December 29, 2014
 - Response to Section 1651 of the National Defense Authorization Act of 2013 (“NDAA”)
- Under the new rule, “similarly situated entities” could collectively meet the performance of work requirement
- “Similarly situated” means small business subcontractor that is a participant of the same small business program as the prime contractor
 - Prime must identify the similarly situated entities in its offer
 - The percentage of the prime contract award that will be spent on each similarly situated entity must be identified in a written agreement between the prime contractor and similarly situated subcontractor(s)



Other Aspects of the Proposed Rule

- Change from a “cost-based” to “percentage of total payments” methodology
 - Instead of looking at the labor costs incurred by the prime contractor, compliance would be based on the amount paid by the government to the prime that the prime can pay to subs
 - 50% for services and supply contracts
 - 85% for general construction
- New penalties for noncompliance
- Exemption for contracts less than \$150,000



How Does the Rule Affect the 8(a) Program?

- Rewrites 13 C.F.R. § 124.510 and 13 C.F.R. § 125.6
- An 8(a) prime contractor performing an IDIQ contract may satisfy the performance of work requirement by subcontracting to other 8(a)s
- For 8(a) set-aside contracts for services or supplies, the requirement could be met as long as at least 50% of the amount paid by the government to the 8(a) prime was paid to firms, at any tier, that are also 8(a)s
- For 8(a) set-aside contracts for general construction, the performance of work requirement would be met if no more than 85% of the amount paid by the government to the prime was paid to firms, at any tier, that are not similarly situated (i.e. 8(a)s)



Questions?

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