Making the Team: Best Practices for Forming Teaming Agreements and Avoiding Disputes

Sarah Maguire, BAE Systems
Skye Mathieson, Crowell & Moring LLP
Michelle D. Coleman, Crowell & Moring LLP

March 19, 2019
Teaming Agreements
Definition, Considerations, Opportunities, Benefits, and Limitations
What Are Teaming Agreements?

• Teaming Agreements are contracts between parties to team together for a specified period of time for the purpose of bidding on a contract.

• FAR Subpart 9.6 defines Teaming Arrangements as “an arrangement in which –
  • (1) Two or more companies form a partnership or joint venture to act as a potential prime contractor;
  • (2) 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.”
Teaming Agreement Considerations

• Does the teaming partner provide specialized experience or skill?
• Does the teaming partner know the customer?
• Will the teaming partner properly perform?
• Is the teaming partner a small business?
• Will the teaming partner provide a competitive price/cost?
• Will the teaming partner provide proposal support?
Teaming Agreement – Opportunities

• Market Entry
• Funding
• Leverage Capabilities
• Past Performance
• Formal teaming agreement reduces risk
  • i.e. eases reluctance to team with unfamiliar company
Teaming Agreement – Benefits

• Establish exclusivity
• Pre-negotiate terms before contract award
  • E.g., termination provisions, disputes, choice of law
• Define statement of work or work share
• Tailor to a specific procurement(s)
Teaming Agreement - Limitations

• May be unenforceable

• May need to negotiate a new Teaming Agreement for each new opportunity

• May fail to agree on subcontract terms and conditions after contract award

• Teaming with the wrong company could result in loss of award

• Some government customers may prohibit exclusivity
Teaming Agreement – Limitations Continued

• Could limit future actions:

  • If agreement is terminated, team member may lose the ability to bid on procurement

  • May limit the ability to perform work in-house (e.g. make or buy decision)

  • May limit the ability to develop capabilities
Teaming Agreements

Due Diligence
Due Diligence

• Due diligence is a must before entering into any teaming arrangement

• Consider the following:
  • Responsibility, e.g. SAM.Gov, excluded party?
  • Performance, e.g. any terminations for default/cause?
  • Organizational Conflicts of Interest
  • Resources
  • Relationship with customer
  • Penchant for law suits
  • Reputation
Teaming Agreements

Key Terms
Key Terms

• Non-Solicitation of employees
  • Prohibits the solicitation of the other party's employees
  • Typically contains a time period for the prohibition

• Exclusivity
  • Prohibits the subcontractor from teaming with another prime contractor for the same procurement
Key Terms Continued

• Workshare
  • Provides the scope of work and/or work share percentage for future subcontract

• Termination
  • Explains when and under what circumstances a Teaming Agreement can be terminated
Key Terms Continued

• Non-Disclosure
  • May be executed separately
  • Permits the parties to share information but restricts improper use and disclosure to third parties

• Intellectual Property
  • Protects both parties’ intellectual property
  • FAR Subpart 27.304-3 prohibits primes from using subcontracts to acquire the rights to a subcontractor’s inventions/IP for themselves
Key Terms Continued

- Choice of Law
  - Which law state law governs
  - Federal Law (FAR 52.233-4)
- Disputes
  - Defines parameter of disputes
  - Can require negotiation between company executives before other forms of dispute resolution
  - Arbitration vs. court
  - Dispute fees
Key Terms Continued

- Limitation of Liability
  - Can limit damages to actual costs of time spent on teaming activities

- Flow Down Clauses and Key Subcontract Terms
  - Identify required flow-down clauses (FAR and Supplemental FAR clauses)
    - Check size and scope thresholds
    - Exceptions for commercial items and small business subcontractors
Teaming Agreements

Leverage and Bargaining Power
Leverage and Bargaining Power - Prime

• Has leverage by virtue of leading the team
• Likely has the key personnel, specialized experience, and customer relationship
• Likely has past performance
• Will care the bulk of the bid and proposal cost
Leverage and Bargaining Power - Prime

• Prime can:
  • Limit scope of work/work share
  • Ensure favorable termination provisions
Leverage and Bargaining Power - Subcontractor

• More leverage when:
  • The arrangement results in prime and sub relationship
  • Subcontractor has key personnel
  • Subcontractor has specialized expertise, i.e. fills a void the prime cannot fill
  • Subcontractor has a better reputation
  • Subcontractor assists with proposal preparation
Leverage and Bargaining Power - Subcontractor

• Subcontractor can ask for:
  • Clearly defined scope of work
  • Work share percentage
  • Requirement for prime to seek best efforts to obtain consent to subcontract (FAR Subpart 44.2)
  • Prohibit the use of known bad past performance to be basis for termination of the agreement
  • Agreement that other suitable work will be provided if the government descopes subcontractor’s SOW work or equivalent work on a different contract
Teaming Agreements
Choice of Law, Enforceability, and Key Takeaways
Choice of Law

• Companies generally choose to make state law apply
• Federal law likely does not apply
  • FAR 52.233-4, Applicable Law for Breach of Contract Claim
  • Parties may be diverse but likely no federal question
    • National security could invoke federal question (*See New SD, Inc. v. Rockwell Int’l Corp.*, 79 F.3d 953 (9th Cir. 1996))
• Consider whether the law selected will uphold the enforceability of the agreement
Teaming Agreement Enforceability – Virginia

• Teaming Agreements that are conditioned on future events and negotiations without guarantees regarding price, scope of work, etc. is unenforceable
  

• However, teaming agreements that require a resulting subcontract award and clearly define the subcontractor’s role and the work to be performed are enforceable
  
  • See EG&G Tech. Serv. Inc. v. Cube Corp., Ch. No. 178996 (Fairfax County Cir. Ct. Dec. 23, 2002) (specific performance granted)
Teaming Agreement Enforceability – D.C.

- Teaming Agreements are enforceable if:
  - (1) there was an intent to be bound
  - (2) material and essential terms are sufficiently definite
- May be enforceable if obligation is specific even if details on how to meet the obligation are not
- Key is to be able to tell from the agreement whether (1) a breach occurred; and (2) what the remedy would be
Teaming Agreement Enforceability – Maryland

• Teaming Agreements are enforceable if they provide **definite terms** and **specific obligations**

• Agreement to negotiate in good faith likely enforceable over an agreement to a framework to negotiate a future subcontract
  

• Workshare agreements may be enforceable if no material terms are left for future negotiation
Teaming Agreement Enforceability – Delaware

- Enforceable if: (1) the parties intended to be bound; and (2) contains definite material or essential terms
Teaming Agreement Enforceability – Takeaways

• Teaming Agreements that contain all essential terms might be legally cognizable as subcontracts.

• But, generally, Teaming Agreements are unenforceable regarding “guaranteeing” a subcontract, expected prices, workshare, etc.

• TAs are generally enforceable as agreements-to-agree, requiring the parties to negotiate a future subcontract “in good faith,” unless the TA lacks specificity.
Teaming Agreement Enforceability – Takeaways

• Cases are fact intensive and parties’ actions can create an enforceable agreement
  • *i.e.* do the parties hold themselves out as teammates? Were there oral conversations that established a teaming agreement?
• Damages could include specific performance or large recoveries (especially if there is bad faith)
  • Limitation of Liability Clause can cap recovery
• Choice of law and choice of forum does not have to be the same state
Teaming Agreements
Commonly Litigated Issues
Enforcement of Workshare Percentages

- The enforcement of workshare percentages is a commonly litigated issue because workshare terms are often ill-defined.
- Workshare can be percentage of dollars or work.
- If percentage of dollars, is the percentage based on the amount awarded or the amount bid? Is the percentage of the amount awarded or bid taken after the prime’s share?
- If percentage of work, is the percentage based on the entire statement of work, a specific piece of the statement of work, FTE, etc.?
- Is there a time frame to reach the workshare percentage, i.e. does the percentage have to be met in the base period or over the life of the contract?
Teaming Agreements
Other Preliminary Agreements
Letters of Intent

• An agreement to explore whether a teaming arrangement is possible
• Can result in a teaming agreement or can be used in lieu of a teaming agreement, if the team member is not providing past performance or proposal support
• Can include a statement of terms to be negotiated or a schedule of milestones to reach a definitive agreement
• May contain exclusivity language
• Less formal than other preliminary agreements
Memorandum of Understanding (MOU)

• More formal than a letter of intent
• Describes the opportunity/procurement and outlines the parties’ understanding of the relationship for the opportunity
• May limit the team members’ ability to team with other companies
• May contain basic terms and conditions, e.g. Disputes clause
• Could become the basis for a cause of action
Memorandum of Agreement (MOA)

- Similar to the MOU except it outlines the parties’ agreement of key terms
- May limit the team members’ ability to team with other companies
- May contain basic terms and conditions, e.g. Disputes clause
- Could become the basis for a cause of action
Other Preliminary Agreements Takeaways

• Preliminary Agreements are means to facilitate negotiation and assistance with the proposal process
• Requirement to enter into a future contract may or may not be enforceable
• Can create a cause of action and result in the assessment of substantial damages
  • $11 billion Pennzoil recovery based on interference with preliminary agreement (recovery later reduced)
Teaming Agreements

Subcontracts
Subcontracts - Definition

- An **enforceable contract** between a prime contractor and a subcontractor or a subcontractor and a lower-tier subcontract, if lower-tier subcontracting is permissible
- Typically executed or becomes effective after prime contract award
- No privity of contract between subcontractor and the government
Subcontracts- Prime’s Responsibility

• Prime contractor is responsible for:
  • Overall contract performance and managing subcontractor’s performance;
  • Flowing down required FAR clauses and ensuring compliance with clauses; and
  • Payment
Subcontracts- Subcontractor’s Responsibility

- Subcontractor is responsible for:
  - Performing properly and timely
  - Submitting timely invoices
  - Notifying prime of performance issues
  - Managing lower-tier subcontractors, if applicable
Subcontracts – Key Contract Provisions

- Subcontract should include the following key contract provisions:
  - Mandatory FAR flow-down clauses
  - The FAR Changes clause incorporated in the prime’s contract or a tailored changes clause
  - A Termination for Convenience clause
  - An Intellectual Property clause
    - See FAR 27.304-3
  - A clearly defined statement of work
  - A disputes clause (including one that Choice of law, choice of forum, and addresses pass-through claims)
  - Invoicing instructions
Questions?

Sarah Maguire
Senior Counsel
BAE Systems
T: 703-873-1354
Sarah.a.maguire@baesystems.com

Skye Mathieson
Counsel
Crowell & Moring LLP
T: 202-624-2606
smathieson@crowell.com

Michelle Coleman
Associate
Crowell & Moring LLP
T: 202-654-6708
mcoleman@crowell.com
Crowell & Moring LLP is an international law firm with more than 500 lawyers representing clients in litigation and arbitration, regulatory, and transactional matters. The firm is internationally recognized for its representation of Fortune 500 companies in high-stakes litigation, as well as its ongoing commitment to pro bono service and diversity. The firm has offices in Washington, D.C., New York, Los Angeles, San Francisco, Orange County, London, and Brussels.

© Crowell & Moring LLP 2018

Attorney advertising. The contents of this briefing are not intended to serve as legal advice related to any individual situation. This material is made available by Crowell & Moring LLP for information purposes only.