Best (and worst) Practices in Teaming Agreements

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What Is a Teaming Agreement?

Federal Acquisition Regulation §9.601

- “Contractor Team Arrangement” (CTA)
  - Two or more companies form a joint venture or partnership to act as a potential prime contractor, or
  - 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

Federal Acquisition Regulation §9.602

- Desirable when:
  - Contractors complement each other's unique capabilities
  - Contractors offer the Government the best combination of performance, cost, and delivery for the system or product being acquired

Federal Acquisition Regulation §9.602

- Policy
  - The Government will recognize the integrity and validity of contractor team arrangements, provided, the arrangements are identified and company relationships are fully disclosed in an offer or, for arrangements entered into after submission of an offer, before the arrangement becomes effective. The Government will not normally require or encourage the dissolution of contractor team arrangements.

Teaming Arrangements

- Generally
  - Joint venture
  - Subcontract

Subcontracting/Key Elements of Contract

- Prime Contractor Responsibilities
  - Prime has direct relationship with DoD
  - Prime has contract privity with DoD
  - Prime is responsible for performing to contract terms and conditions
  - Prime conveys appropriate terms and conditions to subcontractor
  - Prime manages subcontractor's performance and adherence to subcontract

Subcontractor

- Sub has direct relationship with Prime and not DoD
- Sub is responsible for adhering to subcontract terms and conditions
- Sub conveys appropriate terms and conditions to second-tier subcontractors
- Sub manages the second-tier subcontractor's performance and adherence to subcontract

Why Use a Prime/Sub Teaming Agreement?

Benefits to Department of Defense

- Consolidate requirements with a single contractor
- Reduce administrative burden
- Have a single point of contact (not always)
- Reduce program management

Benefits to Department of Defense

- Support small business contractor development
- Increased competition and expand opportunities for small business
- Increase innovation
- Reduce risks

Benefits

- Maximize complementary skills, resources, and capabilities
- Minimize risks - pooled capital/shared risk
- Develop a direct relationship with DoD (as prime)

Benefits

- Fill gaps in past performance for new bids
- Eliminate barriers - for example, supporting requirements that are geographically dispersed
- Increase competitiveness - spread B and P costs

Potential Types of Teaming Agreements

- For one proposal/bid only
- Ongoing basis - indefinite delivery/indefinite quantity (IDIQ) contract, BPA under GSA Schedule
- Exclusive/nonexclusive

So…

How would you characterize a Teaming Agreement?

Is it a Letter of Intent?

"It is difficult to say who do you the most mischief, enemies with the worst intentions or friends with the best."

Lord Lytton
English statesman and poet
(1831-1891)

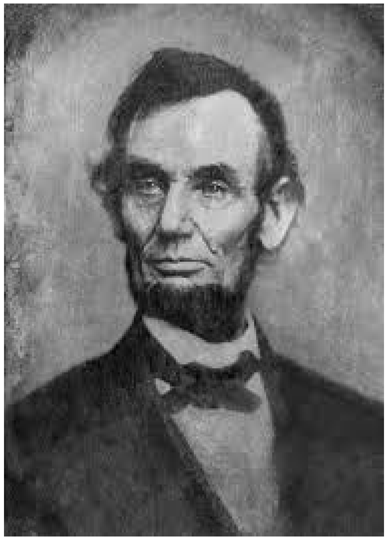
Is it a "gentleman's agreement"?

"A gentlemen's agreement is an arrangement which is not an agreement, entered into between two persons, neither of whom is a gentleman, with each expecting the other to be strictly bound while he himself has no intention of being bound at all."

Justice Vaisey (1877-1965) was a senior judge in the Chancery Division of the High Court of Justice in England and Wales

Is it an agreement to agree?

"I am a slow walker, but I never walk backwards."
Abraham Lincoln



Is it an agreement to negotiate in good faith?

"Barring the natural expression of villainy which we all have, the man looked honest enough…"

Mark Twain

Is it a binding, enforceable contract?

Definitive “legal” answer…

“It depends…”

EG&G Inc. v. The Cube Corp.

- EG&G - large business (sub); The Cube - small minority owned business (prime) / NASA RFP
- Teaming Agreement Terms:
  - Subcontract for 49% of work to EG&G; functions to be determined upon RFP release
  - Exclusive on RFP
  - Fully-loaded fee structure including G&A to be agreed when response to RFP submitted

EG&G Inc. v. The Cube Corp.

- Teaming Agreement Terms (cont'd):
  - Upon award, parties would "enter into a prime/subcontractor agreement for the sole purpose of performing the contract requirements."
  - Fee sharing based upon incurred costs

EG&G Inc. v. The Cube Corp.

- EG&G engaged in discussions with NASA and touted "The Cube Team" including the name and capabilities of EG&G
- Cube submitted final proposal capping G&A at 3.9% (EG&G included 8.7% in its proposal to Cube)
- Cost-reimbursement, incentive-fee contract awarded
- Letter subcontract for 90 days signed pending final contract negotiations

EG&G Inc. v. The Cube Corp.

- Work begins
- Cube proposes new definitized subcontract with 3.9% G&A cap, and no limitation termination for convenience clause (FAR T for C clause previously set out in agreement dependent upon NASA termination)
- EG&G offers G&A compromise at 6.35%
- Cube allows letter subcontract to expire and tells EG&G to remove employees from work site

EG&G Position

- EG&G sues for specific performance and a permanent injunction enjoining Cube from terminating EG&G
- Agreement did not say EG&G “might” be a subcontractor “if” in the agreement were worked out, but “would” be a subcontractor pursuant to the teaming agreement terms
- Essential terms were found in the teaming agreement, the initial proposal, final proposal, the letter subcontract, and the parties performance

Cube Position

- Neither party intended teaming agreement to state full subcontract terms
- No formal subcontract signed
- Material terms were "vague or uncertain" and agreement was an unenforceable "agreement to agree"
- Worst case, Cube has an agreement to "negotiate in good faith" to arrive at a final subcontract

What Result?

Court Opines…

- Essential terms of a service contract are:
  - The nature of the scope of the work to be performed
  - The compensation to be paid
  - Place of performance
  - Duration of the contract

  G&A rate and termination are material terms the parties agreed to them in the initial proposal, so intent of the parties was clear

Court Decides

- Cube negotiated in bad faith by attempting to renegotiate already agreed-upon G&A rate, and newly negotiate termination terms
- Cube behavior "at best disingenuous, and at worst fraudulent"
- Teaming agreement, and performance under existing proposals submitted to NASA constituted a binding and enforceable contract
- Specific performance granted

Trianco v. IBM

- IBM (prime) solicited Trianco (subcontractor) for its experience regarding RFQ for point of sale technology at military commissaries
- Teaming Agreement Terms
  - Teaming Agreement signed obligating Trianco to prepare cost/price and technical proposals for subcontract, and IBM was to prepare proposal for prime contract
  - Trianco required to collaborate exclusively with IBM

Trianco v. IBM

- "Upon award to IBM of the prime contract for the Project, IBM will award a subcontract to Trianco."
- "Subject to successful contract award from the government, IBM shall offer Trianco a subcontract to support IBM by providing resources to perform under the contract."
- "If Trianco offers competitive pricing, availability of component resources, and an acceptable plan/strategy to perform the work in these areas, Trianco will have the right of first refusal to perform the work."

Trianco v. IBM

- “After the successful award of a contract to IBM, the parties will in good faith negotiate mutually acceptable terms and conditions of the subcontract.”
- “The Agreement will terminate if the parties fail to negotiate and execute a subcontract agreement containing mutually satisfactory prices and terms within a reasonable period after the award of the prime contract to IBM.”

Trianco v. IBM

- "Trianco's support/participation is subject to the ability of the parties to negotiate mutually acceptable terms and conditions and Trianco offering competitive pricing."

Trianco v. IBM

- Trianco's proposal work product contains proprietary business information reflecting years of experience on similar proposals
- IBM used the proposal and was awarded the prime contract
- IBM advised Trianco that its pricing proposals were unacceptable and not competitive and requested that Trianco "rebid" pricing

Trianco v. IBM

- Trianco submitted a new bid “under protest” which IBM rejected
- IBM revealed that it had solicited an alternative bid from a third party

Trianco's Position

- Trianco sues for breach of contract, unjust enrichment, breach of fiduciary duty, equitable estoppel, promissory estoppel, and breach of implied covenant of good faith and fair dealing
- IBM accepted and agreed with Trianco's pricing as competitive when it submitted the bid to the government

IBM’s Position

- Pricing was not agreed
- Teaming Agreement is an “agreement to agree” and unenforceable
- Essential price term missing; subject to future negotiation

What is the Result?

Courts Opines

- A contract provision is an unenforceable "agreement to agree" if the parties leave a material term for future negotiation
- But, where it is clear from the language of the agreement the parties intended to be bound, and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain

Courts Opines

- An "objective method" (gap filler) can be identified:
  - Where, within the four corners of the agreement, there exists a methodology for ascertaining the missing term, or
  - Where the agreement invited recourse to an objective, intrinsic event, condition, or standard on which the amount was made to depend

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Court Decides

- Material price term is missing
- Right of first refusal tied to “competitive pricing” which is undefined and does not refer to any object method to determine price
- BUT – unjust enrichment?
  - Defendant enriched
  - At expense of plaintiff
  - Inequitable to permit defendant to retain such benefits

Court Decides

- Agreement had “severability” clause
- Although the promise of IBM to grant Trianco the subcontract is not binding and is unenforceable, the remainder of the agreement is not rendered unenforceable
- Trianco provided proprietary information and industry expertise in preparing the bid but received no consideration (no subcontract) in return
- Remanded to district court for resolution

Cyberlock Consulting, Inc. v. Information Experts, Inc.

- IE (prime) and CCI had series of Teaming Agreements to provide United States Office of Personal Management project management and cyber security services and solutions
- Teaming Agreement Terms
  - "In the event that IE is awarded a prime contract for the Program, IE agrees to execute a subcontract agreement to provide CCI 49% of the prime contract for the work set forth in Exhibit A"

Cyberlock Consulting, Inc. v. Information Experts, Inc.

- Teaming Agreement Terms
  - "The contemplated subcontract will contain provisions passing down those terms and conditions of the prime contract which must be passed on to CCI in order to comply with such prime contract, as well as those that are reasonably necessary for IE to perform the requirements of the prime contract."

Cyberlock Consulting, Inc. v. Information Experts, Inc.

- Teaming Agreement Terms
  - Previous Teaming Agreements specified Exhibit A, specifying scope of work; this one did not
  - “Future subcontract may be subject to the approval of the client regardless of the provisions of this Teaming Agreement.”
  - “IE shall exert reasonable efforts to obtain client’s approval for the proposed subcontract for the Program.”

Cyberlock Consulting, Inc. v. Information Experts, Inc.

- Teaming Agreement Terms
  - Teaming Agreement contained a termination provision indicating that the agreement would be terminated upon “failure of the parties to reach agreement on the subcontract after a reasonable period of good faith negotiations.”
  - “Each party will bear the respective costs, risks, and liabilities incurred by it as a result of its activities and obligations under this Agreement without any right of reimbursement, payment, or compensation of any kind from the other party.”

Cyberlock Consulting, Inc. v. Information Experts, Inc.

- Prime contract was awarded; parties negotiated for 30 days to no avail and IE terminated the agreement

Cyberlock Consulting, Inc. Position

- The parties intended to enter into a binding subcontract, and the agreement contains all the essential terms
- The agreement requires IE to provide CCI with 49% of the prime contract; IE breached
- IE breached the contract by acting in bad faith in failing to finalize a subcontract
- Past Teaming Agreements were consistent with this intent and course of dealing of the parties
- Unjust enrichment

IE Position

- IE had no legally enforceable obligation
- Agreement was an “agreement to agree”
- The parties contemplated negotiation of a formal subcontract after the Teaming Agreement

What Result?

Court Opines

- There is some language suggesting IE obligation to provide 49% of the prime contract to CCI
- The teaming agreement also said that upon award IE "will perform 51% of the scope of work with CCI performing 49%"
- But, the agreement read as a whole was not meant to be a binding obligation, but rather set forth a contractual objective and agreed framework for negotiation of a future subcontract agreement

Court Decides…

- Agreement is an unenforceable agreement to agree in the future
- Agreements to “negotiate open issues in good faith” without more are construed as an agreement to agree rather than a valid contract
- “Merger” or “integration clause” in agreement prevented introduction of other evidence regarding intent and course of dealing from previous agreements

Best Practices (you have seen the worst…)

Regarding the Teaming Arrangement

- What is the intent?
  - Binding or not? Say so.
  - Some, but not all, binding provisions?
    - Confidentiality?
    - Exclusivity?
    - Non-compete?
    - No solicitation?
  - What flexibility is needed?
  - Are you the prime or sub?

Don’t be a weasel…

“Let your ‘Yes’ mean ‘Yes’, and your ‘No’ mean ‘No.’ Anything more is from the evil one.”

Matthew 5:37

Regarding the Teaming Arrangement

- With new partner, consider
  - Financial strength
    - Strong contract provisions and indemnities are useless if your contracting partner has no financial depth
  - Ability to obtain bonds
  - Past performance resume
  - Strengths, weaknesses, and culture
  - Compliance/ ethics
  - Potential conflicts of interest

Regarding the Teaming Arrangement

- If a small business is in play, consider:
  - Affiliation Rules, 13 C.F.R. §121.103
  - Ostensible subcontractor rule, 13 C.F.R. §121.103(h)(4)
- Consider the statute of frauds if sale of goods, not services

Teaming Agreement Provisions

- Beware of "one size fits all" forms
- Purpose
  - At least generally stated in background or recitals
- Scope of work
  - As specific as possible, but always accurate
  - Who controls proposal submission/ content / presentations/ communications
- Confidentiality
  - Term or indefinite (trade secrets)/ separate agreement may be preferred

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Teaming Agreement Provisions

- Term and termination
  - Failure to agree/ dispute/time limit/credit issues
  - Government termination, delay, non-approval
  - Survival/continuing obligations post agreement
- Treatment of intellectual property
  - No, or limited license, if intended
- Non compete/ non proselyte
- B and P costs/ payment (avoid unjust enrichment claims)

Teaming Agreement Provisions

- Assignment/novation/transfer
- Limitation of liability/ consequential damages
- Independent contractor FAR §9.6 arrangement/ no JV, partnership, agency
- Compliance with law
- Indemnity – breach of confidentiality, compliance with law, other
- Merger/integration clause

Teaming Agreement Provisions

- Flowdowns
- Exclusivity/ 1 or 2 way/adding team members
- Severability clause
- Dispute resolution/ choice of law
- Notice provision
- Specific parties engaged

Always remember…

- Any contract is simply an allocation of risk
- Whether the terms are acceptable or not depends upon whether the benefit of the agreement is commensurate with the risk allocation in the contract
- Do not be afraid to negotiate; if you do not ask for concessions, you surely will not get them
- Forms are fine but each potential contract scenario is different

Questions

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