



10th Annual U.S. Department of Energy Small Business Conference

TEAM/PARTNERING FOR SUCCESS

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Small Businesses Leading the Way to Recovery and Reinvestment

INTRODUCTION: WHAT IS A TEAMING AGREEMENT?

- ▶ “An arrangement pursuant to which . . .
- ▶ A. Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
- ▶ B. A potential prime contractor agrees with one or more other companies to have them act as its subcontractor under a specified government contract or acquisition program”

FAR 9.601

DETERMINING YOUR NEGOTIATION LEVERAGE

5 Reasons Why a Prime Would Be Interested in You

Two Questions to Ask to Determine Which Reason Applies to You

SMALL BUSINESS'S OBJECTIVE IN NEGOTIATING THE TEAMING AGREEMENT

- ▶ Prime Contractor's Perfect World
- ▶ Subcontractor's Perfect World

BEFORE THE NEGOTIATIONS START

- ▶ The Pre-Nup
- ▶ “There ain’t no good guy; there ain’t no bad guy; it’s just you and me and we just don’t agree
- ▶ Protecting What Came Out of Your Mouth
- ▶ Advance Confidentiality Agreement

GETTING THROUGH THE FORMALITIES

Getting it in Writing

But Just What is it That You Have That's in Writing

Memorandum of Understanding, Letter of Intent, or a Teaming Agreement

THE TEAMING AGREEMENT: A PROMISE OR A CONTRACT?

- ▶ A Short Lesson in Contracts
- ▶ Gratuitous Promise
- ▶ Non-Binding Expression of Interest
- ▶ Agreement to Agree
- ▶ Obligation to Negotiate in Good Faith
- ▶ Obligation to Award a Subcontract

GETTING TO THE HEART OF THE MATTER

- ▶ Essential Terms of the Teaming Agreement
- ▶ Notice of Intent
- ▶ Protection of Intellectual Property
- ▶ Termination Clauses

TERMINATION CLAUSES

- ▶ Termination for Convenience
- ▶ Termination for Convenience in Disguise

DISCLOSURE REQUIREMENTS

- ▶ Funny how things change all of the sudden – once the contract is won
- ▶ A Series of Unfortunate Events
- ▶ Protecting Yourself

PROSELYTIZING OF EMPLOYEES

- ▶ “Although the teaming arrangement with your company didn’t work out, we think you’d make a fine management employee with our company.”

DISPUTES AND DAMAGES

- ▶ Disputes: “I never thought it would come to this.”
Litigation vs. Arbitration
- ▶ Damages: What to Ask for

WHEN THE SMALL BUSINESS IS THE PRIME

Issue to Avoid: An SBA Determination
of Being “Other Than Small” by virtue of:
Affiliation

Ostensible Subcontractor Rule

AFFILIATION

When one firm controls or has the power to control another

SBA considers factors such as ownership, management, previous relationships with or ties to another concern

“Totality of Circumstances” Test

Consequences of SBA Finding of Affiliation

OSTENSIBLE SUBCONTRACTOR RULE

Subcontractor performs primary and vital requirements of a contract

Small Prime is unusually reliant on Subcontractor

Subcontractor was Prime but is no longer eligible because it has outgrown size

OTHER EXCEPTIONS TO AFFILIATION AND OSTENSIBLE SUBCONTRACTOR RULE

SBA–Approved Mentor Protégé Relationships

SBA–Approved 8(a) Joint Ventures

Unapproved SBA 8(a) Mentor Protégé Joint Ventures on non–8(a) procurements

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