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Fundamentals of Teaming Agreements

by Ed Kinberg

This article will address two critical issues that must be in every teaming agreement between a large and small contractor that are teaming for the purposes of bidding on one of the various set-aside solicitations issued by the various federal agencies. From my perspective, there are two essential elements to a teaming agreement involving a set-aside:

- A clear statement that the prime contractor, i.e. the business that qualifies for the particular set-aside, is in control and will remain in control if the contract is awarded to the prime.
- A clear requirement for the prime to issue a subcontract to the team member if the contract is awarded to the prime.

Control needs to be clearly set out to avoid an Agency from finding the agreement is more like a joint venture than a teaming agreement. This issue frequently comes up as the result of a size protest filed with the Small Business Administration. *There are many cases in which the SBA has found that a teaming agreement should be considered a joint venture. If that happens, the parties to the agreement can be considered affiliates which will typically result in disqualification of the team for the set-aside.*

The SBA typically makes this finding based on a finding that the terms of the agreement do not give the "set-aside" business real control or that the overall relationship between the two parties to the teaming agreement creates an appearance that the relationship is more like a joint venture than a teaming agreement.

Given the SBA's ability to consider the "totality of the circumstances" in making a decision on a size protest, the teaming agreement and the actual practices between the parties must show that there is "connection" between the parties other than a subcontract, that the terms of the subcontract clearly establish the authority of the prime to manage the "vital and primary" functions of the contract and that the performance history of contracts performed together, show that the subcontract is being performed in strict accordance with the terms of the subcontract.

The second item that should be in all teaming agreements is a firm agreement to award a subcontract the team member if the contract is awarded to the prime contractor. I have seen several agreements in which the parties agree to negotiate a subcontract in "good faith" which allows both the prime and subcontractor to leave the team if an agreement cannot be reached.

From my perspective, an agreement that simply requires negotiation of a subcontractor upon award of the prime contract is not a teaming agreement as neither party is committed to work with the other. More importantly, most of the agreements that use this kind of language do not identify the scope of work that will be awarded to the subcontractor or how the subcontractor will be compensated for its work.

There are many cases in which a prime has been awarded a subcontract, conducted "good faith" negotiations which resulted in a failure to reach an agreement on scope and/or price resulting in the prime finding a "better deal" with another subcontractor. This can create a significant problem with the Agency awarding the contract if the proposal was based on the use of a specific subcontractor. It can also result in a lawsuit between the prime contractor and subcontractor.

To avoid this problem, a teaming agreement should clearly state the scope of work that will be provided by the subcontractor, how the subcontractor will be compensated for its work and the terms and conditions that will be included in the subcontract. If the parties to the agreement cannot resolve these issues before entering into a teaming agreement, there is a strong likelihood they will not be able to reach an agreement after the prime contract is awarded.

This article briefly discusses just two of the many issues involved in preparing a teaming agreement. There are many other areas to be considered that will be discussed in future articles. The most important thing to remember in preparing a teaming agreement or reviewing one is that each agreement must be tailored to the facts and circumstances involved in a specific proposal.

The use of a "standard form" agreement or simply accepting the agreement drafted by the other party can be a dangerous practice. Each agreement must be carefully drafted to ensure that it creates a legally enforceable relationship and will not be subject to "second guessing" by the SBA or other government reviewers.