



VENABLE

Non-Disclosure and Teaming Agreements

Drafting Tips to Protect Your Rights and Interests

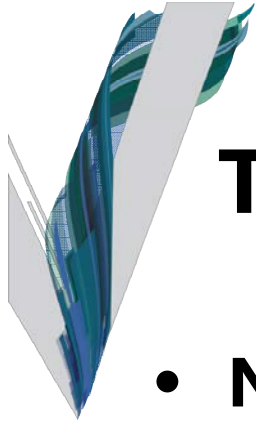
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Goals

- Drafting non-disclosure and teaming agreements that protect your (your client's) interests
- Knowing how to target the issues that are unique to each opportunity
- Understanding the elements essential for all non-disclosure and teaming agreements



The Basics

- **Non-Disclosure Agreement (NDA)** – a confidentiality agreement prohibiting the disclosure of confidential information exchanged between parties; an NDA is often the first step before entering into a Teaming Agreement
- **Teaming Agreement** – an agreement between two or more parties, often a potential prime contractor and subcontractor, who elect to work together to pursue either an isolated contracting opportunity or related multiple contracting opportunities



The Process

- A contracting opportunity arises
- To enhance the probability of contract award, two parties consider joining forces to pursue the opportunity as a team
- The parties negotiate and execute an NDA to share information to determine whether working together enhances each party's probability of award
- If joining forces makes sense after the exchange of information, the parties negotiate and execute a teaming agreement to define each party's role, rights and responsibilities



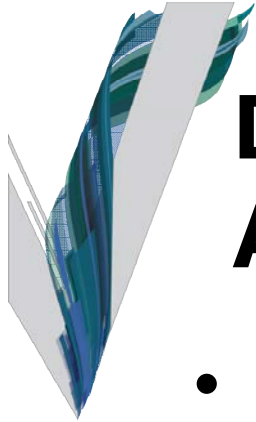
NDA Essentials

- An NDA must:
 - Be in writing
 - Define “protected information”
 - Detail the protocol for each party to identify protected information
 - Specify remedies for breach, including the right to equitable relief (e.g., TRO and an injunction)
 - Identify the process for returning/destroying “protected information” when the teaming relationship ends
 - Specify a term of agreement with surviving obligations
 - Be incorporated into the teaming agreement



NDA Terms Subject To Negotiation

- Retrospective confidential designation or designation at the time of disclosure
- Obligation to internally track confidential information received
- Disclosure rights and obligations before passing confidential information to third parties
- Liquidated damages
- Scope of liability for third party NDA breaches
- Limitations on indemnity responsibility
- Exclusivity before the decision to enter into a teaming agreement



Deciding To Enter Into A Teaming Arrangement (TA)

- After the exchange of confidential information, factors to consider when deciding whether to team:
 - Do complementary capabilities exist to meet the requirements of the opportunity
 - Bundled procurement
 - Large labor/service requirements
 - Financial/bonding capacity
 - Would teaming satisfy small business requirements or goals
 - Would teaming result in a enhanced past performance resume'
 - Does teaming create anti-trust or OCI issues
 - Joint-venture a more attractive alternative (the JV seeks the opportunity)



FAR Guidance

- FAR Subpart 9.6 governs teaming agreements:
 - Definition:
 - Two or more *companies form a partnership or joint venture to act as a potential prime contractor” and/or*
 - *A potential prime contractor agrees with one or more other companies to have them act as subcontractors under a specified government contract or acquisition program*
- *When entities team, “the Government will recognize the integrity and validity of the team arrangements provided, the arrangements are identified and company relationships are fully disclosed in an offer...”*



Objectives For The Teaming Agreement

- Identify the roles and responsibilities for each team member during proposal preparation and during contract performance:
 - Prime and subcontractor work scope
 - Control over the proposal content
 - Control over communications with the government client
 - Commitment of specific resources
 - Defined decision-making responsibilities if the procurement is negotiated
 - Structure negotiating cost of work for each



Key Terms for Continuing the Relationship After Award

- Open and unrestricted:
 - Upon contract award, the prime agrees to “negotiate in good faith” a mutually acceptable subcontract
 - Upon contract award, the prime agrees to “use reasonable efforts” to secure Government approval or teaming partner as a subcontractor
- Defined roles and responsibilities:
 - Upon contract award, the prime and subcontractor shall enter into a subcontract as follows: a) scope of subcontract work, b) cost and/or cost type, c) place of performance, d) duration
 - Promise of exclusivity



Negotiating Priorities

- “Open and unrestricted” teaming agreements constitute “agreements to agree” and are not typically enforceable
- “Defined” teaming agreements with tangible scope, cost and duration terms are enforceable
- Prime contractors prefer “open and unrestricted” agreements
- Subcontractors prefer “defined” agreements
- Assess leverage at the negotiation phase



Key Proposal Preparation Terms

- Division of responsibilities
- Subcontractor identified in proposal
- Party with authority for final content
- Ability to adjust/negotiate costs
 - Duty to notify of changes in proposal terms/costs



Defining Scope of Work

- Identifying each party's role:
 - Key to creating enforceable subcontractor responsibilities and avoiding misunderstanding during subcontract negotiations
- Teaming Agreement SOW becomes the Subcontract SOW
- Exhibit A to the Teaming Agreement:
 - Typically incorporates parts of the Solicitation



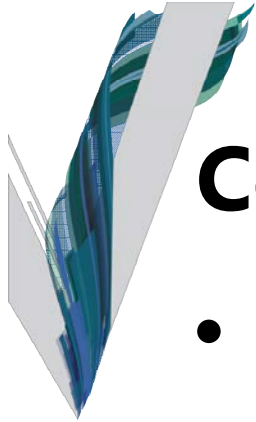
Exclusivity or Not?

- Exclusivity Options:
 - Mutually exclusive
 - Prime agrees to not solicit other subcontractors for stated work scope
 - Subcontractor agrees to not participate in connection with any other proposal
 - Subcontractor exclusive
 - Subcontractor will not team with any other prime contractors, but the prime is free to seek other subcontractors for all or part of the subcontractor's scope of work
 - No exclusivity
 - Neither the prime nor the subcontractor commits to an exclusive relationship



Defining When The Relationship Ends

- Negotiating termination rights to fit your situation:
 - Either party can walkaway upon written notice
 - Mutual agreement to terminate until award decision is made
 - Defined duration for teaming agreement which can only be renewed by mutual consent



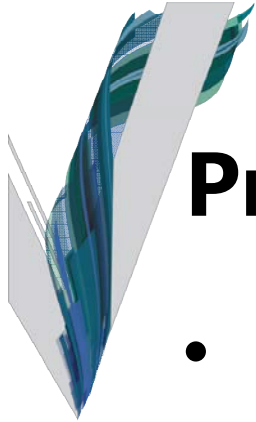
Common Termination Triggers

- Agency cancellation of the Solicitation or program
- OCI that cannot be resolved
- Subcontractor rejected by the agency
- Prime Contractor decision to not bid
- Subcontract negotiations breakdown
- Agency Awards contract to a competitor:
 - Subcontractor right to seek to work for competitor after award



Organization Conflict of Interest Protections

- FAR Subpart 9.5 identifies OCI standard
- As part of the teaming agreement, each party should certify to its teaming partner that “it is unaware and lacks any reason to believe that an actual or potential conflict of interest exists which would prevent its participation in the proposal effort or could otherwise impact consideration of the proposal or performance of the contract after award.”
- If an OCI is discovered during the pre-award stage, in addition to the termination of the teaming agreement, the non-OCI party may independently pursue award



Protecting Intellectual Property Rights

- IP Developed Independently
 - The teaming agreement must protect each party's right to all IP developed independent of the teaming partner either before the proposal preparation process, during proposal preparation or during performance.
 - Limited license to the teaming partner
- IP Developed Together
 - Based upon the circumstances, the teaming agreement should allocate rights and liabilities for any invention, technical data, software or other proprietary information that will be jointly developed during the proposal process or contract performance



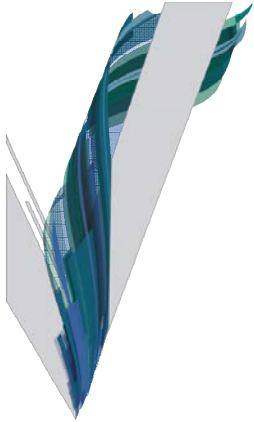
Disputes Clause and Limits on Liability

- Disputes clause should specify:
 - An adjudication process (mediation, arbitration, litigation)
 - Choice of forum
 - Choice of law
 - Equitable remedies as specified in the NDA
 - Prevailing Party clause or not
- Potential limits on liability:
 - Consequential and punitive damages
 - Dollar limitations based upon potential harm



Summing Up

- During the NDA stage (prior to the negotiation of the teaming agreement)
 - Conduct due diligence on your potential partner (e.g., SAM registration, past performance history, financial information, assess likelihood of award on potential team partners)
- During negotiations
 - Open-ended and unrestricted v. defined roles and responsibilities
 - Exclusive v. non-exclusive
- After contract award
 - IP Protections
 - Negotiating the subcontract



Questions?

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Next Month's Government Contracts Webinar:

**Mandatory Disclosures: Best Practices for Protecting Your
Company's Interests in the Current Compliance Environment**

Wednesday, May 17, 2017

12:00pm-1:30pm ET