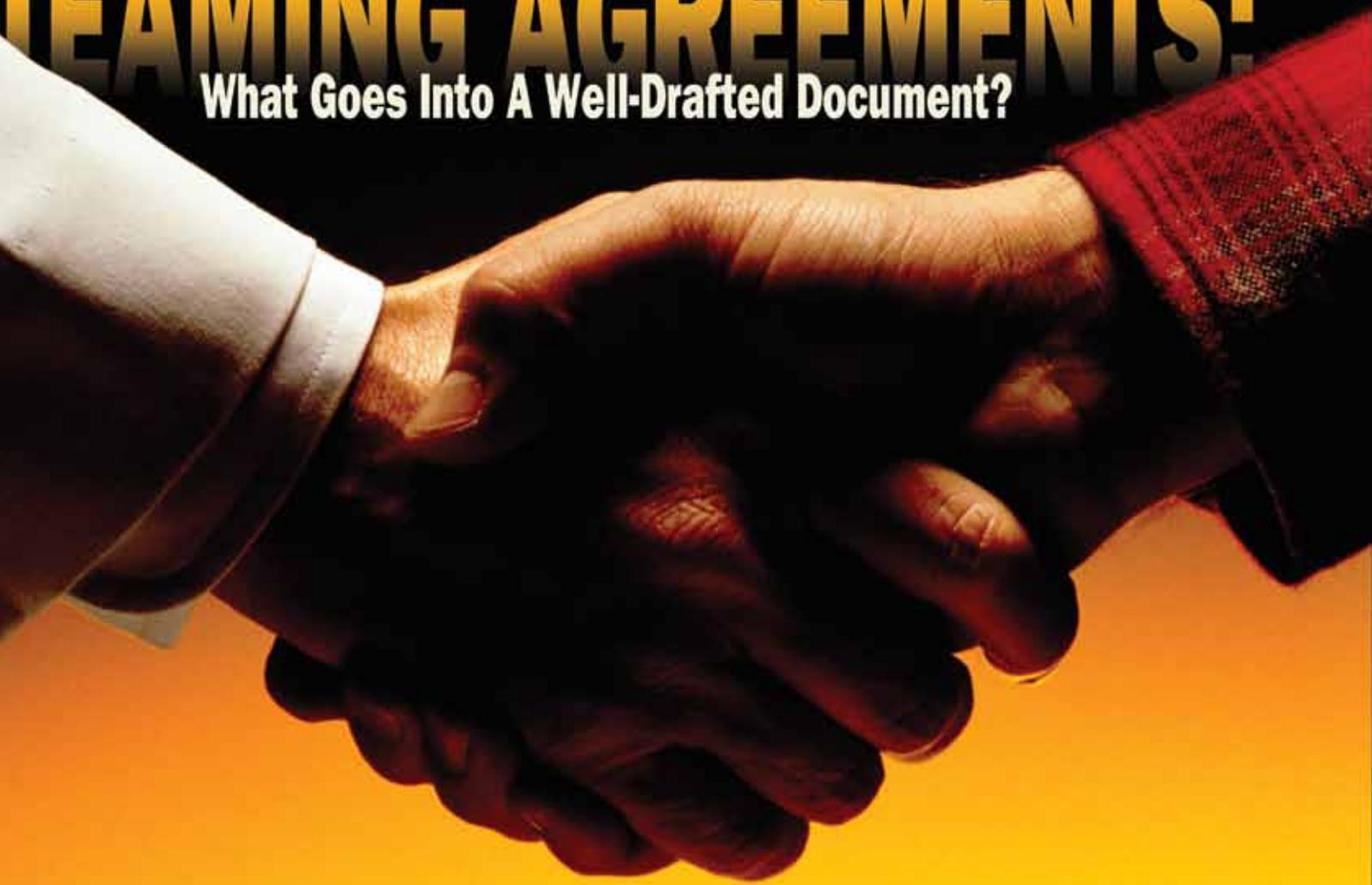


TEAMING AGREEMENTS:

What Goes Into A Well-Drafted Document?



A list of issues to consider when drafting or negotiating a teaming agreement and the ground rules by which the team members will operate.

By
**Lauren J.
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In the April 2010 issue of *Contract Management Magazine*, the various elements to consider before entering into a teaming arrangement were discussed in the article, "Teaming Agreements: To Team or Not to Team?" But what specifically goes into a well-drafted teaming agreement document?

As noted in the article mentioned above, *Federal Acquisition Regulation (FAR)* 9.601 defines *contractor team arrangement* as "an arrangement in which 1) two or more companies form a partnership or joint venture to act as a potential prime contractor; or 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."¹ Teaming agreements must be properly drafted so as to clearly define each party's role.² If not properly drafted, a teaming arrangement could be deemed an "affiliation."

According to the Small Business Administration (SBA), "Generally, affiliation exists when one business controls or has the power to control another or when a third party (or parties) controls or has the power to control both businesses. Control may arise through ownership, management, or other relationships or interactions between the parties."³ In determining whether there is affiliation, SBA "considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships...."⁴ However, there are exceptions to what will be deemed an "affiliation"

and 13 C.F.R. §121.103 should be consulted for what those exceptions are.

It is imperative that the teaming agreement sets forth that the "allocation of the contract work" will be "made on discrete tasks" and not on percentages so as "to avoid a conclusion that the teaming partners are simply combining resources to carry out a specific business venture," which would in all likelihood render a finding that an affiliation exists.⁵ Furthermore, "the proposed prime contractor must prepare and be responsible for the competitive proposal" and also be in total control of contract performance.⁶ Lastly, "joint venture disclaimers in [a] teaming agreement will be ignored in favor of a careful review of all of the circumstances."⁷

There are many teaming agreement templates out there. As succinctly stated, "there is no formula for drafting an effective teaming agreement. The terms of the agreement may depend on the result each party seeks to achieve, as well as upon each party's relative bargaining position."⁸ But, I offer to you the following checklist to ensure that whether you are drafting or

negotiating your first teaming agreement or your 100th teaming agreement, you have at least taken into consideration certain, and sometimes necessary, points.

Teaming agreements are most often divided into five sections:

- Introductory paragraph;
- Recitals;
- Mutual covenants (terms and conditions);
- Signature blocks; and
- Attachments, exhibits, or schedules.

Introductory Paragraph

The introductory paragraph is important because it sets forth the "who" and the "when." Ask yourself the following questions:

- Does the introductory paragraph clearly set forth the date the teaming agreement is entered into?
- Does it clearly set forth the legal business names of the parties, any applicable "doing business names," and where the parties are located?
- Does it set forth what type of business entity each party is (i.e., corporation, LLC, etc.)?
- Does the agreement declare the formation of the team and specifically reference the provisions of *FAR* Subpart 9.6?⁹

Recitals

The recitals immediately follow the introductory paragraph and usually begin with "Whereas..." Sometimes there are only a couple of recitals and other times there may be many recitals. The recitals are important because they set forth the discrete universe of what the teaming agreement is about: the "what," "where," and "why" of the teaming arrangement. Furthermore, because recitals are admission that can be used in court,

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they are “useful to address the facts and circumstances that relate to the issues...in light of the antitrust issues that commonly affect teaming agreements.”¹⁰ Ask yourself the following questions:

- Do the recitals clearly state the purpose of the teaming agreement?
- Do they state why the team members have been chosen?
- Do they state who the team leader/prime contractor is and who the team member/subcontractor is?
- Do they clearly and unequivocally delineate each team member's role or scope of work in the endeavor?
- Do they clearly and narrowly define the proposal/contract/endeavor that the team is going after? For example, if the teaming agreement is to go after one task order on an indefinite delivery/indefinite quantity contract, is the specific task order number, name, and location clearly identified such that it cannot be construed to mean the entire indefinite delivery/indefinite quantity contract or some other task order?
- Do they clearly set forth what the end objective of the teaming agreement is? For example, winning a new client but at a lower margin might be the goal. Ensure that all team members are on board with what the specific objective is of the team arrangement.

Mutual Covenants (Terms and Conditions)

Immediately following the recitals are the actual terms and conditions of the teaming agreement. Mutual covenants are essentially the promises, or terms and conditions, which the parties agree to operate under during the teaming agreement. Most often the mutual covenants are preceded by “Now, therefore, in consideration of the foregoing and the mutual covenants contained herein, it is hereby agreed as follows...” or some other transitional language.

For ease of review, the mutual covenants have been broken down into general categories below.

Definitions

- Who is who and what is what?
- Do the definitions allow for “short-form phrases in lieu of repetitive, lengthy descriptions that would otherwise be necessary to achieve clarity”?¹¹

Proposal Preparation

- Which party is in charge of the technical proposal and proposal management?
- Where will the proposal be produced?
- Which party bears the costs, risks, and liabilities incurred during the pre-proposal and proposal periods?
- Is either party entitled to any reimbursement of proposal costs?
- Which party decides the form and content of the proposal?
- Are the team members identified? How will the team members be utilized as subcontractors if the prime is awarded a contract?
- Which party maintains contact and interfaces with the government or other client?
- If presentations to the client are required or allowed, which party decides the content, who gives the presentation, and who can be present?
- Is the team member required to support any presentation preparation?

Termination

- How long is the teaming agreement effective for?
- The teaming agreement will often set forth a litany such as the following:

“There is no formula for drafting an effective teaming agreement. The terms of the agreement may depend on the result each party seeks to achieve, as well as upon each party’s relative bargaining position.”

“This agreement shall automatically expire and terminate upon the happening of any of the following events:

- The client cancels the solicitation or program.
- Award of a prime contract (or task order) to a contractor(s) other than the prime contractor.
- Award of a subcontract to the subcontractor for performance of the scope of work to be performed by the subcontractor. (Optional.)
- The failure of the parties after good faith negotiations to reach agreement on the terms of a contemplated subcontract. (You may wish to stipulate how many days the parties shall negotiate.)
- Disapproval by the client of subcontractor as a subcontractor after good faith effort by the prime contractor to obtain the client’s approval; provided, however, if

changes in the prospective subcontract can resolve the client’s objections, this agreement shall not be deemed terminated unless the parties fail to reach a timely agreement to effect such changes despite reasonable efforts to do so.

- One year after the effective date of this teaming agreement, or one year after submission of a proposal to the government or client, whichever is later.
- The petition of one of the parties for bankruptcy or reorganization under the bankruptcy laws or assignment for the benefit of creditors.
- The suspension or debarment by the U.S. government of the prime contractor or subcontractor.
- A decision by a party not to submit a proposal made and communicated in writing to the other party.
- Evaluation of past performance data of the subcontractor jeopardizes the probability of success for the prime contractor to receive the award.
- A material breach of the teaming agreement by one party that is not corrected by the other party within 14 calendar days after receipt of written notice of such breach.
- By mutual written agreement between the parties.
- A significant and material change in the ability of either party to satisfactorily address its specific areas of scope responsibility. (Be sure to define what a “significant change” would encompass.)
- A decision by a party not to submit a proposal and communicated in writing to the other party not less than seven calendar days following the issuance of the final solicitation. In such case, the non-withdrawing

party will be free to submit a proposal without the withdrawing party and may join or create another team. The withdrawing party in such case shall not bid on the solicitation in any capacity.

Notices

- To whose attention—including address, e-mail, and phone numbers—should notices be sent to?
- When are notices deemed to be effective?

Applicability and Relationship of the Parties

- Is it stated that the teaming arrangement is not intended by either party to constitute a joint venture, pooling arrangement, partnership, affiliation, or any other formal business organization of any kind other than a team arrangement as set forth in FAR 9.6?
- Is it stated that each party is an independent contractor for this teaming arrangement and neither has the authority to bind or commit the other party?
- Is it stated that neither party has the authority to bind the other except to the extent authorized therein?
- Is it stated whether the teaming arrangement is exclusive between the team members?

Severability Clause

- Is it stated that if any part, term, or provision of the teaming arrangement is held to be void, illegal, unenforceable, or in conflict with any federal, state, or local law having jurisdiction over the arrangement, the validity of the remaining portions of provisions shall not be affected?

Publicity

- Are any news releases, advertisements, or publicity released by either party subject to prior approval of the other party?

- Are any client restrictions on publicity addressed?

Division of Responsibilities

- What tasks will be subcontracted to the team member?
- What are the parties' rights if the solicitation is changed?

Responsibility of the Parties

- Is it stated that the team leader will use its best efforts to secure the contract?
- Are the parties' rights clearly defined if either party wants to protest?
- Is it stated that the team leader can or cannot reserve the right to add additional members to the team?

Laws and Regulations

- Do the parties agree to comply with all applicable federal, state, and local laws and regulations of the U.S. government, and any other applicable orders or regulations of departments or agencies thereto?
- Do the parties agree to comply with the Procurement Integrity Act as set forth at 41 U.S.C. §423 (if applicable)?
- For work to be performed in other countries or for teaming agreements with non-U.S. firms, do the parties agree to comply with the U.S. Foreign Corrupt Practices Act,¹² the U.S. Money Laundering Control Act,¹³ Office of Foreign Asset Control sanctions,¹⁴ Export Administration Regulations,¹⁵ and International *Traffic in Arms Regulations*,¹⁶ to name a few (if applicable)?¹⁷

Disputes

- How are disputes to be resolved—negotiation, mediation, arbitration, or court system?
- Where are disputes to be resolved?

- What are the causes of action and available remedies?

Applicable Law

- What state or commonwealth laws govern the teaming agreement?

Assignment

- Can the teaming agreement be assigned or can it not, and under what conditions?

Amendments/Modifications

- Are amendments/modifications not binding unless put in writing and signed by both parties?

Proprietary Information

- What constitutes proprietary information?
- When do disclosure restrictions not apply?
- Upon termination of the teaming agreement, how will data be promptly returned to the owner or promptly destroyed, as requested by the owner of the data?
- Does termination or expiration of the teaming agreement not supersede the obligation of the parties with respect to the protection of proprietary information?

Indemnification and Limitation of Liability

- Does the agreement set forth “the potential range of liabilities for which indemnity might be appropriate”?¹⁸
- Does the agreement “predetermine whether and how the parties’ implementing subcontracts will address such indemnities”?¹⁹

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Entire Agreement

- Does the teaming agreement set forth the entire understanding and agreement between the parties and supersede any prior agreement, verbal or written?

Signature Blocks

Just prior to the signatures, there should be language similar to the following:

IN WITNESS WHEREOF, the Parties have caused their duly authorized representatives to execute this Teaming Agreement on and as of the date first above written.

By:
Title:
Date:
Witness:

Attachments, Exhibits, or Schedules

The following are some of the exhibits that are commonly attached to teaming agreements:

- Non-disclosure agreement (if not previously signed prior to entering the team arrangement).
- Negotiated terms and conditions of potential subcontract. This exhibit would be most important if the work to be performed is to be with a new teaming partner or if the work is to be performed in another country. Negotiating the actual subcontract terms and conditions at the time of the teaming agreement serves a few purposes. First, team members are often more agreeable to terms and conditions prior to award. Second, it gives the team members the opportunity to work through the “hard” issues up front and together, thereby affording the team an opportunity to see how the other side works. Lastly, when the prime contractor wins the award, the subcontract can be immediately released, thereby saving a considerable amount of time.
- Scope of work for the team leader/prime contractor and the team member/subcontractor.
- Pricing schedules (if applicable).
- Representations and certifications.
- Health and safety information (if applicable).

To conclude, this is not an exhaustive list, but should give an accurate idea of the issues to take into consideration when drafting or negotiating a teaming agreement, and to set forth the ground rules by which the team members will operate under. **CM**

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Note: Nothing in this article should be construed as legal advice or legal opinion pertaining to specific facts or circumstances. Rather, this is a broad-based checklist and you should consult an attorney for your fact-specific scenario or circumstances.

ENDNOTES

1. FAR 9.601.
2. See Cy Phillips, *The Perils and Pitfalls of Contractor Team Arrangements* (Kilcullen, Wilson & Kilcullen, 1995).
3. www.sba.gov/idc/groups/public/documents/sba_homepage/affiliation_discussion.pdf.
4. 13 C.F.R. §121.103.
5. Phillips, *see* note 2.
6. *Ibid.*
7. *Ibid.*
8. *Teaming Agreements and Advanced Subcontracting Issues* (Federal Publications Seminars, 2008).
9. *Ibid.*, at 81.
10. *Ibid.*
11. *Ibid.*, at 78.
12. 15 U.S.C. §§78-1, *et. seq.*
13. 18 U.S.C. §§1956, 1957.
14. Available at www.treas.gov/offices/enforcement/ofac.
15. 15 C.F.R. parts 730-774.
16. 22 C.F.R.
17. See Adrew D. Irwin, Negar Katirai, and David S. Lorello; “Due Diligence & Compliance Risk Management Abroad for Government Contractors”; *Briefing Papers* (May 2007).
18. *Teaming Agreements and Advanced Subcontracting Issues* (Federal Publications Seminars, 2008).
19. *Ibid.*

