

THE ENGAGEMENT, THE RING AND THE “PRE-NUP”

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The Engagement, the Ring and the “Pre-Nup”

- NDA vs. Teaming Agreement.
- Key elements of Teaming Agreement.
- Important elements if Prime Contractor.
- Important elements if Subcontractor.
- Requirements if solicitation is a set-aside.
- Building relationships throughout proposal process.
- Conclusion.

NDA vs. Teaming Agreement

- **Non-Disclosure Agreement (NDA)**
 - Identifies specific technical area(s) that are proprietary to one or both parties.
 - Notes how oral disclosures are to be handled.
 - Names period that information is to be protected from disclosure.
 - Relatively passive Agreement.

NDA vs. Teaming Agreement

- **Teaming Agreement**
 - Describes each party's specific roles and responsibilities, including financial obligations.
 - Identifies teaming partner's specific work area, percentage of the work, etc.
 - Names conditions for subcontract award and termination of Agreement.
 - May have intellectual property clauses.
 - Very active Agreement.

Key Elements of Teaming Agreement

- **Names program for which proposal will be submitted.**
- **Describes responsibilities (including financial) of Prime Contractor and Subcontractor.**
 - Exclusive vs. nonexclusive.
 - Technical and cost submissions.
 - Contact with Customer.
 - Period after award by which subcontract will be negotiated and awarded.

Key Elements of Teaming Agreement

- Confidentiality clause.
- Handling of intellectual property.
- Conditions for termination of the Agreement.
- Period in which Agreement is effective.
- Applicable FAR clauses if proposal submission is to Federal Government.
- General commercial clauses.

Important Elements if Prime Contractor

- **Maximize flexibility, control of the proposal process and contact with customer.**
 - Upon award of contract to Prime, both parties will negotiate in good faith to award a subcontract to Subcontractor.
 - Teaming Agreement shall terminate if Prime and Sub are unable to negotiate a definitized subcontract within X days following award of contract to Prime Contractor.

Important Elements if Prime Contractor

- Prime identifies what it requires from Subcontractor regarding proposal submission.
- Prime prefers to refer to Subcontractor as Subcontractor and not as Teaming Partner.
- Prime excludes language allowing Subcontractor to review proposal prior to submission.
- Prime reserves exclusive contact with Customer.

Important Elements if Subcontractor

- Include definitive language that requires Prime Contractor to award subcontract to Subcontractor within X days if contract awarded to Prime.
- Include requirement that allows Subcontractor to review Prime's proposal prior to submission to Customer.
- Clause limiting use of proposal information only by Customer for evaluation purposes with no further disclosure allowed.

Important Elements if Subcontractor

- Teaming Agreement should refer to Subcontractor as Subcontractor and Teaming Partner.
- Teaming Agreement should state specific work to be awarded to Subcontractor.
 - Technical area Sub's exclusive responsibility, or
 - X% (not up to X%) of work to be awarded to Subcontractor (can be % of total subcontract value, % of labor dollars or hours, etc.).

Requirements if Solicitation is a Set-Aside

- To qualify as small business must meet small business size standard established for procurement.
- Not less than 51% of the company or for publicly traded companies, not less than 51% of the stock must be owned by the individuals qualifying for the small business criteria.

Requirements if Solicitation is a Set-Aside

- Services: at least 50% of the cost of personnel for contract performance will be spent for employees of the concern or for employees of other same class of small business concerns.
- Supplies: at least 50% of the cost of manufacturing, excluding the cost of materials, will be performed by the firm...
- General construction: at least 15% of the cost of contract performance incurred for personnel...
- Construction by special trade manufacturers: at least 25% of the cost of contract performance incurred for personnel...

Requirements if Solicitation is a Small Business Set-Aside

- Small business requirements can be met by a single business meeting the small business criteria or by a consortium of small businesses as long as the combined sum (whether number of employees or average annual revenue over previous three years) of the businesses' criteria do not exceed the criteria established for the procurement.

Building Relationships Throughout Proposal Process

- Regardless of whether the Prime and Sub have worked together in the past, it is very important for all of the parties to build excellent working relationships during the proposal process.
- Doing this will facilitate both subcontract negotiations as well as positive working relationships during performance.

Conclusion

- Throughout the marketing, teaming and proposal development process, it is critical for both parties to work together as a team as much as possible.
- It is also very important that Subcontractors do everything reasonably possible to protect their performance and financial interests.