

# Teaming Arrangements: The Good, The Bad and The Ugly

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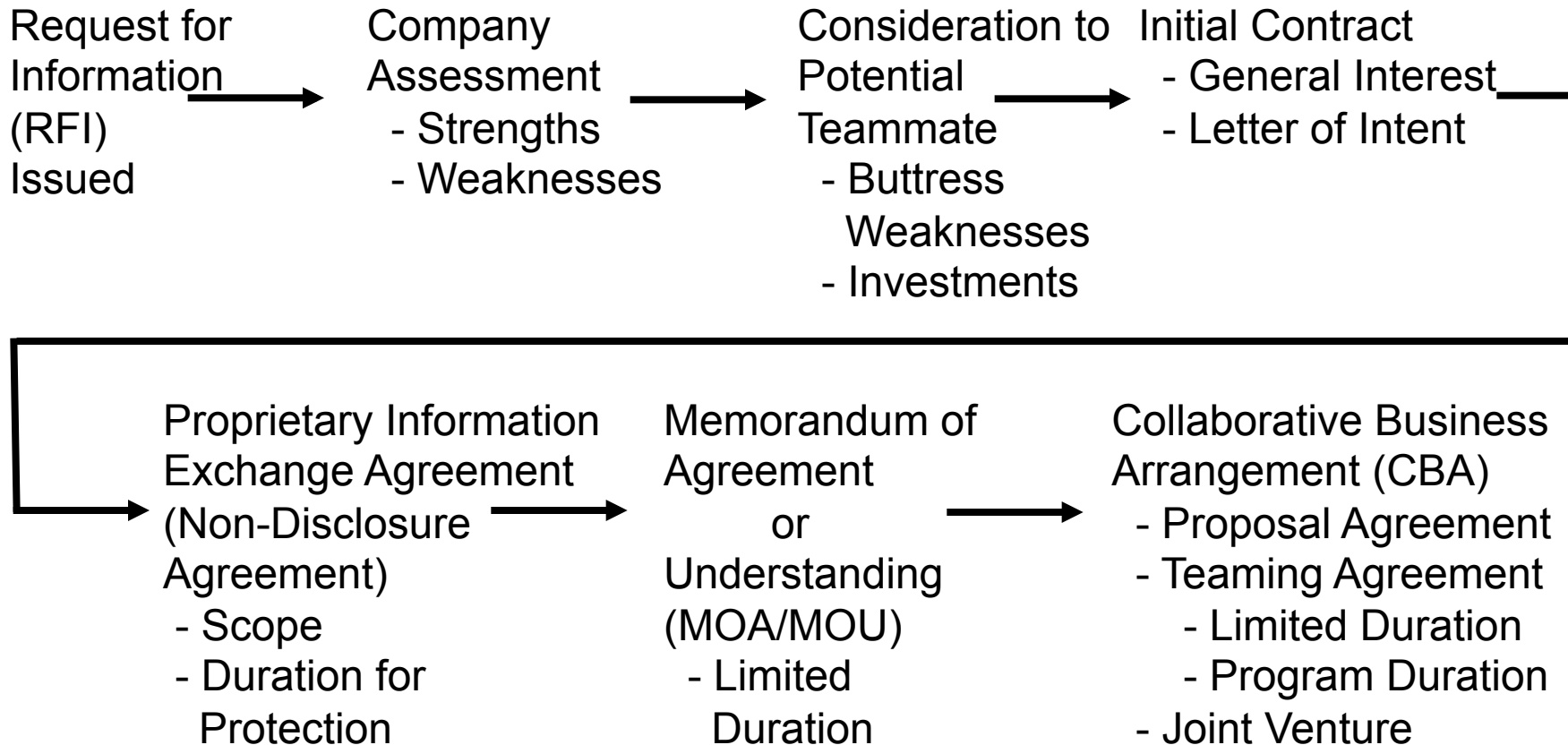
# Overview

- Typical Flow Process
- The Basics
- Deciding on the Prime
- Essential Elements/Key Provisions
  - Definitions
  - Responsibilities of the Parties
  - Awarding a Fair Subcontract
  - Protection of Proprietary/Confidential Information
  - Term and Termination
  - Dispute Resolution
  - Defining Relative Work Share/Content
- Summary



# Teaming Agreement

## Typical Flow Process



# The Basics

- Teaming Agreement:
  - Written agreement to join together for:
    - Specific Contract or Project
    - Specific Customer
  - Enables cooperation between parties to accomplish a common goal (business capture, post-capture performance, etc.)
  - May be limited in duration or for entire life of the Program
  - One party is the prime and the other is the subcontractor; or roles may be reversed as defined
  - Appropriate when two entities want a long-term relationship
  - TAs contain special features to establish the framework for business relationship
  - Teaming Agreements are contracts



# The Basics

- Defined at FAR 9.601:
  - “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.”
- FAR 9.602 notes that such arrangements “may be desirable from both a Government and industry standpoint in order to enable the companies involved to—(1) complement each other’s unique capabilities; and (2) offer the Government the best combination of performance, cost, and delivery for the system or product being acquired.”
- In FAR 9.603 the Government states that it “will recognize the integrity and validity of contractor team arrangements, provided, the arrangements are identified and company relationships are fully disclosed in an offer or, for arrangements entered into after submission of an offer, before the arrangement becomes effective. The Government will not normally require or encourage the dissolution of contractor team arrangements.”
- Particularly appropriate for “complex R & D.” FAR 9.602(b)
- Useful for other acquisitions, including production. FAR 9.602(b).



# The Basics

- The Government also establishes boundaries:
  - Under FAR 9.604, the Teaming Agreement may not limit the Government's rights to:
    - Require consent to subcontracts
    - Determine, on the basis of the stated team, the responsibility of the prime
    - Provide to the prime data rights owned or controlled by the Government
    - Pursue policies on competitive contracting, subcontracting and component breakout after initial production or at any time;
    - Hold prime fully responsible for contract performance



# Basic Questions



- What are the company's strategic objectives?
- What are the company's strengths and weaknesses?
- Is the company capable of being the Prime?
- Who should the company team with and why?
- What type of collaborative business arrangement is appropriate?
- What's the relationship of the Parties?
- What's the duration and are there any off-ramps?



# Why Team?

## Reasons to Form a TA Alliance

- Leverage capabilities of each party's to provide the customer enhanced capability and best value from a single "team" source
- Competitive discriminators are enhanced; specifically address customer requirements or needs
  - Discriminator cannot be directly filled by single party due to shortfall in experience, resources or capability
  - Complimentary capabilities enhance probability of combined team win
  - Discriminators can include: Technical expertise, past performance, domain experience, customer knowledge, mission experience, cost performance, etc.
- Reduce risk of execution by drawing on each party's expertise
- Facilitate market entry based on one or both parties' prior experience



# Other Considerations

- **Competitive Environment**
  - Acquisition plan, # of awards, competitors, Pwin
- **Anti-trust compliance**
  - Nothing authorizes any agreement that violates anti-trust laws (FAR 9.604)
  - Team Agreements must enhance competition – not eliminate it!
- **Compatibility and ethics of the parties**
- **Capitalize on existing party's facilities/ infrastructure, thereby minimizing capital asset expenditures**
- **Financial resources and mutual commitment to the common objective**



# Deciding The Prime

- **Basic Questions:**

- Who will perform the Program integration effort?
- Who appears most credible to the customer?
- What teaming relationship has the highest Probability of Winning (Pwin)?

- **Consideration Should be Given to:**

- Prime vs. Subcontract Role and Responsibilities vs. Joint Responsibilities
- Work Share based on party' s strengths and capabilities
- Work Content of each party

- **What' s the Relationship of the Parties?**

	<u>If Prime</u>	<u>If Subcontractor</u>
• Authority	Unilateral	Bilateral
• Customer Contact	Sole	Joint
• Work Share/Content	Limited	Maximum
• Terms & Conditions	Standard	Tailored Prime
• Termination	Exit Criteria	Longevity
• Investment	Tied to Work Share/ Work Content	Minimum



# Essential Elements

## Definitions

- Ensure clear and consistent understanding of terms used through the Teaming Agreement
- Typical Definitions
  - Program
  - Intellectual Property
  - Customer(s), including FMS and other international
  - Prime Contractor
  - Principal Subcontractor
  - Proprietary Information
  - Technical Data/Computer Software
  - Work Share
  - Work Content



# Other Key Provisions

- Relationship of the Parties (Roles and Responsibilities)
- Exclusivity
- Awarding a Fair Subcontract
- Communications/Contact with the Customer(s)
- Protection of Proprietary Information/Non-Disclosure Agreement
- Term and Termination
- Governing Law
- Limitation of Liability
- Disputes and Resolution Process



# Relationship of the Parties

- One Party is identified as the Prime; the other Party is designated as the “Principal Subcontractor”
- Relationship is exclusive, unless exceptions are clearly stipulated
- Responsibilities of each party are identified; e.g., if Prime Contractor is awarded a contract, it must award a subcontract, with same or similar terms and conditions, to the Principal Subcontractor; Subcontractor agrees to accept and perform
- Joint responsibilities may also be identified; e.g., negotiations in good faith, participation in the development of proposal strategy, participation in and funding of marketing/communication campaigns, etc.



# Awarding a Fair Subcontract

- Subcontracts negotiated and issued after a prime contract award
- Fundamental issue: Is TA by itself enforceable? Is it agreement to agree?
- Common TA clause requires good faith negotiations by the parties
  - Example: “If, during the term of this Agreement, a prime contract resulting from the Solicitation is awarded to the Prime, the Parties will, to the extent permitted by Government rules, regulations and applicable law, engage in good faith negotiations towards entering into a subcontract . . . If the Prime and Subcontractor cannot reach an agreement after 90 days, the Prime shall be free to contract with another source.”
  - Example: “If the parties fail to reach agreement within 90 days, the Prime may unilaterally determine the price, schedule or other terms, subject to the provision entitled “Disputes” of this Agreement.”
- All key terms and conditions should be covered in the Subcontract: *i.e.*, price, delivery schedule, inspection requirements, place of delivery and Choice of Law



# Proprietary Information/Confidentiality

- Parties contemplating a teaming agreement typically first enter into a separate Non-Disclosure Agreement (NDA); aka Proprietary Information Agreement (PIA)
- Purpose of the NDA is to protect both parties' proprietary information
- Limits the use of proprietary information to the purposes of the Program
- Information is protected during term of the NDA as well as after expiration
- Prevents disclosure to any third party—except as authorized
  - Require third party agent to sign separate NDA
- NDA coverage includes:
  - Nature and Scope of NDA
  - Definition of “Proprietary Information”
  - “Marking” Requirements
  - Exclusions, if any
- Provides for destruction or return of proprietary information upon expiration/termination of NDA



# Term and Termination

- Term may cite:
  - Limited period of time or through a specific phase of the program
  - In perpetuity; i.e., for all phases/entire life of the program
- Typically a list of terminating events:
  - Decision by either party to terminate with prior written notice (before program award) and by mutual consent after award
  - Passage of time—e.g. one year
  - Award of prime contract/subcontract (Proposal Agreement)
  - Award of prime contract to others
  - Cancellation of Solicitation
  - Prime unable to obtain Govt approval of Subcontractor
  - Inability of prime and subcontractor to negotiate an agreement
  - Insolvency of a party
  - Suspension/debarment of one party
- Identify any provision which will survive a termination; e.g., Protection of Proprietary Rights, Disputes, Choice of Law, etc.



# Dispute Resolution

- May include multiple attempts to resolve the dispute
- Initial escalation: Senior company executives attempt to resolve dispute within specified timeframe; if no resolution, either party may proceed into litigation:
  - Mediation
  - Arbitration
  - Federal Court
- Litigation proceedings should address: place, selection of referees, limitation of damages, Choice of Law, etc.
- Clause Example: “Any controversy or claim arising out of or relating to this Agreement or the breach thereof, shall be resolved by ascending levels of management as described below. In the event that the executives fail to resolve the dispute within 30 calendar days, then either party may pursue the resolution through arbitration. Arbitration shall take place in Ft. Worth, Texas and in accordance with the Commercial Arbitration Rules of the American Arbitration Association.”



# Damages/Limitations of Liability

- Limits party recovery of damages
- Example: “The relief that may be awarded pursuant to any dispute under this contract may not exceed direct damages or actual, compensatory damages. In no event may special, indirect, consequential or punitive damages be awarded.”
- Ensure your limitation of liability creates certainty.
- Example: “Contractor’s total liability under this contract . . .
  - shall not exceed the total contract price . . .” or . . .
  - shall be capped at \$\_\_\_ per day, for maximum of \_\_\_ days.”
- Some jurisdictions limit scope/use; check with Legal Counsel



# Subcontractor's Work Share

- Subcontractor's role is generally defined in TA Provisions or Attachment/Exhibit
- Methodology for calculation:  $\$ \text{ Value of Subcontract} \div \$ \text{ Value of Total Prime Contract}$
- State in specific tasks and/or % of total work  
Example: "49% of the data entry clerks and medical coding auditor FTEs over the life of the contract, reimbursed on a T&M basis."  
Note: If ID/IQ, include percentages per task v. overall
- Critical to enforcement of the TA; parties agree to negotiate the detailed Work Content at some future date



# Subcontractor's Work Content

- Subcontractor's role is specifically defined in a TA Attachment or Exhibit
- If multiple phases of a program are contemplated, the subcontractor's role in each phase should be clearly described
- State in specific tasks; e.g., “fabricate and assembly the forward and aft fuselage” or “provide all technical orders/manuals associated with Subcontractor's Work Content cited above
- Define party's responsibility for incorporation of changes; e.g., in-line production, retrofit kits, tech orders, etc pursuant to the “Changes” Clause of the Contract



# Summary

- Preparation is important; clarity is essential
- Teaming Agreement is a negotiated contract; know your objective and Essential Elements
- Teaming Agreement is like a Pre-Nuptial Agreement – It is Only as Good as its Terms

