

Government Contracting by John W. Chierichella

Can this business marriage be saved? Should it be?



“Teaming arrangements” enable companies to combine talents, experience and resources to pursue competitive business opportunities. The theory that underlies the formation of a team is extraordinarily simple: both parties believe that they have a better chance of prevailing in the competition as a team than they would either individually or as a member of some competing team.

The most common form of teaming arrangement is a vertically structured agreement in which a prime contractor and a subcontractor agree to bid on a prime contract they hope will be awarded to the prime contractor. The prime contractor, in turn, will award a subcontract to the subcontractor for a portion of the work.

These agreements may be regarded as “marriages of industrial convenience,” and diabolically so — both parties sally forth from the altar upon which their agreement was consummated, consumed by visions of cooperative bliss and mutual success, confident of the economic “win/win” scenario that their industrial union will generate over time.

And, as often as not, these marriages, like so many, end with dashed expectations, charges of

infidelity and competing claims for a share of the “community property.”

In many respects, a teaming agreement should be approached much as one would a prenuptial agreement. It should define not only the parties’ mutual expectations but also the exit strategy and consequences when expectations are not met.

• **How badly do I need my teammate? How badly does my teammate need me? What are our respective options?** A frank answer to these questions helps you to assess the leverage that you will have in negotiating individual terms. If the subcontractor is truly an indispensable key to a successful competition, it must capitalize on that leverage at the outset, because that leverage can erode significantly over time, particularly as the infusion of government money affects the subcontractor’s ability to exercise exclusive control over the intellectual property it brought to the union.

• **Does my teammate have a history?** Watch out for companies that have a history of leaving their teammates at the altar (for example, by simply not submitting a proposal to the customer or walking away when someone more attractive emerges on the scene). Do your homework. “Marry in haste; repent at leisure.”

• **Should this be an exclusive relationship?** Some teaming agreements are truly monogamous, requiring both parties to deal exclusively with each other. Some require fidelity only on the part of the subcontractor, leaving the prime contractor free to solicit replacement vendors for reasons relating to price or performance. Some subcontractors have sufficient leverage to wed the prime contractor exclusively to the subcontractor, while the subcontractor is free to shop its wares to competing teams. Your choices in this regard will drive many other terms of the agreement.

• **Is this really a “win/win” arrangement?** You cannot answer this question unless you know whether and under what circumstances a subcontractor will actually receive a subcontract. Is this simply an agreement to negotiate in good faith, which courts are disinclined to enforce? If the subcontract cannot be finalized within 30 days

of the prime contract award, does the teaming agreement terminate? Is the subcontractor’s right nothing more than a right of first refusal at the lowest available price? What about future contracts? In a multiphase program, the real dollars may not flow until Phase 2 or 3. Do the subcontractor’s rights extend to those phases or does the agreement terminate earlier?

• **Is this marriage a mutual suicide pact?** What if the teammate does not make the requisite investments, diverts its key personnel to other projects, exercises no meaningful cost control or produces a substandard product/proposal? Is there a defined process for the “divorce”? Without a defined process, are you likely to be charged with “abandonment”?

• **Have you read the boilerplate?** Many teaming agreements, carefully crafted in other respects, preclude consequential and incidental damages, including lost profits and punitive damages, whether based on contract, tort or other theories of recovery. This is the teaming analogue to a “take nothing” provision in a prenuptial agreement. This is fabulous for the breaching party, but not for the abused.

• **What happens to my intellectual property if my teammate walks away?** It depends on what the teaming agreement says. IP rights need to be addressed separately with respect to (a) the “courtship” period that preceded the teaming agreement, (b) the proposal phase, (c) the post-prime contract award phase (the prime contractor should not be authorized to use subcontractor’s IP to perform the prime contract unless it has awarded the subcontract to subcontractor) and (d) any ensuing subcontracts. In many teaming agreements, these IP provisions form the heart of the relationship and are the true “ties that bind.”

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