



Five signs your teaming agreement will lead to affiliation

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Teaming agreements are valuable tools for all government contractors. They allow the proposed prime contractor and subcontractor to iron out their relationship prior to competing for a government opportunity. Teaming relationships themselves are particularly important to small business contractors who are trying to grow their portfolio, but may need the insight of an experienced subcontractor.

However, small business primes teamed with large subcontractors on set-aside contracts are chief targets for size protests. Therefore, all small business primes must ensure that their teaming agreements cannot give rise to a finding of affiliation in the event of a size protest. Below are five ways your teaming agreement could do just that:

1. Subcontractor's Scope of Work is Unclear or it is Performing Primary and Vital Tasks

It is important to be as detailed as possible in describing what the subcontractor will do. If the arrangement is challenged via a size protest, the Small Business Administration will look at whether the teaming agreement assigned discrete functions to the subcontractor, or if the teaming agreement gives the impression that the subcontractor will be involved with everything on the project and will really be running the show.

Along these lines, the SBA will also look to see if the subcontractor is doing the majority of the "primary and vital" requirements of the prime contract. You must make sure that the prime contractor is performing primary and vital requirements and has assigned discrete functions to its subcontractors.

2. Prime Contractor Does Not Have Final Say

On a related note, if a teaming agreement indicates that it is the subcontractor, and not the prime, calling the shots on the proposal and ultimately contract performance, the SBA will find that the subcontractor is only an "osten-

sible" subcontractor and, consequently, the prime and its ostensible subcontractor are joint venturers and, therefore, affiliates, rendering the prime ineligible for the set-aside contract. The teaming agreement must afford the prime the same rights as any other contractor serving as the prime would expect responsibility over approving the proposal before submission, negotiations with the government, and execution of performance.

Additionally, the prime should make the call on what types and how many subcontractors it will need, meaning the prime should be allowed under the terms of a teaming agreement to subcontract with other firms without the need to obtain approval from a subcontractor.

3. Subcontractor Will Exceed Work Share Limits

A teaming agreement for a set-aside opportunity should specify the subcontractor's maximum work share. For instance, a large subcontractor on a set-aside services contract must perform no more than 50% of the work, and the prime's teaming agreement should so state. If a teaming agreement states that the subcontractor will perform more than 50% of the contract with its own employees, the SBA will find the prime contractor is not eligible for the set-aside contract because of its ostensible subcontractor.

4. Subcontractor Provides More Than Services

To avoid a finding of affiliation, a teaming agreement must make clear that the parties are entering a prime-subcontractor relationship and not a joint venture. In this regard, if the subcontractor is offering to provide more than its services under the teaming agreement, the SBA may view such terms skeptically. For example, if a subcontractor is subleasing office space to the prime under the teaming agreement, that may indicate to the SBA that the prime shares an identity of interest with the subcontractor, a ground for affiliation. Like-

wise, if the teaming agreement indicates that the subcontractor is supplying all resources for preparation of the proposal and an entire team to prepare the proposal, the SBA may find that the prime is unduly reliant upon the subcontractor.

5. Sharing of Profits and Losses

Again, in drafting a teaming agreement for a set-aside contract, the prime must ensure that the teaming agreement represents a prime-subcontractor relationship and not a joint venture. Primes and subcontractors, therefore, should avoid certain business terms that are common to joint ventures, like sharing profits and losses. Although profit sharing alone may not give rise to affiliation, it would be considered under the totality of the circumstances analysis. And there are SBA Office of Hearings and Appeals decisions concluding profit sharing between a prime and subcontractor may lead to a finding of affiliation if other indications of affiliation are present. Therefore, the more conservative approach is to avoid the sharing of profits altogether under the terms of a teaming agreement.

Teaming agreements are vital tools in the government contracting toolbox, but small business prime contractors must be careful with them. A sample teaming agreement found on the internet may work for other contractors not pursuing set-aside work, but may give rise to a finding of affiliation in the event of a size protest. Avoiding the five signs of affiliation above in your next teaming agreement will improve your odds of a favorable size determination. You may also want to consider asking an experienced small business government contracting attorney to review your teaming agreement template for any red flags.

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