

DEVELOPING A WINNING CAPTURE STRATEGY AND AVOIDING LEGAL PITFALLS

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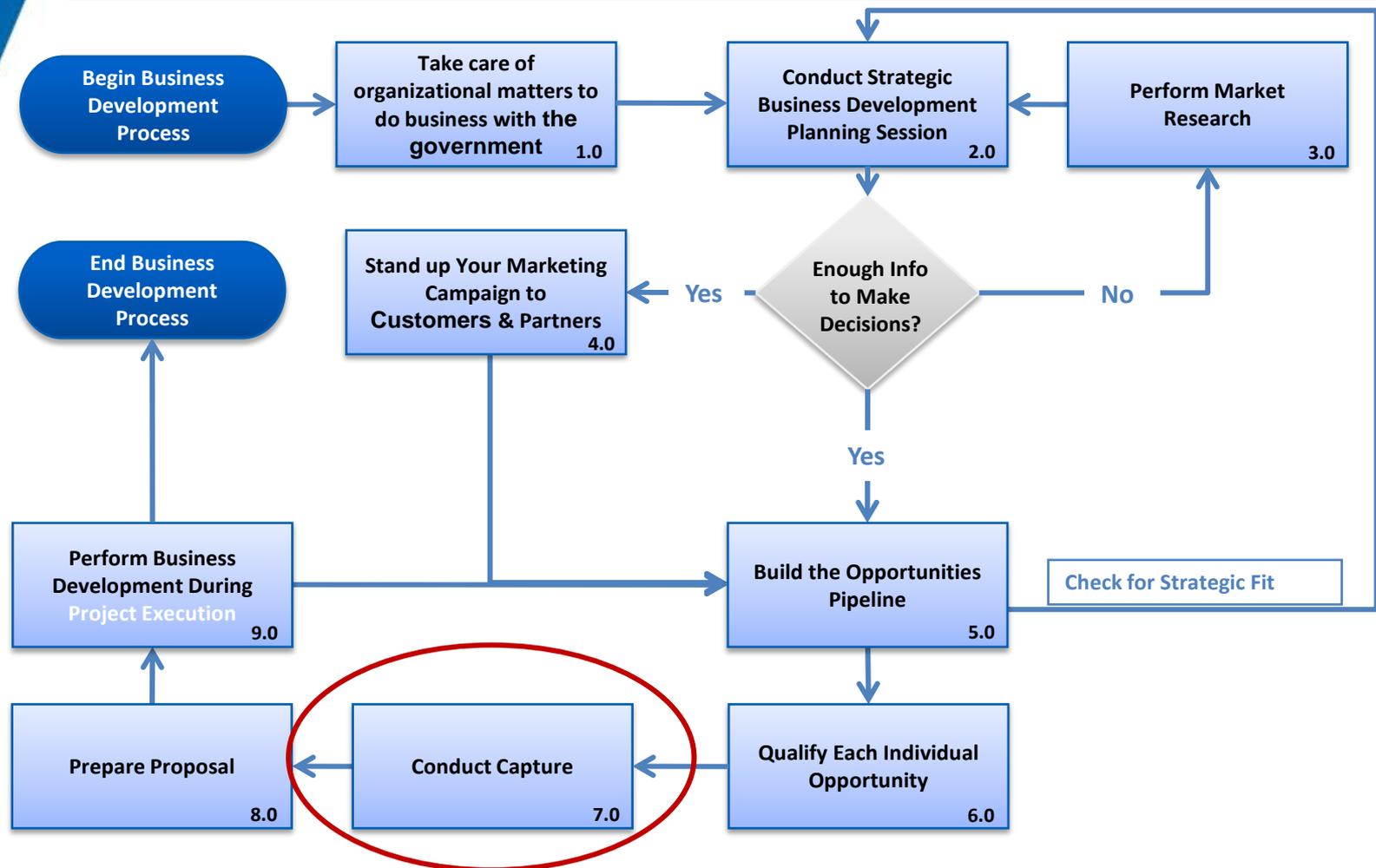
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BUSINESS DEVELOPMENT LIFECYCLE



SIX ASPECTS OF CAPTURE



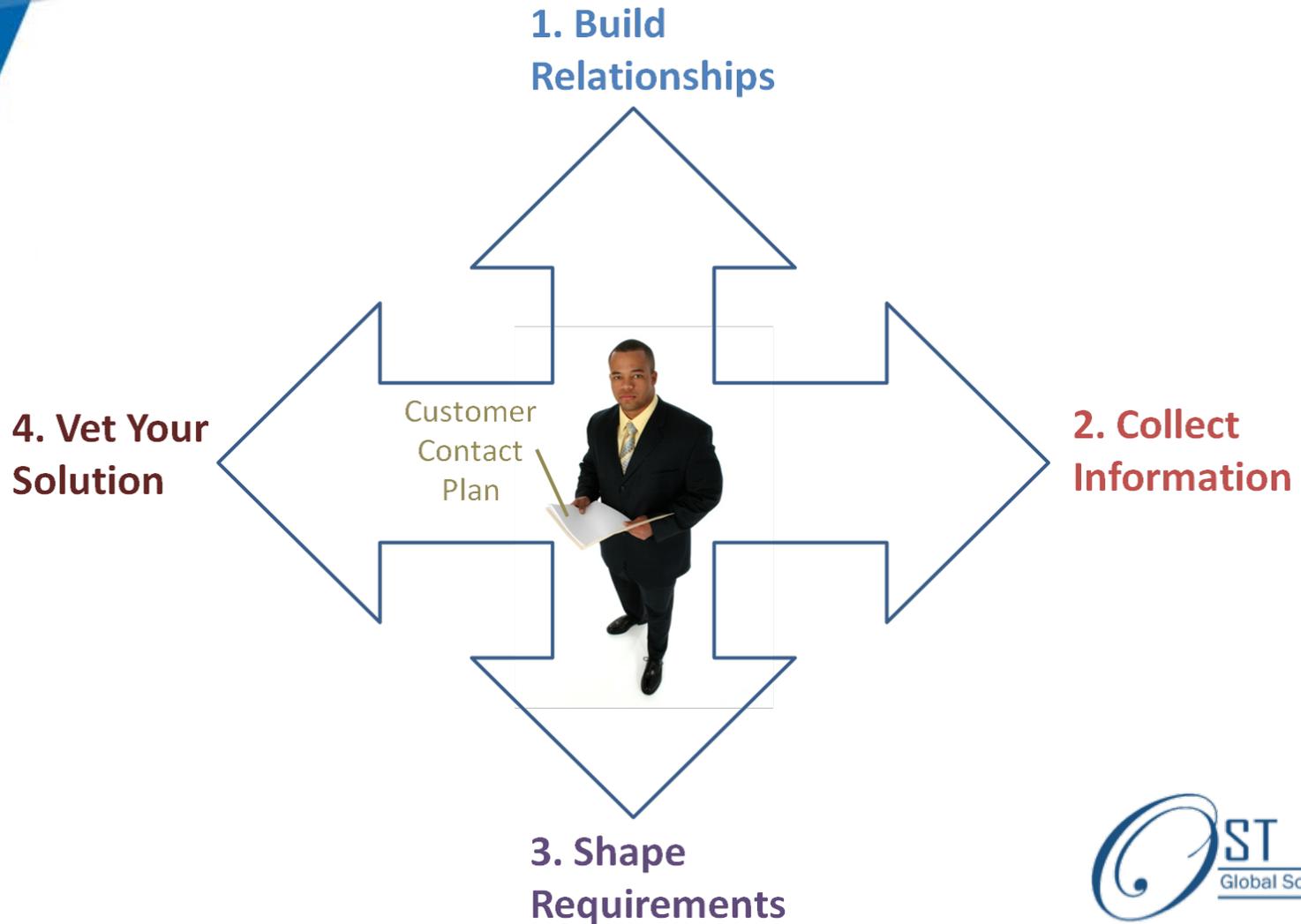
OVERVIEW: LEGAL ISSUES WITH THE GOVERNMENT

- **Gratuities**
- **Post Employment Restrictions on Government Employees**
- **Procurement Integrity Act**
- **Organizational Conflicts of Interest**

OVERVIEW: LEGAL ISSUES WITH COMPETITORS AND TEAMING PARTNERS

- **Non-Disclosure Agreements**
- **Trade Secrets Act**
- **Non-Compete Agreements**
- **Affiliation**

FOUR MAIN CUSTOMER TASKS



WHO IS THE CUSTOMER?

- ❑ Who are the contracting officer, program manager, and others?
- ❑ Who would be involved in the source selection evaluation process?
- ❑ Who is the source selection authority?
- ❑ Where does the technical expertise evaluating compliance with the specifications come from?
- ❑ Who is in charge up the chain of command?
- ❑ Who defines the policy and may be involved as well?
- ❑ Who are the end users and would they generate requirements for this program?
- ❑ Which offices and other agencies are involved?
- ❑ Which Congressional committees are champions of this opportunity?

TASK 1: BUILD RELATIONSHIPS

1. Build Relationships



YOUR MINDSET AS A TRUSTED ADVISOR

- You are squeaky clean honest
- You are ethical and you play by the rules
- You care about them and the project more
- You care about our country a great deal
- You understand how this government servant's mission impacts the entire country
- You honestly believe that your company will be the best possible contractor for the job
- You are there to help and to solve their problems
- You will always give them the best deal
- You respect them a great deal – you are never dismissive of the government even if they are
- You also recognize they are a human being
- You are to be trusted



UNDERSTAND YOUR CUSTOMER

- What is it that keeps your customer up at night?
- What is it that keeps them going and gives meaning to their lives?
- What makes them proud?
- What causes them anxiety?
- What are their goals?
- What are the recurrent themes and words that you keep seeing that are underlying a core need?
- Where does your pursuit fit in all of this?



GRATUITIES

- **Government employees cannot solicit or accept gifts from any entity that does/seeks business with the government**
- **A “gift” is any item having monetary value**
 - **“Gift” does not include modest items of food, refreshments, greeting cards, items with little intrinsic value (e.g., plaques, certificates)**
- **So what gifts are okay?**
 - **The \$20/\$50 Rule – A one-time gift of \$20 or less in value, but not exceeding \$50 in value per calendar year**
 - **Gifts Based on Personal/Family Relationships – Relationship predates business-related contacts and the friend/family pays for the gifts**
 - **Discounts – Where the discount offer does not discriminate against other government employees based on rank or position**

GRATUITIES (cont'd)

- **Awards and Honorary Degrees** – If the value of the gift is \$200 or less and based on meritorious service OR if the value of the gift is more than \$200 and approved by agency ethics official
- **Gifts Based on Outside Relationships** – When based on outside business or employment activities OR the business or employment activities of employee's spouse
- **Gifts in Connection with Political Activities** – Meals, lodging, transportation and other benefits associated with political organization when actively participating in such organization
- **Widely Attended Gatherings** – Where employee is asked to speak at an event or otherwise attends the event in the interest of the agency, may accept gift of free attendance
- **Social Invitations** – When invited by a person who is not a “prohibited source” and other attendees are not charged fees

POST EMPLOYMENT RESTRICTIONS

- **Restrictions during government employment** – E/ee cannot participate “personally and substantially” in matters which the E/ee knows “directly and predictably” affect financial interests of the prospective E/er
 - **Reporting requirement** – A government E/ee participating in a procurement in which the Kor has submitted a bid or offer **must** report any inquiries made by the Kor regarding prospective employment
- **Post employment regulations**
 - **Who is affected?** Former government E/ees who participated “personally and substantially” in a particular matter, had “official responsibility” for the particular matter, and are “senior” or “very senior” E/ees
 - **What are the restrictions?** Former government E/ees are prohibited from making “representations” to the government during a prescribed “cooling off” period

POST EMPLOYMENT RESTRICTIONS

- What is a “representation”? Any communication or appearance
- How long is the “cooling off” period?
 - E/ee participated “personally and substantially” in a particular matter during government service → PERMANENT and lasts while employed outside the government
 - E/ee had “official responsibility” for a particular matter pending before the government within the last year of service → 2 YEARS
 - E/ee was a “senior” E/ee in the same agency to which he is going to make representations about a particular matter → 1 YEAR unless appointed after Jan. 20, 2009, then 2 YEARS
 - E/ee was a “very senior” e/ee in the same agency to which he is going to make representations about any matter → 2 YEARS

TASK 2: COLLECT INFORMATION



**2. Collect
Information**

QUESTIONS TO GET STARTED

1. What exactly is this project all about? What is the scope of the work?
2. What is the acquisition strategy that the customer is intending to use?
3. What type of contract is the customer likely to use:
 - Cost Plus (and its varieties – Fixed Fee, Incentive Fee, Award Fee, etc.)
 - Firm Fixed Price
 - Time and Materials
 - Other?
4. Is the contract or some portion of it going to be a small business set-aside?
5. When would they like the project to begin in an ideal world scenario versus what the reality given all the protocols they have to follow?
6. What are the key project milestones? What is the project duration?
7. Where is the customer in the procurement process – what needs to happen in order for the procurement to be issued? What is the approximate schedule for that? What are the issues that are still unresolved?

MORE QUESTIONS

8. What is the ballpark budget for this opportunity? Does this include the government personnel costs?
9. Has this budget been approved and funded? If not, what are the milestones for approval and funding? What is the risk that the project will not be funded?
10. Is this existing work, and if so, via what vehicle? Who is the incumbent?
11. What about the way the work is being done right now – could it be performed better?
12. Does a customer have a specific vision for solving their problem? Would they like some suggestions and options?
13. What is the customer's vision as to how this work should be done – a particular technology, approach, platform, or a solution?
14. Who else in the customer's organization is or will be involved in this procurement – and what will be their role?
15. At which location will this work be done, and on government or contractor site?

AND MORE...

16. Are there any facilities requirements?
17. Are there any special personnel requirements? Security clearances? Certifications?
18. Is there any specific challenge the customer is worried about? What “keeps them up at night?”
19. Would they like help with anything – a description of work requirements, for example, a white paper on different solutions for the problem, tradeoff analysis, or anything else that would help them write the Statement of Work for the RFP?
20. Has anything changed since the last visit or conversation?



PROCUREMENT INTEGRITY AND ETHICS

- **Never ask for or accept acquisition-sensitive information from the customer or others close to the customer**
- **Do not fish for data from the people that you have just hired away from your competitors (such as an incumbent) – and especially DO NOT accept any documents from them that they may have carried with them when they left**
- **Do not accept any kind of sensitive information from your employees, consultants, teammates, or subcontractors**

NON-DISCLOSURE AGREEMENTS AND TRADE SECRETS ACT

- **NDA Between Teaming Partners**
- **NDA Between Teaming Partners and 3rd Parties**
- **NDA Between Potential Hires and 3rd Party Employers**

NON-DISCLOSURE AGREEMENTS AND TRADE SECRETS ACT

- **Risk for Violation**
 - **Breach of Contract**
 - **Tortious Interference with Contractual Relations**
 - **Procurement Integrity Act**
 - **Violation of Trade Secrets Act**
- **Exposure to:**
 - **Law suit for Damages**
 - **Injunction**
 - **Disqualification from Competition**

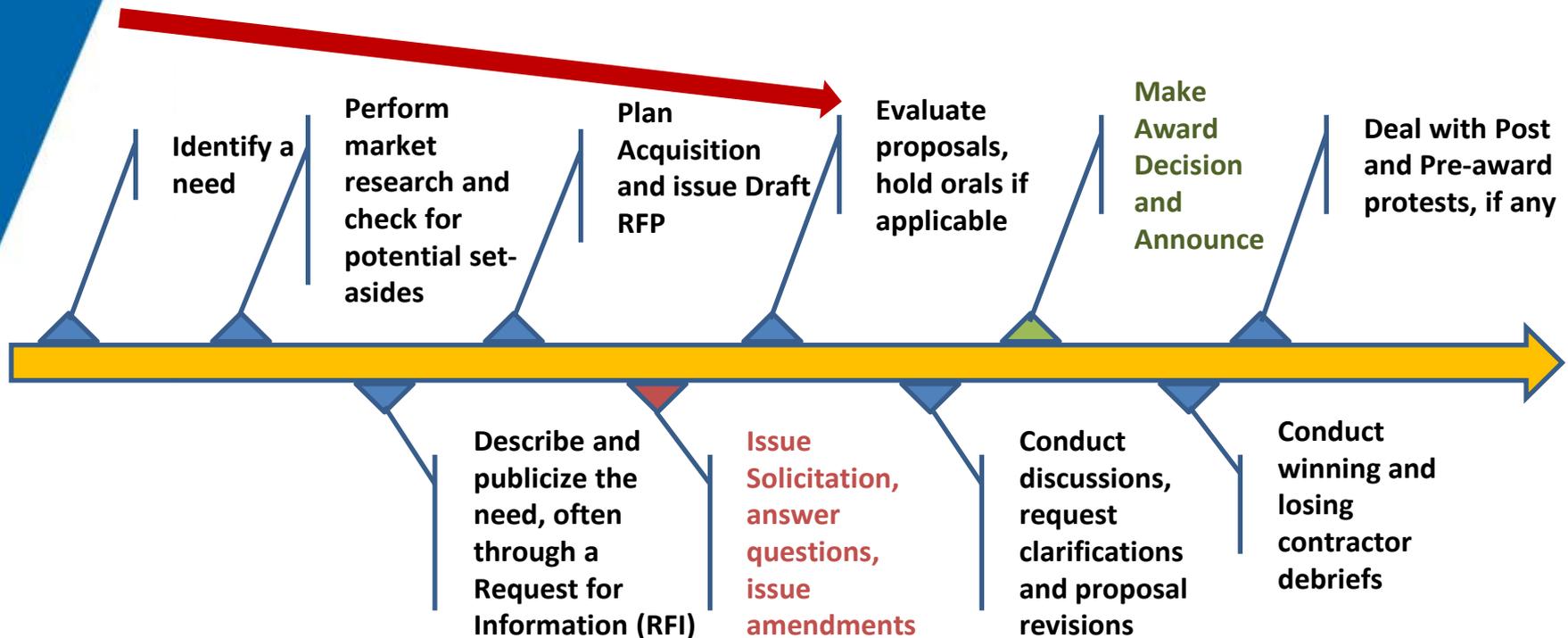
TASK 3: SHAPE THE REQUIREMENTS



3. Shape Requirements

- **What shape of the requirements is illegal vs. what is good capture?**

DIMINISHING OPPORTUNITY



WHAT YOU CAN LEGALLY SHAPE

- Scope of work
 - Tasks and objectives to solve the problem
 - Metrics to custom-fit for your solution
 - Adding the scope to your existing contract
 - Keeping the scope under one procurement or splitting it up (within the legal bounds)
 - Prescriptive SOW versus looser SOO or PWS
 - Tailoring of scope to your capabilities
- Contractual, procurement, and evaluation matters
 - Type of contract, procurement and proposal duration
 - Leveling of the playing field
 - Evaluation criteria
 - Page limits
 - Small business set-aside or full and open competition
 - Organizational Conflict of Interest (OCI)
 - Orals and demos



Shaping is not illegal if you play by the rules and help the government better define the requirements and issue a better RFP; it may just happen to also benefit you in the process

MORE AREAS TO SHAPE

- Solution
 - Past performance, key personnel, and resume requirements
 - Aggressive or not-so-aggressive project schedule
- Legal and insurance considerations
 - Intellectual property ownership for software or inventions
 - Insurance requirements for special environments



If you don't do the shaping, someone else will – and it is easier to win the game for which they have created the rules

ORGANIZATIONAL CONFLICTS OF INTEREST

- **Biased Ground Rules**
- **Impaired Objectivity**
- **Unequal Access to Information**

ORGANIZATIONAL CONFLICTS OF INTEREST

- **Contractors that help prepare SOW to be used in acquiring systems/services**
- **Contractors that perform systems engineering or provide technical direction**
- **Contractors that evaluate offers/services**
- **Contractors with access to proprietary information**

TASK 4: VET YOUR SOLUTION

4. Vet Your Solution



AFFILIATION AND TEAMING PARTNERS

- **Impacts size; nothing wrong with affiliation between small businesses**
- **Affiliation is a problem when:**
 - **Size is protested and firms are deemed large**
 - **Firm certified to being small knowing it is large/affiliated**
- **Affiliation can create OCIs that could disqualify firms**
- **Ostensible Subcontractor Rule**
 - **Undue reliance on Subcontractor**
 - **Who is performing primary and vital requirements of the contract?**

RUN YOUR SOLUTION BY THE CUSTOMER

- Verify the buzz words
- Vet your understanding of the problem
- Never discuss a problem without a solution

Get it EXACTLY as your customer sees it!



WHEN TO BE CAREFUL

- *Think twice whether to give presentations, fully disclose your discriminators in the RFI, or leave any white papers or other artifacts with the customer*
- Customer is close with competition and they may disclose your solution to them
- Too many contractors' fingers involved in the procurement so your information could leak



Questions?