

LEGAL ADVISOR



A PilieroMazza Update for Federal Contractors and Commercial Businesses

GOVERNMENT CONTRACTING

Protecting Your Employees and Confidential Information when Working with Teaming Partners

By Ambika Biggs



Teaming with another company to win federal contracts can be a fruitful practice for small and large business alike. Small companies may get the opportunity to bid on work that they otherwise would be unable to perform, and large companies can subcontract with small companies to bid as part of a team on work that

they may be ineligible to perform because competition is restricted to businesses in certain socio-economic groups.

However, teaming with another company to win work is not without risk. Two common issues that arise are disputes between teaming partners regarding employee poaching and the misappropriation of a teaming member's confidential and proprietary information. It is important for contractors to be familiar with the types of disputes that could occur with respect to these issues so they can take proactive steps to try to prevent them from happening in the first place.

With respect to employee poaching, a couple of scenarios commonly occur. Take, for example, a situation in which a contractor has performed on a government contract for years, but is no longer eligible to bid on it when the contract is re-competed due to its increased size, so the contractor teams with a small business to bid on the contract. After the small business prime is awarded a government contract, the prime terminates the subcontractor so the prime can receive all of the profit on the contract instead

of splitting it with the subcontractor. Oftentimes, not only will the prime contractor wrongfully terminate the subcontractor, but it also will solicit and hire the subcontractor's employees who have experience performing on the contract. Another common scenario is that a prime and subcontractor work together on a contract, but then end up as competitors on the follow-on contract, and one company attempts to hire away its former partner's employees.

Contractors can avoid these types of issues by including appropriate non-solicitation provisions in their teaming agreements and subcontracts that prevent their teaming partners from attempting to hire away their employees. When using non-solicitation provisions, companies should consider the following tips:

1. If you are not the drafting party, make sure the provision is mutual. Oftentimes, the provision will be drafted to prevent one party from soliciting the other party's employees (i.e., the subcontractor is prohibited from soliciting the prime's employees), but not vice versa.
2. Ensure that the provision is enforceable. Sometimes non-solicitation clauses are too vague because they do not define key terms, such as which employees are covered by the provisions. Other times, they are too broad and attempt to cover more activity than is necessary for a company to protect its business interests, for example by prohibiting the parties from hiring any employees of the other teaming partner, even if they have no connection to the contract on which the parties teamed.
3. Make sure the clauses are for a reasonable length of time. If a non-solicitation provision only covers the period when the teaming agreement or subcontract is in force, a teaming partner could simply terminate the contract and then would be free to hire its

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former teaming partner's employees. On the flip-side, if the provision's term is too long, a court may not enforce it at all.

4. Ensure that the provision is in compliance with the applicable law. Teaming agreements and subcontracts should establish which state's laws will govern the agreements, and companies should make sure that the non-solicitation clause is enforceable under that state's laws, as some jurisdictions have stricter requirements than others.

Even when companies follow these tips, there will be some occasions when they have no choice but to let a successor contractor hire their employees. For instance, for contracts relating to services that are deemed "vital" to the Government, under FAR 52.237-3, the incumbent contract must allow "as many personnel as practicable to remain on the job to help the successor maintain the continuity and consistency of the services" provided in the contract. And, for contracts that are subject to Executive Order 13495, the successor contractor must offer employment to the predecessor contractor's employees for positions for which they are qualified.

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With regard to the misappropriation of proprietary information, a common scenario that arises involves one of the teaming partners providing confidential material to the other partner to include in the proposal or during the performance of the contract, and the other teaming partner then uses this material for a later contract or with a different teaming partner. To try to avoid these scenarios, confidentiality provisions in teaming agreements and subcontracts should:

1. Clearly define what type of information is covered by the confidentiality provision. This material could include technical methods, inventions, and know-how, or even the specific language contained in a proposal, as it can take substantial effort to draft the perfect proposal language.

2. Detail how confidential information will be identified. Will all information exchanged be considered confidential information, or does the information have to be marked with a legend indicating it is confidential?
3. Establish the remedies for a breach of the clause. The party whose information is disclosed or misappropriated may be entitled to damages or injunctive relief, and this should be clearly set forth in the contract.
4. Include a timeline for either returning or destroying the other party's confidential information and verifying that all such information has been returned or destroyed.

Even if non-solicitation and confidentiality provisions are included in teaming agreements and subcontracts, a company may still attempt to hire its teaming partner's employees or misappropriate its confidential and proprietary information. However, if the provisions are well drafted, any dispute should be short lived and more easily resolved than it otherwise would be, saving the company time, money, and the frustration that comes with protracted litigation. An ounce of prevention when drafting these provisions is usually worth a pound of cure if a dispute arises.

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