MEMORANDUM

Date: September 2, 2020

Re: Teaming agreement best practices for non-profits

**Teaming Agreements**

Teaming agreements are contractual agreements commonly used in the government contracting space.[[1]](#footnote-1) Firms bidding on government contracts frequently include the services of other businesses in project proposals as a way to offer expertise or technical capacity that the prime contractor could not offer alone.[[2]](#footnote-2) Those prime contractors usually encourage other organizations to team with them with the prospect of a future subcontract of work if the team wins the bid.[[3]](#footnote-3) In the contracting space, binding teaming agreements allow the parties to lay out the rights and responsibilities of both primary contractors and potential subcontractors during the bidding process.[[4]](#footnote-4)

Teaming agreements are an established part of government contracting, but their use is less common in the government grant space.[[5]](#footnote-5) While most legal issues regarding teaming in a contract situation are settled, the potential issues of teaming in a grant situation are mostly unresolved.[[6]](#footnote-6) Informal, unenforceable teaming arrangements are common in government grants, and so while a handful of cases address teaming agreements for contracts, little or no case law addresses teaming for grants specifically.[[7]](#footnote-7) Still, the concept of teaming for government grants comes directly from the practice in government contracting, and the issues that arise are similar.[[8]](#footnote-8) Prime contractors and prime grantees (“Primes”) have similar incentives, as do Subcontractors and Subgrantees (“Subs”) when pursuing potential subcontracts or subgrants.

**What are best practices for non-profits when teaming for government grants?**

 When bidding on government grants, non-profit organizations often benefit from teaming with other organizations to strengthen their bids.[[9]](#footnote-9) Teaming with organizations that have technical expertise or specialized experience can strengthen the Prime’s bid, but doing so can also complicate the bidding process by introducing an element of uncertainty if the Sub’s role is not fully agreed upon.[[10]](#footnote-10) When teaming, the Prime and the Sub have specific needs and risks, and by understanding and addressing these issues early in the process, team collaborators can resolve a number of issues that could disrupt the bidding process.[[11]](#footnote-11)

In the non-profit space, agreements to team are often less formal due to resource constraints. While fully executed teaming agreements are often unworkable, a letter of understanding or memorandum of understanding is an efficient way to lay out the key provisions of the agreement and provide both parties with clarity about their arrangement.[[12]](#footnote-12) While non-binding agreements do not provide the same level of certainty as a binding teaming agreement, they do allow Primes and Subs to establish expectations and can clarify that if either party backs out of the agreement they may damage the relationship with the other organization and their reputation.

**Incentives of Primes and Subs**

 Primes generally (but not always) enter the relationship with more leverage because they are preparing the grant proposals and will carry most of the costs.[[13]](#footnote-13) Primes want to ensure that potential Subs will not join competing bids and will provide their services exclusively to that Prime for the duration of the proposal and potential grant.[[14]](#footnote-14) The main risk Primes face is that they may bind themselves to provide a certain amount of work for the Sub at a time in the bidding process where flexibility is important.[[15]](#footnote-15)

On the two issues of exclusivity and the promise of future work, Sub interests are in direct opposition to Prime interests.[[16]](#footnote-16) Subs will generally want to avoid providing promises of exclusivity while receiving promises for future work that are as binding on the Prime as possible, and will want to include a scope of work that is clear and specific.[[17]](#footnote-17) Subs will generally have more leverage to negotiate when they have technical capacity or key personnel that are *crucial* to win the grant.[[18]](#footnote-18)

 While the interests of Primes and Subs diverge on some key issues, their interests overlap on most issues that arise in agreements to team.[[19]](#footnote-19) Both parties benefit from clarifying expectations around how the parties will act during the bidding process on issues such as confidentiality, intellectual property, and proposal preparation.[[20]](#footnote-20) Simply expressing expectations in writing can provide some assurance that the parties understand each other, even if those provisions are not necessarily binding.

 **Enforceability issues**

 Courts generally regard teaming agreements and similar documents as “agreements to agree” and hold these agreements to be unenforceable, with the exception of a few key provisions.[[21]](#footnote-21) On their own, teaming agreements do not typically result in an enforceable promise for the Prime and Sub to work together if the bid is successful.[[22]](#footnote-22) In the context of government contracting, provisions *requiring* the parties to agree to a future subcontract are generally unenforceable, but courts have upheld a limited duty requiring the parties to negotiate in good faith where the parties had previously agreed to do so in the teaming agreement.[[23]](#footnote-23) However, showing a breach or damages in this situation is difficult, because the only enforceable requirement is that the parties attempt good faith negotiations.[[24]](#footnote-24)

 Primes should understand that even though scope of work provisions or promises to negotiate a future subcontract/subgrant may not be enforceable, those provisions can still shape Sub expectations post-award.[[25]](#footnote-25) Teaming agreements can also include enforceable provisions governing the behavior of the parties during the bidding process.[[26]](#footnote-26) For example, provisions requiring the Prime to submit a proposal identifying the parties or exclusivity provisions on the Sub may be enforceable, so long as the parties intended those provisions to be binding and stated that clearly in the agreement.[[27]](#footnote-27)

**Teaming agreements from least to most formal**

 Agreements to team can range from informal communications to fully executed highly formal teaming agreements. Informal agreements are more efficient to establish but provide less certainty, which may be especially important when teaming for high-value grants. Full teaming agreements may be generally unworkable except in unusual grants situations. A full teaming agreement does not provide much more certainty than an MOU on key issues but can bind the parties during the bidding process.[[28]](#footnote-28) For that reason, negotiating and establishing a highly formal teaming agreement is usually a more complex and costly process. See the attached Letter of Understanding and Memorandum of Understanding templates.

 Letters of Understanding are the least formal way of establishing a teaming arrangement.[[29]](#footnote-29) Letters of Understanding lay out the preliminary terms of an agreement, identify the parties and the target program, and may include an agreement to negotiate a more binding teaming agreement or subcontract if the bid is successful.[[30]](#footnote-30) For nonprofits, this should probably be the most common teaming arrangement used, and can often be in the form of an email exchange.

 Memoranda of Understanding (MOUs) describe the parties’ understanding of certain key terms (such as exclusivity language or expectations of confidentiality) without the level of detail found in a teaming agreement.[[31]](#footnote-31) MOUs allow the parties to agree to a robust framework of expectations for team behavior, but are generally non-binding and allow the parties to be flexible in their arrangements.[[32]](#footnote-32) MOUs can include binding provisions, if the intent of the parties is clear.[[33]](#footnote-33) For most grant situations, a MOU is sufficient for the needs of non-profits.

 Teaming Agreements are the most formal and binding pre-contract arrangement.[[34]](#footnote-34) Teaming agreements establish a binding framework for how each party will act during the bidding process, and are useful in situations where issues like confidentiality, intellectual property rights, or the proposed scope of work are particularly large or complex.[[35]](#footnote-35) For non-profits pursuing government grants, teaming agreements are only necessary in the largest and most complex situations.

 Because every bidding process is unique, the level of formality appropriate for each situation depends on the particular circumstances of the parties. In general, several factors determine which method of documentation is appropriate for a specific situation:

The size of the grant at stake - for larger grants, each party will necessarily want stronger assurances that the other parties will act as agreed.

The importance of the potential Sub to the project - if the Sub is crucial to winning the bid, the Prime will want the security of a binding exclusivity clause to prevent the critical team member from offering their services to competing bids.[[36]](#footnote-36)

The proposal-support a Sub may provide - if the Prime is relying on the Sub to contribute materials to the bid, a teaming agreement that provides a more formal commitment of what the Sub needs to provide and a timeline for doing so is beneficial.[[37]](#footnote-37)

The capacities of the entities negotiating the agreement - all things being equal, fully executed teaming agreements provide more certainty for both Primes and Subs. If the entities involved have the capacity to pursue formal agreements, they should.

**Minimum provisions to include in any agreement to team**

For non-profits, informal teaming agreements like letters of understanding are often desirable because they can address key issues more quickly and at reduced cost, especially those issues where the interests of Primes and Subs diverge. Even with informal agreements to team, both parties benefit from clarifying expectations early about those issues and should include language to that effect. [[38]](#footnote-38)

Statement of work – Any agreement to team should always identify the parties and the grant for which they are teaming, and should specify the role that the Sub is agreeing to take on.[[39]](#footnote-39) A Prime generally wants a statement of work that is relatively vague in order to retain flexibility, while a Sub wants the proposed statement of work to be as clear and specific as possible.[[40]](#footnote-40)

Exclusivity – Usually, a Prime has a strong interest to ensure that a potential Sub will be exclusive, and that the Sub will not join with or originate competing bids.[[41]](#footnote-41) A Prime can strengthen its bid by getting some assurance that a key Sub will team exclusively with the Prime, even if that assurance is informal and non-binding. The Sub, on the other hand, usually wants to retain the ability to join other bids in order to maximize its own chance of receiving work.[[42]](#footnote-42)

Negotiation of future subgrant/subcontract – Because the Courts will view any promise of a future subgrant/subcontract as unenforceable, the parties usually include a provision promising to *negotiate* a future subgrant/subcontract in good faith.[[43]](#footnote-43) An agreement to negotiate in good faith can be enforceable, but even in non-binding agreements these provisions establish an expectation of including the Sub in carrying out the grant that the Prime will usually want to fulfill. A Prime will also include such a provision to avoid any implication that the document is intended as the subgrant/subcontract itself, especially if the document includes detailed language about the Sub’s scope of work and the price for their services.[[44]](#footnote-44)

**Other common issues**

Agreements to team raise a number of issues not discussed above depending on the grant and the parties involved. Because these provisions generally relate to how parties will act in the pre-award stage of the relationship, courts usually enforce them if the terms of each provision are clear.[[45]](#footnote-45)

Confidentiality – Organizations teaming together often share sensitive information about areas like internal processes and technical capacity, and both organizations have an interest in ensuring the other party manages their information responsibly.[[46]](#footnote-46) To that end, agreements to team often include confidentiality clauses.[[47]](#footnote-47) In informal, non-binding agreements, confidentiality provisions can be separately enforceable, or the parties may agree on a separate, binding Non-Disclosure Agreement.

Intellectual Property Rights­ – Primes and Subs are likely going to co-create or share intellectual property (“IP”), possibly including proprietary software and data, in the course of both bidding and executing a grant project.[[48]](#footnote-48) Including provisions stating when and how parties may access or use the other’s or shared IP can help ensure each organization’s property rights are handled correctly.

Proposal Preparation – Subs often assist in the preparation of materials to submit as part of the grant proposal. Indicating specific deadlines for delivery of the Sub’s material to the Prime can address timing issues before they delay the proposal.[[49]](#footnote-49) These provisions often specify that only the Prime will communicate with the government agency offering the grant, and if the agency contacts the Sub, the Sub will inform the Prime of the communication promptly.[[50]](#footnote-50)

 Termination and Dispute Resolution – While most of the agreements discussed in this memo are non-binding, they may include binding clauses such as confidentiality agreements. If these clauses are present, the parties should be clear as to how long those obligations will be in effect. For example, a termination clause can clarify what happens if the team fails to win the bid or if one party does not perform certain aspects of the agreement.[[51]](#footnote-51) Similarly, if the parties have agreed to binding commitments, they may want to agree on some method of dispute resolution. Dispute resolution clauses create a mechanism for the parties to address issues that arise if one party fails to perform without dissolving the entire agreement.[[52]](#footnote-52)

1. Robert H. Koehler, *Teaming Agreements: the Proverbial “Wolf in Sheep’s Clothing,”* 14-6 Briefing Papers 1 (2014). [↑](#footnote-ref-1)
2. *Id.* [↑](#footnote-ref-2)
3. *Id.* [↑](#footnote-ref-3)
4. Ralph C. Nash & Richard N. Kuyath, *Teaming Agreements: Are They Binding?* 27 Nash & Cibinic Rep. 36 (Aug. 2013). [↑](#footnote-ref-4)
5. *See* Koehler, *supra* note 1. [↑](#footnote-ref-5)
6. *Id.* [↑](#footnote-ref-6)
7. *See* Madalyn A. Murtha, *The Enforceability of Teaming Agreements in Government Contracting and its Effect on Agreement Formation*, 49 Procurement Law. 22, 22 (2014). [↑](#footnote-ref-7)
8. Koehler, *supra* note 1. [↑](#footnote-ref-8)
9. *See* Nash & Kuyath, *supra* note 4. [↑](#footnote-ref-9)
10. *Id.* [↑](#footnote-ref-10)
11. *Id.* [↑](#footnote-ref-11)
12. Murtha, *supra* note 7. [↑](#footnote-ref-12)
13. *Id.* at 27. [↑](#footnote-ref-13)
14. *See* Steptoe & Johnson, LLP, Government Contractor Teaming Agreement Toolkit 44-45 (2018). [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. Nash & Kuyath, *supra* note 4. [↑](#footnote-ref-16)
17. Murtha, *supra* note 7, at 23. [↑](#footnote-ref-17)
18. *Id.* [↑](#footnote-ref-18)
19. Nash & Kuyath, *supra* note 4. [↑](#footnote-ref-19)
20. *Id.* [↑](#footnote-ref-20)
21. *E.g.*,Cyberlock Consulting, Inc. v. Information Experts, Inc., 939 F. Supp. 2d 572, 580 (E.D. Va. 2013), aff’d, 549 F. App’x 211 (4th Cir. 2014); CGI Fed. Inc. v. FCi Fed., Inc., 814 S.E.2d 183, 188 (2018). [↑](#footnote-ref-21)
22. *Id.*  [↑](#footnote-ref-22)
23. *See* Advance Telecom Process LLC v. DSFederal, Inc., 119 A.3d 175, 185 (Md. Ct. Spec. App. 2015). [↑](#footnote-ref-23)
24. *Id; see also* Sentrillion Corp. v. United States, 114 Fed. Cl. 557, 565, 566-67 (2014). [↑](#footnote-ref-24)
25. *See* Nash & Kuyath, *supra* note 4. [↑](#footnote-ref-25)
26. *See, e.g.,* CGI Fed. Inc., 814 S.E.2d at 185; *see also* ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659, 668 (3d Cir. 1998). [↑](#footnote-ref-26)
27. *Id*; *see* Murtha, *supra* note 7, at 22. [↑](#footnote-ref-27)
28. *See* Nash & Kuyath, *supra* note 4. [↑](#footnote-ref-28)
29. Nick J. Vizy, Sp. Study for Corp. Couns. on Using Letters of Intent in Bus. Trans. § 1:6.Effects of a letter of intent—Legal principles (July 2019). [↑](#footnote-ref-29)
30. *Id.* [↑](#footnote-ref-30)
31. Gerald V. Niesar, Cal. Transactions Forms Bus. Entities §2:7 Memoranda of understanding and letters of intent (March 2020). [↑](#footnote-ref-31)
32. *Id.* [↑](#footnote-ref-32)
33. *Id*. [↑](#footnote-ref-33)
34. *See* Koehler, *supra* note 1. [↑](#footnote-ref-34)
35. *See* Steptoe & Johnson, *supra* note 14, at 42-43. [↑](#footnote-ref-35)
36. *Id.* at 45. [↑](#footnote-ref-36)
37. *Id.* at 47. [↑](#footnote-ref-37)
38. *Id.* at45. [↑](#footnote-ref-38)
39. Murtha, *supra* note 7, at 27; Nash & Kuyath, *supra* note 4. [↑](#footnote-ref-39)
40. *Id.* [↑](#footnote-ref-40)
41. *See* Steptoe & Johnson, *supra* note 14, at 44-45 (2018). [↑](#footnote-ref-41)
42. *See* Nash & Kuyath, *supra* note 4. [↑](#footnote-ref-42)
43. Advance Telecom Process LLC, 119 A.3d at 185; *see* Nash & Kuyath, *supra* note 4. [↑](#footnote-ref-43)
44. Nash & Kuyath, *supra* note 4; *see also* Murtha, *supra* note 7, at 27. [↑](#footnote-ref-44)
45. Koehler, *supra* note 1, at 3. [↑](#footnote-ref-45)
46. Steptoe & Johnson, *supra* note 14, at 45. [↑](#footnote-ref-46)
47. *Id.* [↑](#footnote-ref-47)
48. *Id.* at 60. [↑](#footnote-ref-48)
49. *Id.* at 47. [↑](#footnote-ref-49)
50. *Id.* [↑](#footnote-ref-50)
51. *Id.* at 51. [↑](#footnote-ref-51)
52. *Id.* at 50. [↑](#footnote-ref-52)