



PilieroMazza Webinar

How to Avoid Common Subcontracting Pitfalls

June 7, 2017

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About PilieroMazza

PilieroMazza PLLC is a full-service law firm with offices in Washington, DC and Boulder, CO. We are most well known as a government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

Our primary practice areas are:

- Government Contracting
- Small Business Programs
- Labor & Employment
- Business & Corporate
- Litigation

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Overview

- Intro to teaming and subcontracting disputes
- Common pitfalls and tips to best avoid and resolve issues with:
 - Work share
 - Term and termination
 - Non-competition and non-solicitation
 - Protection of proprietary information

Basics of Teaming and Subcontracting Agreements

- Probably the most common agreements between government contractors
- Should be in writing!
- Teaming agreement comes first, then the subcontract once the prime contract is awarded (but before work begins)
- A well-drafted teaming agreement should pave the way for the subcontract

To Agree, or Not to Agree...

- That is not the question for a teaming agreement
 - Avoid the “agreement to agree” trap
 - Best practice: attach a copy of the subcontract to the teaming agreement
 - At a minimum, the teaming agreement must demonstrate parties’ intent to be bound and evidence agreement on key terms
- If a teaming agreement is merely an “agreement to agree,” it may not be enforceable
 - State-by-state determination
 - Virginia is especially tough on “agreements to agree”
 - 5th Circuit is more receptive to enforcing teaming agreements

Disputes and Protests

- Given prevalence of teaming and subcontracting agreements, they are the most common type of contractual dispute we handle in our litigation group
- Teaming agreements and subcontract disputes can end up in federal court, state court, arbitration, and/or mediation
- Many settle, but can go to full trial
- Teaming and subcontracting agreements are also subject of size protests, particularly allegations under SBA's ostensible subcontractor and identity of interest rules

Potential Exposure

- Claims for breach of contract or as unjust enrichment
- Damages equal to lost profits associated with work subcontractor expected to perform, potentially over the entire duration of the project
- Consequential or punitive damages?
- Injunctive relief
- Attorneys' fees
- Disruption to business operations
- Reputational harm and friction with government customer

Ounce of Prevention

- Carefully review agreements before execution or proposal submission
 - Generally, there will be much more your counsel can do to help you, and counsel will be able to do so more efficiently, if you seek advice before the agreement is signed (compared to after a dispute has occurred)
- Read and understand the boilerplate
- Do not be afraid to push back on one-sided agreements
- Be careful about vague provisions – ambiguity may not work in your favor
- Develop template agreements that reflect your organization's contracting and business objectives for key terms

Work Share Provisions – Common Issues

- Agreement does not specify the work share at all
- Language describing the work share is non-committal
 - Example: the prime contractor “will strive” to provide up to a certain amount of work
- Language describing the work share is vague
 - How will the work share be measured – FTEs, days worked, revenue, etc.?
- Work share in subcontract is not consistent with work share agreed upon in teaming agreement
- Subcontractor raises rates between teaming agreement and contract award

Work Share Provisions – Common Issues

- Division of work between prime and subcontractor is not clearly defined
- Small business prime contractor commits to work share it cannot perform, or it will not perform enough of the work itself
- Prime adds a new team member, which affects the work share for the pre-existing team members

Work Share Provisions – Tips

- Prime needs flexibility to adjust the sub's work share
 - Work share will be “approximately” or “no more than” XX%
 - But, be careful about not clearly defining scope of large business subcontractor on set-aside project
- Sub needs a definitive agreement
 - **Key:** In teaming agreement, avoid “negotiations” for subcontract and insist on language indicating the prime “shall” issue the subcontract within a short (defined) period after award
 - Insist on clear statement of your work share
 - shall be X% > approximately X% > will strive for X%
 - Adding team members will not affect your work share

Work Share Provisions – Tips

- Address how parties will ensure the work share is achieved
 - Meet periodically to review performance
 - Agree to work in good faith to make adjustments to work share as needed if targets are not being met
 - For set-aside projects, include clear expression of applicable limitation on subcontracting and parties' commitment to it
- Use Exhibit A to define scope of work and discrete functions assigned to subcontractor
 - Even for IDIQ contracts, agreement should specify target % and the categories of work/PWS tasks that each party anticipates fulfilling
 - A work share that is inconsistent with small business set-aside rules may be legally unenforceable – use SBA's rules to your advantage when negotiating

Work Share Provisions – Tips

- Involve agency CO if necessary
 - FAR allows subcontractor to communicate directly with CO if prime has not provided the promised work share, or is not utilizing the subcontractor to the same extent as indicated in the proposal
- If small business prime may have difficulty meeting the prime contract performance requirement
 - Utilize “similarly situated subcontractors” to help prime meet the performance requirement
 - Form a joint venture: the JV must meet the performance requirement and commits all parties in the JV to ensure performance of the prime contract
 - SBA Mentor-Protégé JV allows LB sub to participate in the JV
 - Establish escrow for contract payments

Protections for Size and Status

- Increasingly common for primes to:
 - Require written representation of size/status from subcontractors in teaming and subcontracting agreements
 - Include indemnification if subcontractor's represented size/status turns out to be wrong
- Ditto for subcontractors on set-aside projects:
 - Obtain written representation from your prime when pursuing a set-aside contract and consider indemnification in the event the prime is protested for size/status and your team loses the contract
- Identify primary and vital contract requirements and ensure teaming agreement indicates the prime will perform them

Term and Termination Provisions – Common Issues

- Term is not clearly defined
 - Does the subcontract term automatically continue as long as the prime contract is in effect?
 - Or, does the prime have unilateral discretion to exercise options to continue the subcontract?
- Term is too broad
 - Term provision requires the subcontract to remain in effect for not only the full length of the prime contract, but also any extension, modifications, or follow-on contracts
- Agreement can be terminated with no opportunity to cure

Term and Termination Provisions – Common Issues

- Prime wants to get out of arrangement with sub, but agreement does not provide a clear path
 - Common example: Prime terminates the sub because the government wanted it to, but there is no written direction from the government and contract does not provide for contingency
- Prime does not have the right to terminate for convenience (“T4C”) if government issues T4C
- Teaming agreement does not account for unanticipated circumstances such as:
 - Prime decides not to bid on procurement
 - Government materially modifies the solicitation (such as changing from set-aside to full-and-open)

Term and Termination Provisions – Tips

- Agreements should spell out reasons and process for termination – better for both parties to avoid ambiguity
- For primes, seek:
 - Flexibility in extending term unilaterally
 - No commitment to sub beyond the original term of the prime contract
 - Full T4C right, or at least insofar as government T4C
 - Ability to terminate or change work share as necessary to comply with government direction or to ensure customer is happy
 - Mitigate termination risk through express limitations on damages

Term and Termination Provisions – Tips

- For subs, seek:
 - Term continues as long as prime contract is in effect
 - Prime cannot unilaterally decide to no-bid, or at least not after a certain point, or should have to compensate sub for proposal and related costs of teaming effort
 - No right to T4C except to same extent as government T4C
 - Limit bases for termination as much as possible, and make sure they are not all one-sided
 - Prime should be required to provide notice and reasonable opportunity to cure before termination

Non-Competition and Non-Solicitation – Common Issues

- Common scenario: after the teaming/subcontracting arrangement has ended, the parties end up as competitors, either for the current contract or follow-on contract
- Agreement has no non-compete/non-solicitation provisions
- Provisions are one-sided
- Too broad
 - No time or geographic limitations, or they are too extensive
 - Applies to any work with the relevant customer (or federal government at large)
 - Applies to all employees

Non-Competition and Non-Solicitation – Common Issues

- Not broad enough
 - Only prohibits competition and solicitation during period of contract performance, but not after
 - No survivability clause
- Too vague
 - Example: provision uses terms such as “prospective clients” or “customers” but does not define them
- Provisions do not consider applicable state law
 - Teaming and subcontracting agreements likely contain choice of law provision specifying applicable state law
 - Some states do not enforce non-hires except in very limited circumstances

Non-Competition and Non-Solicitation – Tips

- As the non-drafting party, watch out for one-sided provisions and insist they should be mutual
- Be mindful of the applicable state law
- Define key terms
- Include a survivability clause
- Be reasonable in crafting the scope and duration
 - Generally, should be no broader than necessary to protect the parties' interests
 - You can push the envelope, but be careful in seeking to enforce an overly broad/restrictive provision

Non-Competition and Non-Solicitation – Tips

- Consider appropriate carve-outs
 - Non-solicitation does not have to mean non-hire
 - For small business, seek exclusion from non-solicitation and non-compete provisions for small business set-aside contracts for which large business partner is ineligible
 - For large business, non-compete should not restrict competition with small business partner's customers on work that is not set-aside for small businesses
 - Successor contractors with obligations under FAR 52.237-3 and Executive Order 13495 to maintain continuity of service and give right of first refusal to incumbent workforce

Proprietary and Confidential Information – Common Issues

- Parties exchange information before the teaming agreement and with no NDA
- Limited or no confidentiality provision in the teaming and subcontracting agreements
- Provisions do not clearly define what constitutes proprietary and confidential information
 - Does the agreement cover all information exchanged between the parties?
 - Does the information have to be marked as “proprietary and confidential” to be protected?
 - How is information that is relayed verbally to be identified as proprietary and confidential?
- No survivability clause

Proprietary and Confidential Information – Common Issues

- Nothing to specify when/how confidential information must be returned or destroyed
- No specified remedies in the event of breach
- Agreement is unclear on how the parties will handle their proposal
- Contractor did not realize the agreement required specific procedures to label and safeguard confidential information, and failed to follow the stated procedures

Proprietary and Confidential Information – Tips

- Clearly identify what constitutes confidential and proprietary information
- Consider appropriate level of formality for procedures on marking and handling of confidential information
 - Preference may depend on positions of the parties, information to be disclosed, and other factors
 - In most cases, we would favor specific procedures to avoid ambiguity and ensure your critical information is protected
 - But, you have to ensure the stated procedures are followed
- Ensure the provision survives termination of the agreement
- If you did not draft, make sure the provision is not one-sided

Proprietary and Confidential Information – Tips

- Most states have enacted a version of the Uniform Trade Secrets Act, which can help in the event of a dispute
 - Provides for injunctive relief
 - Provides for damages, including actual loss, unjust enrichment and exemplary
- Proposal should be addressed
- Damages for breach to include injunctive relief
- State clear timelines and procedures for returning or destroying confidential information

Questions?

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