

SUBCONTRACT AGREEMENTS

Negotiation and Drafting Issues



McMahon,
Welch AND
Learned, PLLC

About the Firm

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McMahon, Welch and Learned, PLLC represents many small and mid-sized federal services contractors in Northern Virginia, DC and Maryland, including small-disadvantaged firms, veteran-owned firms, women-owned firms and Hub Zone qualified firms. We also have a strong corporate and acquisitions-support practice which focuses on general business legal matters of significant interest to the broader business community.

Presenters

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J. Patrick McMahan, Partner

Mr. McMahan has nearly thirty years of experience with a primary focus on representation of companies that offer information technology products and services to the federal government. Mr. McMahan advises corporations and other business entities in connection with all aspects of their federal procurement business including contract award and terminations, claims, contract disputes, bid protests, and prime contractor/subcontractor relationships.

Presenters

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Kevin R. Learned, Partner

Mr. Learned's practice focuses on advising clients on general corporate and securities matters, including company formation and governance, buy-sell agreements, operating and stockholder agreements, mergers and acquisitions, private offerings of debt and equity securities (including friends and family, angel, venture capital and private equity investments), corporate divorces and other reorganizations, joint ventures, small business certifications (including 8(a), SDVO, WOSB, HUB Zone and MBE/DBE certifications), executive employment and equity matters, deferred compensation plans, franchise agreements, trademarks, and other commercial contracts and agreements.

Moderator

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William T. Welch, Partner

Mr. Welch has twenty years of experience providing legal counsel for the entire lifecycle of a government contractor from contract negotiation, award, and protests to contract administration and contract claims. Mr. Welch also has experience in teaming agreements, subcontractor agreements, and related issues. In addition, Mr. Welch advises contractors who qualify for small business set-aside awards, 8(a) competitive and non-competitive contracts, and HUBZone and Service-Disabled, Veteran Owned contracts.

Introduction

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- Relationship Among
 - Non-Disclosure Agreements
 - Teaming Agreements
 - Subcontract Agreements

Non-Disclosure Agreements

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- Purpose
- Parties
 - ▣ Disclosing Party
 - ▣ Receiving Party
- Types
 - ▣ Unilateral
 - ▣ Mutual – Should always be mutual in a teaming/subcontracting relationship

Non-Disclosure Agreements

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- Definition of “Confidential Information”
 - All information in any form
 - written/tangible, electronic, visual or oral
 - Whether or not marked “confidential”
 - “reasonably understood to be proprietary and confidential”
 - From disclosing party or its representatives
 - Before or after execution of the NDA

Non-Disclosure Agreements

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- Exclusions from definition of “Confidential Information” include information that...
 - ▣ is or becomes generally known (other than by breach)
 - ▣ was in receiving party’s possession (legitimately)
 - ▣ developed independently (without reference)
 - ▣ becomes available to receiving party on a non-confidential basis (legitimately)

Non-Disclosure Agreements

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- Restrictions/Obligations
 - May only use solely for evaluating proposed transaction
 - May not be used in any predatory manner
 - Must keep information confidential
 - using same methods/care of own information
 - at least a reasonable standard of care
 - Must provide notice of unauthorized disclosures
 - Must return or destroy information
 - May not solicit or hire employees
 - Must maintain confidentiality of the NDA itself

Non-Disclosure Agreements

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- Permitted Disclosures:
 - With permission
 - To representatives on a need to know basis so long as they are informed of and agree to be bound by the NDA
 - If required by law or court order
 - provide notice prior to disclosure if possible
 - cooperate to prevent or limit disclosures

Non-Disclosure Agreements

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- Disclaimers/Acknowledgments
 - No obligation to provide information
 - No waiver of privileges
 - No representations or warranties
 - No obligation to proceed with any transaction
 - Ownership retained
 - No licenses granted
 - Specific performance/injunctive relief

Teaming Agreements

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- Far 9.601 Recognizes Two Types Of Teaming Relationships:
 - Joint Venture – Two or more companies form a partnership (JV) where the JV is actually the prime contactor and is primarily responsible for contract performance.
 - Contractor Team – Where a prime contactor forms a team including one or more subcontractors in pursuit of a specific solicitation.
- Choice of the type of teaming relationship is dependent on your tactical assessment of the client, the solicitation and the strengths of the JV or teaming partners.

Teaming Agreements

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- General Considerations:
 - A team is ordinarily formed prior to the submission of a competitive bid or offer.
 - A team is ordinarily formed to provide some sort of competitive advantage, and selection of participants is therefore most important.
 - The team members should compliment one another to improve the chances of winning the anticipated work.

Teaming Agreements

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- Common Selection Considerations:
 - What are the relative strengths of the participants?
 - Who has the most experience/influence with the customers?
 - Who can deliver the most impressive key personnel?
 - Who has the most relevant and positive past performance?
 - Is this a set-aside competition?

Teaming Agreements

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- Personal Considerations:
 - ▣ Do I want to prime this?
 - ▣ Do I want someone else to take the risk?
 - ▣ What is my value to the team?
 - ▣ How do I ensure that I will actually get something out of this?

Teaming Agreements

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- Negotiating the Teaming Agreement:
 - Teaming Agreements are not all the same.
 - Positioning – am I stronger now than I will be at the subcontracting stage?
 - Performance period, description of work and positions and specific work assignments or % of work is important.
 - If you do a good job here, negotiation of your subcontract will be easier.

Subcontract Agreements

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Disclaimer: The form of Subcontract Agreement we have provided is for illustration and discussion purposes only. You should not use it or adopt it for business purposes. It is intentionally flawed and incomplete, and many clauses have been purposely altered for discussion purposes.

Subcontract Agreements

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- Operative Terms:
 - Allocation of Responsibility (Section 2)
 - Statement of Work (Attachment A)
 - Term (Section 3)
 - Options (Section 4)
 - Task Orders (Section 5)
 - Personnel (Jump to Section 12)

Subcontract Agreements

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- Getting Paid:
 - Invoices (Sections 6 and 7)
 - Payment (Section 8)
 - Withholding (Section 8)
 - Inspection and Acceptance (Section 10)
 - Disallowance (Section 14)

Subcontract Agreements

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- Protective Provisions:
 - ▣ Proprietary Information (Section 15)
 - ▣ Product Ownership (Section 16)
 - ▣ Solicitation of Employees (Jump ahead to Section 29)
 - ▣ Solicitation of Customers (Section 30)

Subcontract Agreements

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- Termination and Disputes:
 - Termination (Section 17)
 - Indemnification (Section 20)
 - Disputes (Section 21)

Subcontract Agreements

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- Miscellaneous:
 - Assignment and Subcontracting (Section 22)
 - Other Boilerplate Provisions
 - Prime Contract Provisions (Section 35)

Questions?

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