

The Use of Pre-Project Agreements: “The Ties that Bind,” or Perhaps Do Not

Scott D. Cessar*

In this article, the author explains that Teaming Agreements and Memorandums of Cooperation can provide excellent contract vehicles for parties to work jointly to pursue opportunities with some degree of protection and a minimization of risk.

Contractors, subcontractors, and equipment suppliers frequently enter into a joint venture with another party. This joint venture may be for a single project, where the combined human, financial and technical resources of the parties will enable them to collectively better compete to win the project. Other times, the joint venture will be to cooperate with another company to pursue, together, on a broader scale, multiple opportunities where the parties seek to capitalize on one another’s market strength or technical expertise.

Invariably, clients asked for a Joint Venture Agreement. At this point, lawyers should typically say “time out,” and then discuss with the client the possibility of a simpler form of agreement that is short of a Joint Venture Agreement but still accomplishes the expressed intent of the client to venture or partner with another company. This is because, typically, a Joint Venture Agreement is a complex and multifaceted agreement that requires a much more significant expenditure of time and resources in negotiating concepts for a business arrangement that may not

come to fruition or that, by the time it does, will be a much different arrangement than when the parties started and as was provided for in the Joint Venture Agreement. Two such types of simpler, pre-Joint Venture Agreements are Teaming Agreements and Memorandums of Cooperation.

Teaming Agreements

Teaming Agreements—as the name indicates—are intended to permit parties to “team” together for purposes of jointly bidding a project. If, and only if, the joint bid is successful do the parties proceed to a more detailed and involved agreement. Notwithstanding the comparative simplicity of a Teaming Agreement, however, there are a number of issues that should be addressed in a considered Teaming Agreement.

First, the parties must agree on whether they will work exclusively with one another to bid the project. This issue most often arises when there is a large general contractor working with a specialty subcontractor and the general contractor wants the benefit of locking up the exclusive commitment of a

*Scott D. Cessar is the member-in-charge of the Pittsburgh office of Eckert Seamans Cherin & Mellott, LLC. Mr. Cessar, whose practice covers a broad range of civil litigation with a primary focus on construction law, can be reached at scessar@eckertseamans.com.

specialty subcontractor to bid that part of the scope of work, but wants to still shop the price to other specialty subcontractors in the market.

Second, and if the parties are working together exclusively, they should agree on the consequences if, after the preparatory bid investigation has been done or is near done, one party elects not to proceed. For example, can the party that did not opt out find a replacement bidding partner and, if it does, what use may it make of the pre-bid information provided to it by the party that opted out of the joint effort? Should the party that opted out be responsible, if the decision was not for good cause, for the bid preparation costs of the other party? In any event, it is always prudent to include a date for the decision to be made to proceed or not to proceed to bid—"go or no go"—by each party.

Third, the parties should include terms to protect the confidentiality of information exchanged by and between them to protect their respective intellectual property and to prevent solicitation of one another's employees or customers, depending on the circumstances.

Fourth, the Teaming Agreement should address the allocation of the bid preparation costs of each party and of any joint costs, such as for consultants or for pre-bid investigation work.

Fifth, a sound Teaming Agreement lays the groundwork for the parties to work together in the future if they win the bid by denoting the form of entity that will hold the contract, whether as joint venturers or with one party as general contractor and the other as a subcontractor or some other form of alliance. And, if one party is to be a subcontractor, it

can be highly advantageous to address and agree upon the general terms of the subcontract at the time of the Teaming Agreement, if at all possible, and to attach those general terms as an exhibit to the Teaming Agreement. This helps greatly to avoid differences between the parties at the outset of the project, if awarded the job, and permits the parties to assess their rights, roles, responsibilities and risks prior to bid.

Memorandums of Cooperation

Memorandums of Cooperation, by contrast, are generally used not for specific projects, but to set a framework for parties to work together to jointly identify and land a broader array of yet-to-be-identified projects or work. Here, it is important to specify with some care the object of the joint effort, by way of the type of endeavor or project the parties are looking to work on together, and also a geographic area that the joint effort will cover. It is also important to identify the financial resources, technical know-how and/or market access each party is contributing to the joint effort.

A solid Memorandum of Cooperation will also address many of the same concepts as a solid Teaming Agreement: exclusivity, sharing of marketing costs of the joint effort, confidentiality, solicitation of employees, protection of intellectual property and, if possible, some consideration of the rights, roles, risks and responsibilities of the parties if and when the parties successfully land the work.

Importantly, a Memorandum of Cooperation should not be indefinite, but should set forth a term or period in which the parties will cooperate, with rights to extend the term. At the same time, the Memorandum of Cooperation should also provide for a right by a party

to terminate the Memorandum of Cooperation, with an appropriate notice period.

Both Teaming Agreements and Memorandums of Cooperation should also include dispute resolution terms, whether mediation, arbitration or litigation, with an identification of the choice of law and the venue for any actions.

Conclusion

The great American poet Robert Frost

wrote in his famous poem, “Mending Wall,” that “good fences make good neighbors.” Lawyers say that “good contracts made good partners.” Teaming Agreements and Memorandums of Cooperation provide excellent contract vehicles for parties to work jointly to pursue opportunities with some degree of protection and a minimization of risk. They should be considered in appropriate circumstances.