



Agreement to Agree, or Not to Agree? That Is the Question When Entering into a Teaming Agreement

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If you operate in the government contracting industry, chances are you have been involved with a teaming arrangement. Teaming arrangements are encouraged under FAR § 9.6 as a potential win-win for government and industry, and often times they are.

However, when a teaming arrangement goes south, you may get much less than you bargained for if your teaming agreement was not carefully drafted to ensure its provisions are enforceable. The key, as this article will discuss, is to avoid a teaming agreement that is merely an “agreement to agree.”

“Kicking the can down the road”

Teaming agreements are typically entered into before the parties’ approach to a solicitation is made final, and sometimes before the solicitation itself is even issued. Therefore, it is not uncommon for the teaming agreement to focus on pre-award activities such as proposal development, while stating that post-award terms covering performance of work and compensation will be subsequently addressed in a subcontract, to be negotiated after award. While this may seem like a reasonable approach at the teaming agreement stage when much about a project may be up in the air, the risk is that kicking the can down the road for the key subcontract terms may render your teaming agreement unenforceable.

Unenforceable agreement

A recent federal court decision in Virginia underscored this risk. In *Cyberlock Consulting, Inc. v. Information Experts, Inc.*, a prime contractor and subcontractor had a teaming agreement stating that the subcontractor would receive 49% of the work. After the prime contractor won the contract, the parties negotiated for a subcontract but were unable to reach an agreement. As a result, the prime contractor cut off negotiations with the subcontractor, and the subcontractor

then sued to enforce the provision in the teaming agreement stating that it would receive 49% of the work. After reviewing the terms of the parties’ teaming agreement, the court concluded that the subcontractor was not entitled to 49% of the project because the teaming arrangement was an unenforceable agreement to agree.

Questionable aspects of a deal

In *Cyberlock*, the court cited several aspects of the teaming agreement that indicated the parties had not reached an enforceable agreement. For example, the scope of work exhibit attached to the teaming agreement specified only that the subcontractor would perform 49% of the project, but did not set out further details about what the subcontractor would do. In addition, the teaming agreement specified that it would terminate if the parties were unable to reach agreement on a subcontract after a period of good faith negotiations. Thus, while there was some language in the teaming agreement stating that the subcontractor would receive 49% of the project, the court concluded that these were merely expressions of “a contractual objective and agreed framework” for negotiating a subcontract in the future. The court found further support for this conclusion because the teaming agreement described the subcontract as “contemplated,” making it seem tentative and uncertain.

Previous court case

In so ruling, the court noted that a prior Virginia Circuit Court case, *EG & G, Inc. v. The Cube Corporation*, was incorrectly decided and should not be followed insofar as the *EG & G* case suggested that parties’ intentions may be examined to determine the enforceability of a teaming agreement. The court in *EG & G* had looked at a prime contractor’s subsequent proposal and actions indicating its agreement to give work to the sub-

contractor as further evidence of the parties’ intent in entering into the teaming agreement. Based on *Cyberlock*, extraneous evidence of parties’ intentions, including what they put in their proposal, will not aid the enforceability of a teaming agreement if the terms of the teaming agreement are clear (even if those clear terms amount only to an agreement to agree).

A lesson for contractors

While the *Cyberlock* decision involves Virginia law, it offers a good lesson for all contractors regardless of where you operate. To minimize the risk that you will be left with little recourse if your teaming partner walks away from your teaming agreement, you need to understand the law of the jurisdiction in which you intend to enter into a teaming agreement. If you are teaming in a jurisdiction such as Virginia, the terms of your teaming agreement need to be as definite as possible. Avoid terms that indicate the subcontract is merely a possibility in the future – instead, state that the parties “shall” enter into a subcontract within a brief period after contract award. And, if possible, include a draft of the subcontract with the teaming agreement, even if some of the provisions will need to be finalized after contract award. Your arrangement will be more definite (and more likely to be enforced) if you have a clear understanding at the teaming agreement stage about the majority of the subcontract terms.

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