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Teaming Agreements// Enforceable when Drafted Correctly

Companies recognize that one of the keys to being successful in winning government contracts is finding the right teaming partner. On large government procurements involving multiple tasks, indefinite quantities, or goals for subcontracting with various types of small or disadvantaged businesses, it is common for government contractors to join together to form a team consisting of a prime contractor and one or more subcontractors to compete for the a contract award. Teaming agreements are arrangements between potential prime contractors and subcontractors under a specific government contract or acquisition program to work together towards achieving a winning proposal. A teaming agreement is not a subcontract. Rather, the teaming agreement typically contains a provision that if the parties successfully win a government contract, they are to enter into a subcontract. The government ordinarily encourages teaming agreements (provided they do not run afoul of the antitrust laws) because they offer "the best combination of performance, cost, and delivery for the system or product being acquired". FAR Sec. 9.602(a) (2).

However, based on anecdotal information that we have been receiving, many companies seem to accept the "misperception" that teaming agreements between two companies are not binding commitments. Because of this misunderstanding, they mistakenly believe that the execution of a teaming agreement is a waste of time and fail to take adequate steps to negotiate meaningful and effective teaming agreements. Small businesses that depend on teaming arrangements for their livelihood could be potentially devastated if that were true. What happens if their teaming partner decides to work with someone else or keep the work in-house after the party depending on the relationship has already made a substantial investment of time and resources? What if there is a falling out over the terms of the relationship? Fortunately, these agreements have been enforced when they are drafted correctly.

One of the contributing reasons for this "misperception" could be a local Virginia case that was decided several years ago, *W.J. Schafer Associates v. Cordant, Inc.*, 493 S.E. 2d 512 (VA 1997). In that case, the Virginia Supreme Court refused to enforce a teaming agreement for the purchase of "digitizers" because the teaming partners never agreed on the essential terms for the purchase such as the price or an assurance that the product was even available for delivery. Not surprisingly, the Court found that this nonspecific agreement, which left too many key provisions for later negotiations, to be merely in essence an "agreement to agree" at some later date, which, as a matter of law, is simply not a present binding contract. The court reasoned that if the parties have not decided on the essential terms of their relationship, there is no contract. Therefore, the parties to this "agreement to agree" had nothing to enforce in Court.

It is not uncommon that at the initial stage of a procurement, the teaming parties lack sufficient information with respect to the government's requirements or their own capabilities to frame the essential terms of their relationship. However, if the parties prefer to establish a relationship on a "To Be Determined" basis, they need to understand that they will probably be precluded from trying to legally enforce the relationship later on. Such an outcome could be particularly devastating to the subcontractor who was anticipating obtaining a piece of the pie awarded to the prime contractor only to learn that the prime has decided to use someone else after the government announced its selection decision.

This holding in *W.J. Schaefer Associates*, however, does not mean that these agreements are always unenforceable. On the contrary, this decision, and other recent rulings, demonstrate that a business can create an enforceable agreement by including all of the provisions that are essential in any subcontract resulting from a successful teaming relationship such as: the price of performance, a clear identification of the portion of the work that the party is responsible for performing, dates of delivery where applicable, and time for payment.

For example, in a more recent Virginia case, *EG&G, Inc. v. The Cube Corporation*, 63 Va. Cir. 634 (Va. Cir. Ct. 2002), *Cube*, a small business prime contractor teamed with EG&G to compete for a government contract. The teaming agreement indicated that EG&G would perform up to 49% of the contract dollar value. The government eventually selected *Cube* and the parties attempted to negotiate a subcontract. *Cube* tried to impose additional terms upon EG&G that were not consistent with the teaming agreement and the parties failed to finalize a subcontract. Included in these additional terms was a cap on G&A expenses that had not been addressed in the teaming agreement and an unlimited termination clause. Thereafter, EG&G sued *Cube* to enforce the original teaming agreement. The Court examined the terms of the agreement and concluded that everything was agreed to except for minor details. The Court ruled in favor of EG&G and ordered *Cube* to execute the subcontract that had been contemplated according to the teaming agreement. In other words, the Court concluded that the originally negotiated teaming agreement was sufficiently specific

and addressed the essential terms of the relationship contemplated by the parties.

Even though some of the terms of the teaming agreement may conceivably change during negotiations with the Government, the teaming agreement can be adjusted accordingly, if it is drafted properly. Specificity is the key to establishing an enforceable agreement. That's why businesses should stay away from agreements that do not lock in price or the parties' respective "pieces of the pie".

In summary, it is good practice to draft a teaming agreement to specifically define the terms and conditions that will be incorporated into the implementing subcontract to ensure that the parties are bound to their respective commitments. The agreement should be based on specific projects and the drafter should generally try to avoid relying on standard forms that may or may not be applicable. The parties should always decide up front whether they are merely looking for a nonbinding preliminary "agreement to agree", or whether they intend to create a binding and enforceable agreement. There may be instances when a nonbinding relationship is preferable. However if you are the subcontractor, a nonbinding relationship could mean that your "team" wins, i.e., an award is made to the team member that is serving as the prime contractor, but that you will not get any work for your efforts. Normally, you should seek an enforceable agreement if you are a subcontractor that is going to make a significant investment in developing a winning proposal, or a prime contractor that is dependant on having the subcontractor on its team. If the parties intend to create an enforceable agreement, the parties should try to address the essential terms of their relationship up front and at a minimum seek to narrow the open issues.

Well drafted agreements that are carefully assembled are less likely to be challenged on the grounds of unenforceability. Of course, always insist on an enforceable teaming agreement if you expect to preserve your rights.

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