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How to Improve Your



TEAMING AGREEMENT:

PART 1 OF 2
By **STEPHEN P. MULLIGAN**

This article is a guide to both primes and subcontractors on how to restructure teaming agreements to protect themselves in the event of a failed relationship.

If your business uses a “standard” teaming agreement, you might be at risk.

Most companies design their contracts with dual goals in mind: to execute the deal, but to also prepare in the event of a breach. When it comes to teaming agreements, however, even the most sophisticated contractors lose sight of the need for protection if the relationship sours. With a lucrative U.S. federal government contract waiting in the wings, team members assume everything will work out once they receive the contract award.

Too often, this rosy optimism proves short-lived. When it comes time to actually negotiate and perform the subcontract,

the parties may find themselves having successfully bid for the prime contract, but unable to negotiate their internal agreement. When this occurs, many tread into the unpredictable no-man’s land of teaming agreement litigation.

An improved agreement can help avoid those murky waters and create stability and predictability in future disputes. This series of articles is intended to guide all government contractors—primes and subs—on how to restructure their teaming agreements to protect themselves in the event of a failed relationship.

How Do Teaming Agreement Disputes Arise?

Federal regulations encourage prime contractors to team with one or more companies when they bid for projects with the U.S. government and its agencies.¹ These relationships, usually memorialized in teaming agreements, allow companies to complement each other’s capabilities and offer the government a wider range of skills, backgrounds, and preferential statuses, such as veteran-owned small business or small disadvantaged business.² Typically, a potential subcontractor (team member) agrees to support the proposal of the prime contractor (team leader) by providing information and lending its qualifications to the bid.³ In exchange, the team leader offers to execute a subcontract or attempt to negotiate a subcontract with the team member if it receives the prime contract.

In most cases, the parties honor their respective agreements, but there are times when a falling out occurs before they have had a chance to finalize the subcontract.⁴ For example, a team leader may come to learn that it can more profitably obtain its teammate’s services elsewhere and force its teammate to compete with other subcontractors.⁵ On the other hand, a team member can find itself unable to deliver on its promise to provide specialized services, forcing the team leader to obtain a replacement subcontractor at a higher cost.⁶ When these breakdowns occur, one party may file suit for breach of the teaming agreement—a form of litigation fraught with uncertainty.

The Murky Waters of Teaming Agreement Litigation

Teaming agreement litigation is not a new field. As far back as 1964, U.S. courts have recognized and enforced agreements in which one entity teams with a partner to bid on a government contract in exchange for an anticipated subcontract.⁷ Despite a half-century of litigation, there is little consistency or predictability as to whether these forms of agreements are enforceable, even within individual jurisdictions.⁸



Early case law suggested teaming agreements were *per se* enforceable.⁹ In *Air Technology Corp. v. General Elec. Co.*, the Massachusetts Supreme Court became the first court to analyze the validity of a teaming agreement, and it held that General Electric breached the parties' oral agreement when it refused to negotiate a subcontract with its team member.¹⁰

After a lull in teaming agreement litigation following *Air Technology Corp.*, several courts in the 1990s followed the trend of enforcing these agreements.¹¹ In *Steiner Marine Corp. v. RCA*, a Southern District of Alabama jury awarded a verdict to a disappointed

subcontractor who alleged that the team leader breached a promise to award a subcontract after winning the prime.¹²

Similarly, in *ATACS Corp. v. Trans World Commc'ns, Inc.*, a seminal case on teaming agreements,¹³ the Third Circuit affirmed that the prime contractor's decision to solicit bids for potential subcontracts from competitors of its teaming partner constituted a breach of its teaming agreement.¹⁴ The Third Circuit concluded that a promise to engage in good faith negotiations for a subcontract was sufficiently definite to be enforceable, and that the parties' conduct demonstrated an intent to be bound by their agreement.¹⁵

agreements are unenforceable "agreements to agree." In *W.J. Schafer Associates, Inc. v. Cordant, Inc.*, the U.S. Air Force sought bids for a contract to convert personnel files into a computerized database.¹⁶ The teaming agreement stated that the parties would negotiate the specific terms of a subcontract if the prime contract was awarded to the team leader.¹⁷ After the leader won the prime, the team member was unable to supply the computerized goods, known as "digitizers," needed to convert the paper documents to microfiche.¹⁸ The leader sued for breach of the teaming agreement, and prevailed at trial, but the Virginia Supreme

In the late 1990s, however, this authority splintered with several courts holding that the common terms of most teaming



Court reversed the decision, holding that the post-award subcontract negotiation provision was a legally unenforceable agreement to agree.¹⁹

That same year, the Fourth Circuit reached an identical conclusion applying California law.²⁰ In *Dual, Inc. v. Symvionics, Inc.*, a team member sought damages for alleged breach of a teaming agreement's obligation to execute a subcontract to design a flight simulator. The Fourth Circuit ruled that the teaming agreement's "good faith provision was an unenforceable 'agreement to agree'" under California law.²¹

However, this is far from the end of the story. In the last 20 years, courts have applied varying approaches to teaming agreement litigation with many decisions hinging on the nuances in the specific language of the contract. Virginia courts alone have changed positions three times on the enforceability of teaming agreements.

Although the Virginia Supreme Court refused to enforce the teaming agreement in *W.J. Schafer*, a Virginia trial court distinguished that case and enforced a similar agreement just six years later.²² The trial judge in *EG&G v. The Cube Corporation* noted that, whereas most teaming agreements include a requirement to negotiate a subcontract in good faith, its agreement stated that one party "would" be awarded the subcontract.²³ This single word change was a key factor in deciding between enforceability and unenforceability of the teaming agreement.

Since 2000, numerous courts nationwide have followed this logic and enforced teaming agreements,²⁴ while many others held them to be too vague to adjudicate.²⁵ Most recently, the Eastern District of Virginia flipped Virginia precedent yet again and declined to enforce a teaming agreement between two federal contractors.²⁶ The *Cyberlock* court distinguished its agreement from other enforceable contracts because it included a provision calling for termination of the teaming agreement in the event of a "failure of the parties to reach agreement on a subcontract after a reasonable period of good faith negotiations."²⁷

While commentators have attempted to apply some organizational rules to these disparate rulings,²⁸ the Virginia example demonstrates that the enforceability of teaming agreements can be nearly impossible to predict.

The second installment in this series will be featured in the next issue of *Contract Management* and will provide practical tips on how to improve teaming agreements in light of the uncertain case law. **CM**

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Send comments about this article to cm@ncmahq.org.

The discussion in this article is intended for informational purposes only and is not intended as legal advice. Moreover, this article addresses only a portion of the key provisions in teaming agreements. Other provisions (i.e., confidentiality, allocation of costs, and exclusivity) are equally important, but subject to less controversy.

ENDNOTES

1. See *Federal Acquisition Regulation (FAR)* 9.602 and 9.603.
2. See "Recommended Provisions for Teaming Agreements to Help Assure They Are Not Unenforceable 'Agreements to Agree,'" *Squire Sanders* (April 2014), available at <http://tinyurl.com/kfw43ss>; and Darrell J. Oyer, *Accounting For Government Contracts: Federal Acquisition Regulations* (2014).
3. See *Recommended Provisions for Teaming Agreements*, *ibid.*; see also *ATACS Corp. v. Trans World Commc'ns, Inc.*, 155 F.3d 659, 666 (3d Cir. 1998).
4. See *Recommended Provisions for Teaming Agreements*, note 2.
5. For example, in *ATACS Corp.*, the team leader obtained lower-cost proposals from the team member's competitors after entering into a teaming relationship. (See 155 F.3d at 668-69.)
6. See *W.J. Schafer Associates, Inc. v. Cordant, Inc.*, 254 Va. 514 (1997).

7. *Ibid.* The FAR now formally recognizes teaming agreements. (See FAR 9.602 and 9.603.)
8. See Madalyn A. Murtha, "The Enforceability of Teaming Agreements in Government Contracting and its Effect on Contract Formation," *The Procurement Lawyer*, 23 (Summer 2014); Oyer, note 2; and Thomas L. Patten, et al., "Teaming Agreements: Basic Principles and Guidelines," *Government Contractor Briefing Papers* No. 84-4, at 1 (1984).
9. See *ATACS Corp.*, 155 F.3d 659; *Air Tech. Corp.*, 199 N.E.2d 538; and *Steiner Marine Corp. v. RCA*, No. 88-0558 (S.D. Ala. 1991).
10. Brent E. Newton, Note, "The Legal Effect of Government Contractor Teaming Agreements: A Proposal for Determining Liability and Assessing Damages in Event of Breach," *Columbia Law Review* 1990, 2010 (1991).
11. E.g., *ATACS Corp.*, 155 F.3d 659, and *Steiner Marine Corp.*, No. 88-0558.
12. See Newton, note 10, at 2012 n. 115.
13. See Murtha, note 8, at 25.
14. *ATACS Corp.*, 155 F.3d at 668-669.
15. *Ibid.*, at 668.
16. *W.J. Schafer Associates, Inc. v. Cordant, Inc.*, 254 Va. 514 (1997).
17. *Ibid.*, at 517.
18. *Ibid.*, at 518.
19. *Ibid.*, at 519-520.
20. *Dual, Inc. v. Symvionics, Inc.*, No. 97-1228, 1997 U.S. App. LEXIS 23959 (4th Cir. Sept. 12, 1997).
21. *Ibid.*, at *11.
22. *EG&G v. The Cube Corporation*, 63 Va. Cir. 634 (Va. Cir. Ct. 2002).
23. *Ibid.*, at 649.
24. E.g., *Lowry Holding Co., Inc. v. Geroco Tech Holding Corp.*, not reported in N.W.2d, 2012 WL 1890231 (Mich. Ct. App. May 24, 2012); *BAE Sys. Info. & Elec. Sys. Integration*, 2009 Del. Ch. LEXIS 17; and *X Techs., Inc. v. Marvin Test Sys.*, 719 F.3d 406, 408 (5th Cir. 2013) (affirming jury verdict enforcing exclusivity clause in teaming agreement).
25. E.g., *Martin v. Martin*, 326 S.W.3d 741, 748-49 (Tex. App. 2010); *Syringa Networks, LLC v. Idaho Dept. of Admin.*, No. 38735, 2013 WL 1276493 at *6 (Idaho March 29, 2013); and *C.H.S. Constr. Co., Inc. v. Mast Constr. Servs., Inc.*, not reported in A.3d, 2012 WL 488923 (N.J. Super. Ct. App. Div. Feb. 16, 2012).
26. *Cyberlock Consulting, Inc. v. Info. Experts, Inc.*, 939 F. Supp. 2d 572, 580 (E.D. Va. 2013), *aff'd* No. 13-1599, 2014 U.S. App. LEXIS 322 (4th Cir. 2014).
27. *Ibid.*, at 581.
28. Murtha organized the disparate teaming agreement decisions into five categories: 1) liberal view (always enforceable); 2) moderate liberal view (enforceable if intent to be bound is evident by parties' actions); 3) centrist view (enforceable if material terms are reasonably certain and intent to be bound is shown); 4) moderate conservative view (enforceable only if all material terms are clear); and 5) conservative view (generally unenforceable). (Murtha, see note 8, at 23-24.)