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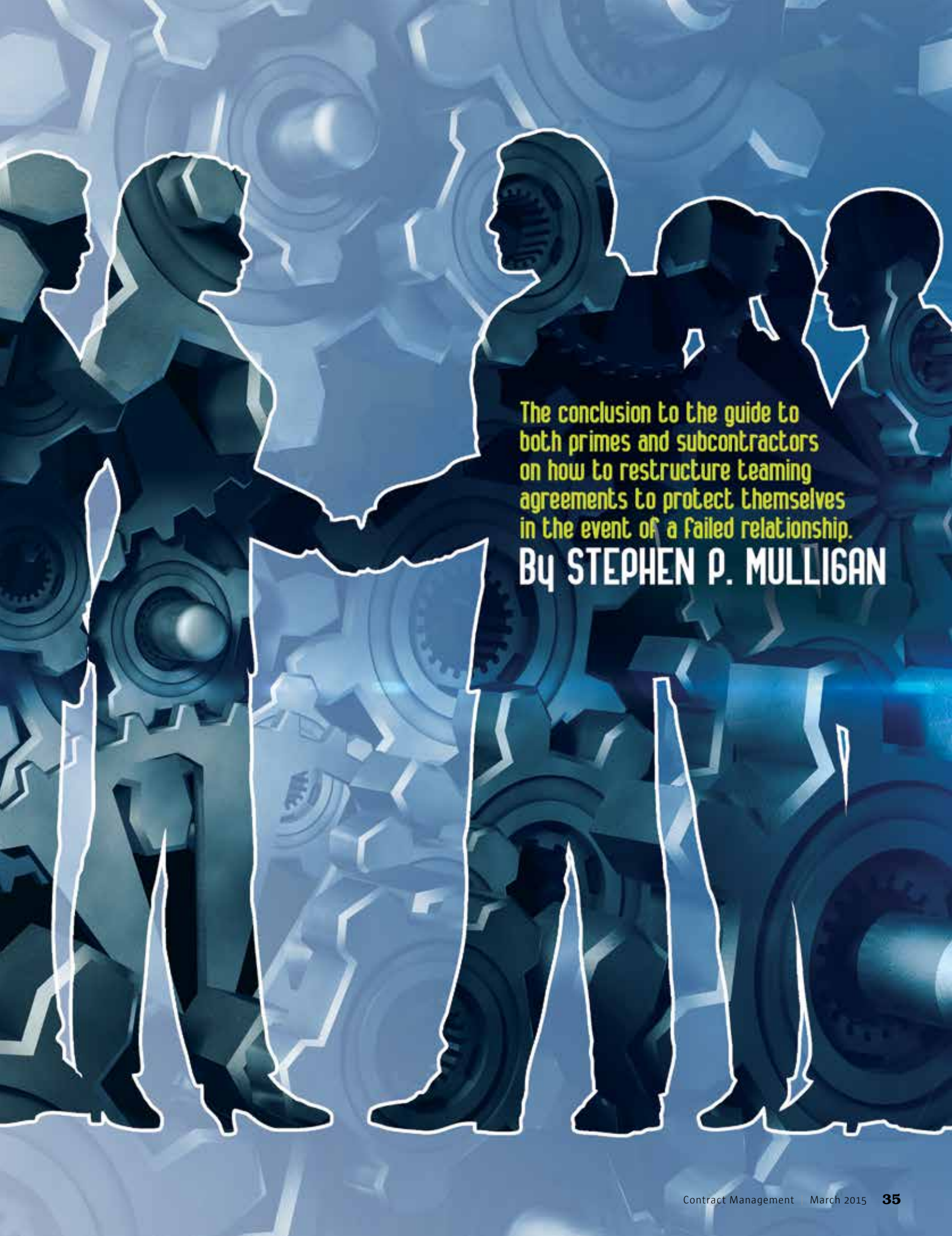
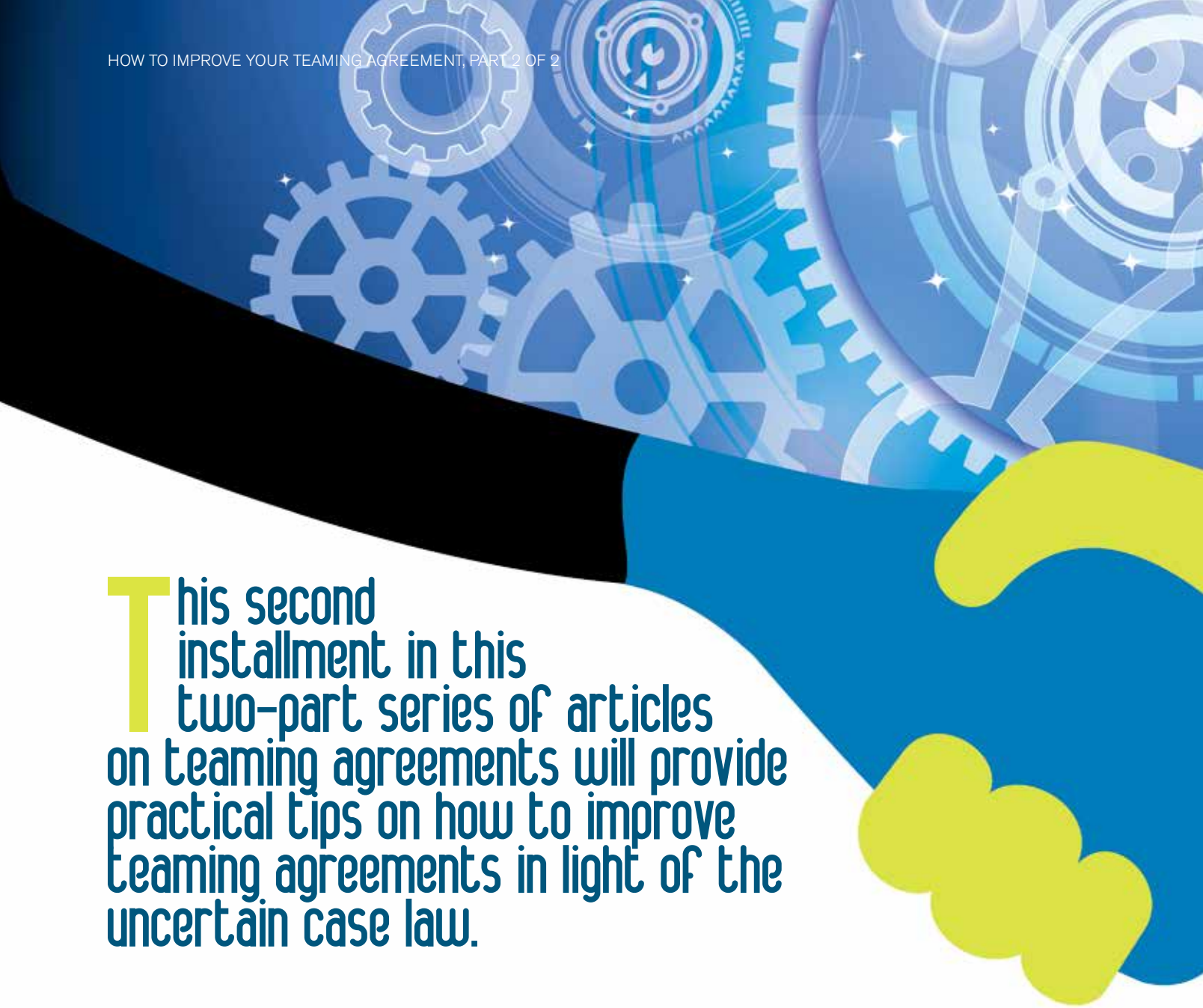
How to Improve Your TEAMING AGREEMENT, Part 2 of 2



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

By STEPHEN P. MULLIGAN



This second installment in this two-part series of articles on teaming agreements will provide practical tips on how to improve teaming agreements in light of the uncertain case law.

Statement of Purpose: Know and Define Your Intentions

Most teaming agreements begin with a statement of purpose.[1] While traditional guidance suggests that the parties should define their purpose as a desire to bid on a particular solicitation,[2] the introduction section of your teaming agreement can accomplish more.

For prime contractors, a well-crafted statement of purpose can preserve flexibility in subcontract negotiations. Because of the inchoate nature of many U.S. federal government projects and the dynamic nature of the procurement process, the details of many government projects change during negotiations and performance.[3] These changes can alter the contours of the teaming relationship and eliminate assumptions about the project that formed the basis of the teaming relationship.[4]

When the government drives these changes, team leaders need the flexibility to revisit and revise the fundamental facets of their teaming relationship, such as scope of work and pricing structure. Accordingly, team leaders should consider adding the following language to their statement of purpose:

> The purpose of this Agreement is to define the terms by which the Parties will work together in an effort to submit their proposal to the Government and the terms by which they will maintain confidentiality; however, this Agreement is not intended to define the terms of the Parties' future subcontract in the event the Government accepts the proposal and awards a prime contract.

Team members seeking a future subcontract should consider an opposite approach. Team members face the risk that their anticipated portion of the contract will be precluded or whittled away, thus defeating their primary purpose for teaming.[5] Therefore, team members should make every effort to demonstrate that it is the parties' intent to award the team member a subcontract in the event of a successful bid:

> The purpose of this Agreement is to define the terms by which the Parties will work together in an effort to submit their proposal to the Government and the terms by which they will maintain confidentiality. This Agreement is further intended to define the material terms that will be included in the Parties' subcontract and to guarantee that the Parties execute a subcontract should the Government award a prime contract to Team Leader.

Courts in nearly every jurisdiction look to the parties' intent when evaluating the meaning of a contract.[6] A clear statement of purpose can guide the court and remove uncertainty as to whether the parties wished to guarantee a subcontract or leave the matter to future negotiations.

Whether to Guarantee a Future Subcontract

Disputes over whether the team leader unambiguously promised to award a subcontract to the team member are at the heart of most teaming agreement litigation.[7] Accordingly, government contractors should use precise language regarding the team leader's obligation to award a subcontract. If the relationship fails, these may be the most important words in the teaming agreement.

For team members, the approach should be simple: The agreement must unambiguously state that the team leader shall execute a subcontract with the team leader. The provision can be straightforward and written as follows:

> Upon an award of a prime contract to the Team Leader, the Parties shall execute a subcontract for that portion of the work described in this Agreement and for the prices set forth in the proposal to the Government. The Parties acknowledge and agree that Team Leader promises to award Team Member a subcontract and that this promise is a material term of and consideration for this Agreement.

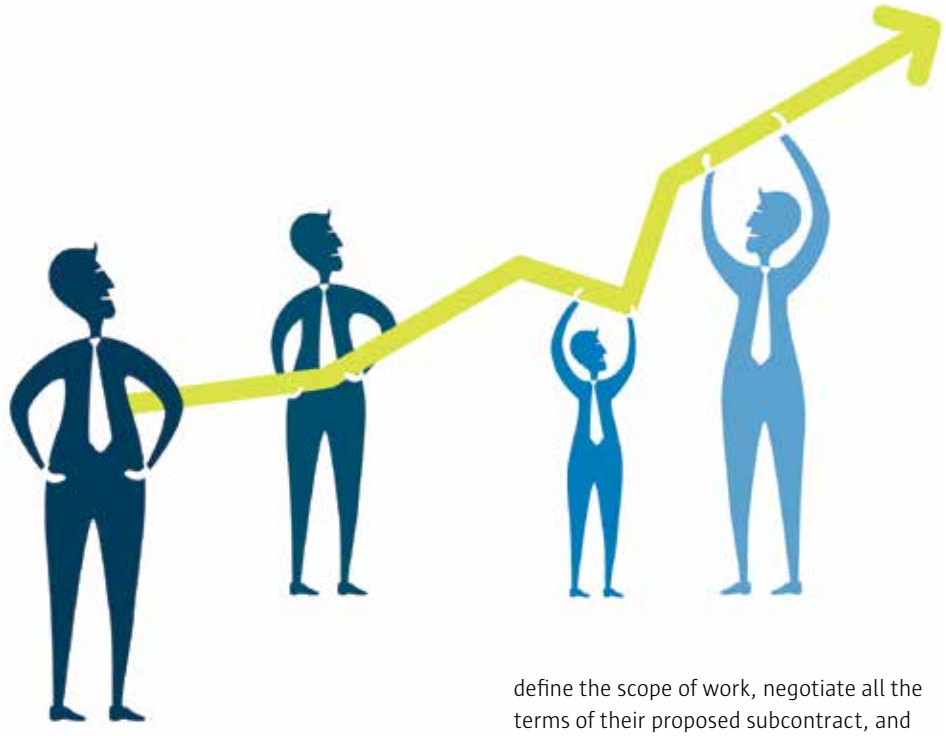
For team leaders, the approach is more complicated. In general, team leaders favor a lack of definiteness in the post-award negotiation provisions because it provides more flexibility to respond to the government's needs and create efficiencies. To that end, team leaders often include open-ended provisions stating that they promise to negotiate a subcontract in good faith, but if their efforts fail, the teaming agreement terminates.[8] Under this reasoning, the team leader can insist on nearly any term during subcontract negotiations, so long as it acts in good faith. If the negotiations fail, the team leader still has the prime contract.

The problem with this approach is that it may render the teaming agreement unenforceable.[9] While some courts have enforced agreements to negotiate in good faith, many others have deemed this form of promise an indefinite agreement to agree.[10]

In some circumstances, team leaders may be happy to escape the requirements of a teaming agreement, especially after they have won the prime contract.[11] However, in other circumstances, they may need to rely on their team members' promises in order to effectively perform for the government.[12] For example, when the team member could not deliver the promised "digitizers" in *W.J. Schafer Associates, Inc.*, the team leader incurred unanticipated costs in finding a replacement producer.[13]

To balance these needs, prime contractors need a middle approach with a provision that is specific enough to be enforceable, but leaves room for flexibility in negotiations. Team leaders should consider using a variation of the following:

> Upon an award of a prime contract to the Team Leader, the Parties intend to execute



> a subcontract for that portion of the work described in this Agreement and for the prices set forth in the proposal to the Government or as otherwise set forth in this Agreement. The Parties acknowledge and agree, however, that the Project may change during the procurement process and early course of performance based on feedback or instruction (both formal and informal) from the Government. Accordingly, the Parties agree that the terms of a future subcontract, including the scope of work and pricing, may change based upon feedback from the Government or changes in circumstances. The Team Leader reserves the right to make reasonable changes to the scope of work and pricing in the subcontract based on such events.

This language distances itself from the open-ended agreement to negotiate in good faith, which risks being unenforceable,[14] but allows the team leader to account for unanticipated changes in the nature or administration of the project.

Defining the Scope of Work

Drafting the scope of work in the teaming agreement raises similar problems as determining whether to guarantee a subcontract. In a perfect world, the parties would clearly define the scope of work, negotiate all the terms of their proposed subcontract, and include it as an exhibit to the teaming agreement.[15] However, because of the evolving nature of many government procurements, this is simply not possible, nor would it allow the team leader the flexibility needed to respond to the government's changing demands.[16]

Nevertheless, team members should define the scope of work as specifically as possible.[17] This can be done by reference to the procurement or request for proposal, through narrative description of the scope of work in the body of the agreement, or by including a detailed description of the work as an exhibit. Regardless of the form, the agreement should entitle the team member to provide "all" goods and services related to its scope of work:

> Team Member shall perform all work and provide all goods and services related to the scope of work defined herein.

Team leaders again should use a different approach because they should balance the desire for flexibility with the need to craft an agreement that is sufficiently definite to be enforceable. In this regard, a team leader–oriented provision should define the scope of work in some fashion, but reserve the right to renegotiate workshare based on a change in the nature of the project or other change in circumstances. In addition, a team leader should look for a scope of work that protects the leader in the event that the government is dissatisfied with the team member's work product. Therefore, team leaders should consider adding the following:

> The Team Member's scope of work is contingent upon its ability to provide competitive pricing, qualified personnel, and goods, services, work product, and prices that are acceptable to the Government. The Team Leader reserves the right to make reasonable changes to the scope of work in the subcontract based on changes in circumstances, or feedback or instruction (both formal and informal) from the Government.

Termination of the Teaming Agreement

Many teaming agreements contain language stating that if the parties have not successfully negotiated a subcontract within a specified period of time after the award of the prime contract, the teaming agreement shall terminate.[18] The *Cyberlock* court focused on this language in invalidating the teaming agreement,[19] and many commentators have suggested that the parties avoid such a termination clause altogether.[20] This is sound advice from a pure legal perspective, and team members should avoid any such termination clause that allows the team leader to find a replacement contractor after the requisite negotiation period.

Team leaders, on the other hand, are often under pressure to begin performing as quickly as possible, regardless of the state of their subcontract negotiations. They may find the possibility of an unlimited negotiation period unpalatable. With a binding prime contract in place and a legal obligation to perform, team leaders should consider back-up options in the event negotiations extend longer than anticipated or prove fruitless altogether.

A team leader's strongest (and most novel) option would be the right to engage a replacement subcontractor, at the team member's cost:

> The Parties intend to execute a subcontract within 60 days of award of the prime contract to Team Leader. If the Parties do not

> execute a subcontract within this 60-day period, the Team Leader shall have the option to find a replacement subcontractor(s) for the work to be performed by the Team Member. The replacement subcontractor shall be selected at the Team Leader's sole discretion. The Team Member shall be responsible for all costs paid to all replacement subcontractors, and it shall directly pay invoices of all such replacement subcontractors within 14 days of receipt from the Team Leader. The Team Member shall further indemnify and hold harmless the Team Leader from any and all claims made by or arising out of the work of a replacement subcontractor, except those caused by the negligence of the Team Leader.

If the team member rejects this provision, or the team member's post-award services are easily replaced, the team leader may consider a second option:

> The Parties intend to execute a subcontract within 60 days of award of the prime contract to the Team Leader. In the event the Parties do not execute a subcontract within this 60-day period, the Team Leader shall have the option to find a replacement subcontractor(s) for the work to be performed by the Team Member. The replacement subcontractor shall be selected at the Team Leader's sole discretion. Notwithstanding the foregoing, the Team Member must be prepared to provide the work product, goods, and services described in this Agreement at the prices set forth in this Agreement, and its failure to comply with this provision shall constitute a breach of this Teaming Agreement giving rise to damages including, without limitation, the cost of a replacement subcontractor(s).

The Problem of Consideration

The issue of consideration can present a problem in teaming agreements, particularly if the parties merely agree to "negotiate" a subcontract. Without the benefit of a definite promise to award a subcontract, the team member arguably receives no consideration for its efforts to support the proposal to the government and exclusivity with the team leader.[21] To avoid this argument and reinforce their understanding of their agreement, contractors should explicitly describe the consideration for their mutual promises.

From a team member's perspective, the most important consideration is the overt guarantee of a subcontract:

> The Team Leader's promise to award a subcontract is a material term of this Agreement and part of the consideration of this Agreement. In return for this promise, the Team Member agrees to support the Team Leader's proposal to the Government.

Conversely, team leaders should distance themselves from an absolute guarantee of a subcontract by pointing to the other mutual promises and obligations:

> The Parties agree that the following mutual promises and obligations constitute the consideration for this Agreement:

i) Confidentiality and nondisparagement,

ii) Exclusivity,

iii) Allocation of costs in preparing the proposal, and

iv) The opportunity to work together to prepare a proposal to the Government, regardless of whether it is accepted or successful.

The parties recognize and agree that these promises are mutual and adequate consideration for this Agreement as a whole.

The Limited Value of a Choice of Law Provision

Some commentators have suggested that contractors can avoid problems like consideration and enforceability through a "choice of law" provision or "forum selection" clause.[22] Several experts have suggested that parties specifically avoid Virginia law because of the *Cyberlock* decision.[23] Given the nuances and unpredictability of teaming agreement litigation, however, there is no state in which teaming agreements are guaranteed to be enforced.[24] Even with state supreme court precedent on the issue, a trial judge may reverse course and distinguish its case based on minute variations in the text of the agreement.[25] Moreover, in those states in which there is a dearth of case law, there will be even less precedent to guide the trial court in making reasoned and predicable rulings.

Ultimately, a "choice of law" clause may be of little value in ensuring enforceability given the changing landscape of teaming agreement litigation. Contractors will achieve better outcomes by ensuring enforceability through their statements of intent and the provisions previously discussed. "Choice of law" provisions are better defined through traditional considerations, such as the relationship to the work to be performed or proximity of key parties and witnesses.

Addressing and Augmenting Available Damages

A final source of improvement in most teaming agreements is the "limitation of liability" and "damages" clauses. The most common limitation of liability language in teaming agreements is a broad waiver stating: "In no event will either party be liable to the other for any lost revenues, lost profits, or incidental, indirect, consequential, special, or punitive damages."[26] In addition to being so broad as to be potentially unenforceable,[27] this waiver may not be in the best interests of many contractors.

Team members, in particular, have little to gain from liability waivers and should consider striking these sections during negotiations. Although difficult to prove and recover,[28] lost profits and consequential damages may be the most desirable form of relief for a team member that is forced out of a project.

Team leaders may wish to continue to use these broad waivers, which are intended to limit overall exposure and allocate risk,[29] but they should also consider the need to pursue equitable remedies.[30] Access to immediate equitable relief, such as a temporary restraining order or preliminary injunction, is particularly important if a team member violates its exclusivity or confidentiality clauses or jeopardizes the team leader's ability to effectively bid for the prime contract.[31] While parties may not be able to guarantee the right to equitable relief by contract, they can include the following language:

> The Team Leader may seek injunctive and declaratory relief to enforce this Agreement if the Team Member violates or fails to perform its obligations. The Parties agree that immediate injunctive relief is an appropriate remedy for a breach of duty of exclusivity or to protect confidential information as set forth herein, and that a violation of these provisions will cause irreparable harm to the Team Leader for which there is no adequate remedy at law.

Courts are more likely to grant such drastic equitable remedies if they see that the parties have agreed to this form of relief.

Conclusion

Although disagreements arising out of teaming agreements are the exception rather than the rule, government contractors of all sizes should still prepare themselves in the event of a failed relationship. The first step to protecting your company is to recognize that there are competing interests in teaming relationships. Consequently, there is no standard, one-size-fits-all teaming agreement that protects all parties' needs. Contractors should carefully review and negotiate the terms of the agreements knowing that they have divergent goals. The recommended language in this article can serve as a starting point for crafting a contract that protects your company. **CM**

ABOUT THE AUTHOR

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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.

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

ENDNOTES

1. *See, e.g.*, Southern Alleghenies Planning & Development Commission, "Drafting a Teaming Agreement," *available at* **www.sapdc.org/documents/Contracting_Tools-Tool_3_Drafting_a_Teaming_Agreement-Tool.pdf** (sample teaming agreement beginning with Section 1.0, "Purpose"); *see also* 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).
2. Eric L. Toomey, "Government Contracts: Teaming Agreements and Other Arrangements," *Practical Law* (2013).
3. *See* Newton, *op. cit.*, at 1994–1995, 2019.
4. *Ibid.*, at 1994–1995.
5. *Ibid.*, at 1995.
6. *See, e.g.*, *Tarrant Reg'l. Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013); *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 292 (4th Cir. 2011); *Bayou Steel Corp. v. Evanston Ins. Co.*, 354 Fed. Appx. 9 (5th Cir. 2009); *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 587 (3d Cir. Pa. 2009) (quoting *Garden State Tanning, Inc. v. Mitchell Mfg. Group, Inc.*, 273 F.3d 332, 335 (3d Cir. 2001).
7. *See, e.g., ATACS Corp.*, 155 F.3d 659; *Dual, Inc.*, 1997 U.S. App. LEXIS 23959; *W.J. Schafer Associates, Inc.*, 254 Va. 514; *Cyberlock*, 939 F. Supp. 572; *and The Cube Corporation*, 63 Va. Cir. 634.
8. *See, e.g., Cyberlock*, 939 F. Supp., at 581.
9. *See e.g., ibid.* (concluding that agreement to negotiate in good faith is unenforceable under Virginia law).
10. *Compare ATACS Corp.*, 155 F.3d, at 664–669 (affirming district court ruling that agreement to "negotiate in good faith the subcontract prices" was enforceable) *with Cyberlock*, 939 F. Supp., at 580 ("the court finds that the post-prime contract award obligations in the second teaming agreement are unambiguous and constitute an unenforceable agreement to agree.")
11. For example, in *Air Technology Corp.*, the prime contractor argued that it was allowed to seek competitive lower bids for the team member's scope of work because the verbal agreement was unenforceable. (199 N.E.2d, at 548.)
12. *See W.J. Schafer Associates, Inc.*, 254 Va. 518–519 (the team leader was unable to perform the prime contract without the team member's computerized goods known as "digitizers").
13. *Ibid.*
14. *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**.
15. *See* Duane Morris, "What's Next for Teaming Agreement After *Cyberlock*?" (May 21, 2013), *available at* **www.duanemorris.com/alerts/what_is_next_for_teaming_agreements_after_cyberlock_4884.html**.
16. *See* "Recommended Provisions for Teaming Agreements," *op. cit.*; *and* Newton, note 1, at 1994–1995.
17. *Ibid.*
18. *See ibid.*; *and Cyberlock*, note 7, at 576.
19. *See* note 7, at 581.
20. *See* Morris, note 15; *and* "Recommended Provisions for Teaming Agreements," note 14.
21. *Ibid.*
22. *See* Madalyn A. Murtha, "The Enforceability of Teaming Agreements in Government Contracting and its Effect on Contract Formation," *The Procurement Lawyer*, 23 (Summer 2014): 26.
23. *See* "Recommended Provisions for Teaming Agreements," note 14; *and* Morris, note 15.
24. *See* part one of this article: Stephen P. Mulligan, "How to Improve Your Teaming Agreement, Part 1 of 2," *Contract Management* Magazine (February 2015).
25. *See EG&G v. The Cube Corporation*, 63 Va. Cir. 634 (Va. Cir. Ct. 2002) (Virginia trial court holding that the teaming agreement is enforceable despite Virginia Supreme Court precedent in *W.J. Schafer Associates, Inc. v. Cordant, Inc.*, 254 Va. 514 (1997)).
26. *See* "Drafting a Teaming Agreement," note 1, at §10. The parties used a similar provision in *Liobmedia, LLC v. Dataflow/Alaska, Inc.*, stating: "Neither party shall be liable to the other for any indirect, incidental, special, or consequential damages, however caused, whether as a consequence of the negligence of the one party or otherwise." (349 Fed. Appx. 843, 845 (4th Cir. 2009).)
27. This provision may conflict with most states' prohibition on waivers of liability for damages caused by a party's own negligence or gross negligence. *See, e.g., Mero v. City Segway Tours of Wash. DC, LLC*, 962 F. Supp. 2d 92, 104, n.12 (D.D.C. 2013) (waiver of liability for gross negligence is unenforceable); *Wolfgang v. Mid-American Motorsports*, 898 F. Supp. 783, 788 (D. Kan. 1995); *Bd. of Ed. v. Valden Associates, Inc.*, 46 N.Y.2d 653 (N.Y. 1979) ("Section 5-323 of the General Obligations Law, which renders void and unenforceable any agreement whereby a contractor attempts to exculpate himself from liability to others arising from his negligence in the construction of real property."); *but see Liobmedia, LLC*, 349 Fed. Appx. 843 (enforcing a similarly broad waiver).
28. *See ATACS Corp.*, 155 F.3d 671 ("variables cloud a reasonably certain calculation of lost profits stemming from the breach of the teaming agreement"); *and* E. Allan Farnsworth, "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations," *Columbia Law Review*, 87, 264 (1987).
29. *Toomey*, *see* note 2, at 3.
30. *See ibid.*
31. *Ibid.*