

Summary

By entering into teaming agreements, potential prime contractors and subcontractors are able to offer the Government the best combination of performance and cost. Teaming agreements containing only an obligation to negotiate a subcontract in good faith risk being unenforceable agreements to agree. To help avoid this result and secure the benefits of teaming, teaming agreements should contain as many of the material terms of the subcontract as practical under the circumstances.

Subpart 9.6 of the US Federal Acquisition Regulation encourages teaming arrangements in which a potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specific government contract or acquisition. Such teaming arrangements are desirable because they enable the companies involved to complement each other's unique capabilities and offer the government the best combination of performance, cost, and delivery for the system or product being acquired.

Typically a potential subcontractor (“team member”) agrees, at its own expense and often on an exclusive basis, to support a prime contract proposal by providing information and allowing its qualifications and prior performance to be referenced in the proposal. A team member only agrees to provide this support in consideration of the promise that if the prospective prime contractor (“team lead”) is awarded a prime contract as a result of the proposal, the team lead will award the team member a subcontract for the work that the proposal identified would be performed by the team member.

In most cases the team lead and the team member will honor their respective commitments in the teaming agreement and execute a subcontract if their team's proposal is selected for award of the prime contract. A team lead normally needs the team member's capabilities to perform the prime contract, and changing subcontractors immediately after award could result in a protest challenging the prime contract award to the team lead. Team members normally are eager to be awarded the work promised in the teaming agreement in order to realize the anticipated return on the bid and proposal dollars invested in the proposal. Neither party wants a reputation for renegeing on commitments made in teaming agreements.

Unfortunately there may be times when the team lead and team member do not enter into the subcontract contemplated by their teaming agreement. While the team lead and team member might agree not to enter into the subcontract, more often one of the parties believes that the other party has acted unreasonably and breached its obligation under the teaming agreement to enter into a subcontract. In those cases, one party may file a lawsuit to force the other party to live up to its bargain in the teaming agreement and enter into a subcontract.

Last year the US District Court for the Eastern District of Virginia considered a claim by a team member that the team lead had breached the teaming agreement by failing to award the team member a subcontract for 49% of the prime contract work. In that case, the court held that the teaming agreement at issue was an unenforceable “agreement to agree” rather than a valid contract because the teaming agreement only set out an agreement to negotiate in good faith to enter into a future subcontract.¹

In reaching its decision, the court found that the provision in the teaming agreement that team lead would perform 51% of the scope of work as the prime contractor with team member performing 49% as a subcontractor was not meant to provide a binding obligation but rather to set forth a contractual objective and agreed framework for negotiating a subcontract in the future. The court noted in its decision that there is nothing contradictory about finding that a contract unambiguously contains an unenforceable bargain between two parties. Recently the US Court of Appeals for the Fourth Circuit affirmed the reasoning of the district court.²

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¹ *Cyberlock Consulting, Inc. v. Information Experts, Inc.*, 939 F. Supp. 2d 572 (E.D.Va. 2013).

² *Cyberlock Consulting, Inc. v. Information Experts, Inc.*, 2014 U.S. App. LEXIS 322 (4th Cir. Jan. 8, 2014).

If the promise of the subcontract award in a teaming agreement is not enforceable, there is no legal consideration for the proposal support provided by the team member or for any promise of exclusivity by the team member. If prospective prime contractors and subcontractors cannot enter into teaming arrangements that they are confident will be honored and enforced, it will be more difficult to offer the government the best combination of performance and cost. Neither the government nor its contractors will benefit from such a result.

One solution to avoid this result might be for the team lead and team member to negotiate and agree upon the subcontract at the time they enter into the teaming agreement. If the government awards the prime contract to the team lead, all that remains is to execute the subcontract. The parties might even deliver signature pages in escrow to be released upon award of the prime contract.

Frankly, this approach, while probably the strongest legally, is simply not practicable. Teaming agreements often are executed prior to the issuance of the solicitation and before the parties thereto will know exactly what the terms and conditions of the prime contract will be. Also, investing bid and proposal dollars in negotiating the subcontract before the team has been selected for award of the prime contract normally would not be prudent. However, waiting until after prime contract award to negotiate the subcontract may result in the teaming agreement being an unenforceable agreement to agree.

There are some revisions to the language of standard teaming agreements that should result in an enforceable obligation to enter into a subcontract. The goal of these revisions is to have the parties agree to as many of the material terms of the subcontract in the teaming agreement as possible so that a court (and the parties and their lawyers) will conclude that there is mutual assent of the parties to terms reasonably certain under the circumstances.

“Team leads and members should review the terms of their teaming agreements to make sure that they unambiguously contain an enforceable bargain between the parties thereto and are not unenforceable agreements to agree.”

Parties to a prospective teaming agreement should consider including the following provisions in order to increase the likelihood that the agreement includes an enforceable obligation to enter into a subcontract:

Scope of Work. The teaming agreement should identify, with as much specificity as possible, the items and services that the team member will provide if the team’s proposal is selected for award. If the parties execute the teaming agreement prior to the issuance of the solicitation, the parties should amend the description of those items and services after the government’s requirement is known and before submission of the proposal.

Prices. The teaming agreement should provide that the team member’s proposed prices, costs or rates for the items and services to be provided by the team member that are included in the proposal on which award of the prime contract is based will be incorporated into the subcontract to be awarded by the team lead to the team member.

Subcontract. The teaming agreement should clearly state that if the government awards the team lead a prime contract as a result of submission of the team’s proposal and the prime contract includes any of the items and services that the teaming agreement has identified as the team member’s work share, the team lead will award the team member, and the team member will accept, a subcontract to deliver and render such items and services.

Conditions to Subcontract. The subcontract award can be subject to the satisfaction of certain conditions (e.g., the customer’s consent to team member’s being a subcontractor, if required, or the team member’s not being suspended or debarred), but must not be conditioned on the parties’ successful negotiation of the subcontract. An agreement to negotiate a subcontract risks being an unenforceable agreement to agree to a future subcontract.

Terms of the Subcontract. As noted earlier, the teaming agreement sets forth the parties’ agreement on items and services to be provided by the team member and the prices, costs or rates for those items and services. While these are perhaps the most important terms, the teaming agreement also should provide that the subcontract will be in substantially the form of an attached form subcontract. The goal here is not to negotiate the final subcontract; rather the team lead should attach its standard form subcontract that has not been tailored for the specific procurement at issue but that does have the standard “boilerplate” terms and conditions that the team lead normally includes in its subcontracts. To minimize negotiation of the form subcontract, the team lead should propose a reasonable form, and the team member should review it for terms that the team member cannot accept. The parties likely will end up negotiating some of these terms and conditions after award of the prime contract, but if negotiations break down, each party must be willing to execute a subcontract in substantially the form of the one attached to the teaming agreement.

Additional Terms and Conditions. Because many of the terms and conditions of the prime contract must be flowed down or included in the subcontract, the teaming agreement should specify that the subcontract will include those clauses of the prime contract that are mandatory or necessary for incorporation into the subcontract so that the team lead can comply with its obligations under the prime contract. Although the teaming agreement does not itemize those clauses, a court should be able to determine which prime contract clauses are mandatory or necessary in the event of a disagreement between the parties. The teaming agreement also can specify other terms and conditions that the parties agree will be included in the subcontract (e.g., restrictions on the right of the team lead to terminate the subcontract for convenience if the prime contract is not so terminated or on solicitation of employees).

Termination of Teaming Agreement. Often included among the various events of termination of the teaming agreement is the failure of the parties to enter into the subcontract within some period after award of the prime contract. Make sure that this provision does not contemplate termination if the parties have not “negotiated” or “agreed upon” the terms and conditions of the subcontract. Any such language could suggest that the teaming agreement is just an agreement to agree on a subcontract and thus potentially unenforceable. This event of termination should be limited to situations where the conditions to the subcontract set forth in the teaming agreement have not been satisfied within the specified time period.

In addition to the foregoing recommended revisions, it is important also to review the entire agreement to confirm that there are no other provisions that a court might find evidence only an unenforceable agreement to agree. The court will look to the language of the agreement to determine whether the parties intended to create an enforceable obligation to enter into a subcontract. Having inconsistent provisions in the agreement regarding the award of the subcontract can create uncertainty as to the parties’ intent.

Teaming is beneficial to contractors and their government customers. Teaming agreements are critical in allocating work share and setting forth the expectations of the parties thereto. Team leads and team members should review the terms of their teaming agreements to make sure that they unambiguously contain an enforceable bargain between the parties thereto and are not unenforceable agreements to agree. Including in teaming agreements the provisions recommended above should help assure that the parties to the agreements realize the benefits contemplated thereby.