Teaming Agreements in Virginia:
Are They Enforceable?

by Jack Rephan

Teaming agreements are widely used in Virginia and elsewhere by prime contractors and subcontractors who regularly contract with the federal, state, and local governments for the provision of services, construction, and other projects to meet the needs of the government and other public bodies. For this reason, it is essential that the contractors and subcontractors be aware of the law in Virginia, and the fact that Virginia courts have refused to enforce teaming agreements as unenforceable "agreements to agree." As detailed in this article, several guidelines may be gleaned from case law in Virginia to improve the chances of drafting an enforceable teaming agreement.

I. The Significance of Teaming Agreements

The use of teaming agreements is rather well established with respect to submitting proposals or bidding upon federal government contracts for the acquisition of supplies, services, construction, research and development and information technology. In fact, the federal procurement regulations encourage the use of teaming agreements.[1] Teaming agreements can also provide opportunities for disadvantaged and small businesses to participate in federal or other public construction or procurement contracts.

Prospective prime contractors and subcontractors should consider carefully whether a proposed teaming agreement is an enforceable contract before entering into such an agreement. **A successful bidder or awardee who relies on the expertise and pricing submitted by a particular subcontractor will want assurance that, if awarded the prime contract, the proposed subcontractor will enter into the proposed subcontract. Absent a binding teaming agreement, the proposed subcontractor will be free to walk away, exposing the prime contractor to the possibility of a substantial increase in cost to engage a different subcontractor.** Unlike the law in some other jurisdictions, the theory of *promissory estoppel* in Virginia will not provide the prime contractor with a cause of action against the prospective subcontractor.[2]

Similarly, the prospective subcontractor

wants assurance that it will receive the promised subcontract for the work if the prime contractor is awarded the job. Without an enforceable teaming agreement, however, the prospective subcontractor likely has no remedy, despite a potentially substantial amount of money spent to support the prime contractor's preparation of the bid or proposal that produced an award of the prime contract.

II. Case Law in Virginia

As the cases discussed below demonstrate, there are decisions in both state and federal courts in Virginia that have refused to enforce what the parties believed to be a binding and enforceable teaming agreement. **These decisions illustrate that the terms of the teaming agreement play a critical role in whether a Virginia court will enforce a teaming agreement.**

The earliest decision of the Supreme Court of Virginia concerning the enforceability of teaming agreements is that of *W.J. Schafer Associates, Inc. v. Cordant, Inc.*[3] In *W.J. Schafer*, Cordant entered into a teaming agreement with Ogden for the purpose of submitting a proposal to the Air Force for a contract to convert personnel records from microfiche to electronic data. After Cordant was awarded the prime contract, it attempted to negotiate a contract with Ogden for the purchase of image scanning equipment known as "digitizers" made by its corporate affiliate, Schafer. After negotiations failed, Cordant instead contracted with another company to replace the Schafer digitizers and sued Cordant and Schafer for breach of contract.

In *W.J. Schafer*, the Supreme Court of Virginia held that the teaming agreement was unenforceable because: "There was no mutual commitment by the parties, no obligation to sell the digitizers or on the part of Cordant to purchase them, no agreed purchase price for the product, and no assurance that the product would be available when needed."[4]

In *EG&G, Inc. v. The Cube Corp.*,[5] EG&G and The Cube Corporation (Cube) entered into a teaming agreement for the purpose of submitting a proposal to NASA with Cube to serve as the prime contractor and EG&G as the subcontractor. Judge Terrence Ney, for the Circuit Court of Fairfax County, granted specific performance of the teaming agreement. In doing so, the court emphasized that the evidence showed that the parties operated for a brief time under a letter agreement and agreed to work together in an "exclusive relationship," that "EG&G *would* be a subcontractor … and perform a substantial amount of the work …" and that the parties would "do more than just 'negotiate in good faith' to arrive at a final subcontract."[6]

In *Cyberlock Consulting, Inc. v. Information Experts, Inc.*,[7] a subcontractor sued a federal government contractor for allegedly breaching a teaming agreement. Two teaming agreements were at issue, one which attached a form subcontract as an exhibit and another that failed to do so. Both teaming agreements contained an integration provision stating that each agreement represented the entire agreement of the parties, and both agreements established the percentages of work to be performed by Cyberlock and Information Experts (IE).

After IE was awarded the prime contract, the parties failed to agree on the terms of a subcontract. As a result, Cyberlock sued IE for breach of contract, fraud and unjust enrichment. In making its decision, the federal district court in *Cyberlock* described the essential requirements for enforcement of a contract in Virginia:

> For a contract to be enforceable, "there must be mutual assent of the contracting parties to terms reasonably certain under the circumstances." *Allen v. Aetna Cas. & Sur. Co.*, 222 Va. 361, 364, 281 S.E.2d 818 (Va. 1981). Mere "agreements to agree in the future" are "too vague and too indefinite to be enforced." *W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 254 Va. 514, 519, 493 S.E.2d 512 (Va. 1997). In considering whether an agreement is an enforceable contract or merely an agreement to agree, courts consider whether the document at issue includes the requisite essential terms and also whether the conduct of the parties and the surrounding circumstances evince the parties' intent to enter a contract.[8]

Based on these principles, the court granted IE's motion for summary judgment and dismissed Cyberlock's breach of contract suit. The court found that the agreement was clear and unambiguous, such that without any parol evidence as to the parties' intent, the court concluded that "any seemingly

mandatory language to award Cyberlock" a subcontract was modified by the following provisions in the teaming agreement:

> (1) the award of such work would require the negotiation and execution of a future subcontract; (2) the award of such work was dependent on the success of such future negotiations; (3) any future executed subcontract was subject to the approval or disapproval of [the government]; and (4) suggesting that the framework set out for the work allocation in a future subcontract potentially could change as it merely was based on the work anticipated to be performed by Cyberlock as then-presently understood by the parties.[9]

On April 28, 2016, the Supreme Court of Virginia held in *Navar, Inc. v. Federal Business Council*[10] that the teaming agreement was unenforceable as "merely an agreement to agree to negotiate at a future date."[11] The teaming agreement provided that, if awarded the prime contract, the prime contractor would negotiate in good faith with the prospective subcontractors and enter into subcontracts with them "upon arriving at prices, terms and conditions acceptable to the parties."[12] The teaming agreement also provided that it would terminate if the parties were unable to reach an agreement on the terms of a subcontract after good faith negotiations. Significantly, the Court cited and quoted from the courts' opinions in both *Shafer* and *Cyberlock* in reaching its decision that the teaming agreement before the Court was unenforceable.

A little over a year later, the Supreme Court of Virginia again addressed the issue of the enforceability of a teaming agreement in *CGI Federal, Inc. v FCi Federal, Inc.*[13] In *CGI*, the parties entered into a teaming agreement to bid on a visa processing contract with the United States Department of State. The teaming agreement required the parties to enter into "good faith negotiations for a subcontract"[14] if FCi were awarded the prime contract and provided for termination of the teaming agreement if the parties were unable to reach agreement on a subcontract within 90 days after the prime contract award. Citing *Navar*, the Court ruled that the parties never agreed to the final terms of a subcontract but only agreed to negotiate in good faith the terms of a subcontract in the future and, thus, CGI could not rely on the agreement to obtain a subcontract for work from FCi.

In *InDyne, Inc. v. Beacon Occupational Health & Safety Services,*[15] InDyne filed suit and moved for summary judgment claiming that the teaming agreement between it and its potential subcontractor, Beacon, was unenforceable. Beacon unsuccessfully attempted to distinguish *CGI, Navar* and *Cyberlock* by arguing that its teaming agreement with InDyne "spoke in definite terms regarding (1) scope of work … (2) price, (3) commitment, and (4) duration and place of performance."[16] Nevertheless, even though the teaming agreement did fix the price, the court declared the teaming agreement unenforceable because it only required InDyne to "enter into negotiations" and "make every effort to subcontract" to Beacon, and called for the agreement to "remain in effect until . . ." the prime contractor and subcontractor, "after negotiating in good faith" were unable to reach an agreement.[17] As in *Navar, CGI* and *Cyberlock,* the teaming agreement was held unenforceable based on language that left the terms of the proposed subcontract to good faith negotiations.

III. Guiding Principles

What then is required to make a teaming agreement enforceable? Now that the Supreme Court of Virginia has twice echoed what it held in *Shafer* and what the Eastern District of Virginia held in *Cyberlock,* **Virginia law on the enforceability of teaming agreements is clear that a mere requirement for the parties to negotiate in good faith the terms and conditions of a subcontract will not suffice to render a teaming agreement enforceable.**

Although a lower court decision, the *Cyberlock* case provides some guidance. In *Cyberlock,* the court held the teaming agreement to be enforceable based upon several notable provisions, including the following:

- An exhibit attached containing a "Statement of Work" covering the period of performance, place of performance, requirement for key personnel, format of the contract, and project management for the work that Cyberlock would be performing for IE.
- An attachment with the specific subcontract the parties intended to use upon award of a prime contract.
- A requirement that, if a prime contract was awarded to IE, IE would enter into the subcontract with Cyberlock within 5 business days from the date of the award.
- The failure of the parties to agree upon the terms of a subcontract was **not** listed as an event that would result in the termination of the teaming agreement.

More broadly, several principles may be gleaned from the case law in Virginia with respect to drafting an enforceable teaming agreement:

1. Avoid language in the teaming agreement making an award of a subcontract subject to "good faith negotiation" of the terms of a subcontract;
2. Negotiate as many of the essential terms of a subcontract as possible before the teaming agreement is entered into and attach a copy of a proposed subcontract containing those terms and conditions as an exhibit to the teaming agreement;
3. Include in the teaming agreement a statement that a subcontract will be awarded to the subcontractor if the prime receives an award of a prime contract in the form attached to the teaming agreement;
4. Include language in the teaming agreement that it is the intent of the parties to enter into a binding contract in

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accordance with the terms of the teaming agreement;
5. Avoid any provision that makes the inability of the parties to reach an agreement on the terms of a subcontract an event that causes the teaming agreement to terminate; and
6. Engage an attorney familiar with government contracting to review any teaming agreement before it is signed. ⚖

Jack Rephan is shareholder in Pender & Coward, PC. After serving as a law clerk for the U.S. Court of Claims, Rephan has been in the private practice with a legal career that has covered a broad range of areas of the law including construction law, government contract law and civil litigation. He serves as an arbitrator and mediator for the American Arbitration Association's national panel of construction arbitrators and mediators. He has been a guest lecturer on construction law at the Regent University School of Law and is the author of numerous articles on construction and public contract law.

Endnotes

1 The FAR provides:
Contractor team arrangements may be desirable from both a Government and industry standpoint in order to enable the companies involved to: (1) 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. 48 C.F.R. § 9.602(a).
2 *W.J. Schafer Assocs., Inc. v. Cordant, Inc.,* 254 Va. 514, 516, 493 S.E.2d 512, 521 (1997).
3 254 Va. 514, 493 S.E.2d 512 (1997).
4 *W.J. Schafer*, 254 Va. at 515 , 493 S.E.2d at 520.
5 63 Va. Cir. 634, 2002 WL 31950215 (Fairfax Cir. Ct. Dec. 23, 2002).
6 *Id.* at *8.
7 939 F. Supp. 572 (E.D. Va. 2013), *aff'd*, 549 F. App'x 211 (4th Cir. 2014).
8 *Id.* at 580.
9 *Id.* at 581–82.
10 291 Va. 338, 784 S.E. 2d 296 (2016).
11 *Id.* at 347, 784 S.E.2d at 300.
12 *Id.* at 342, 784 S.E.2d at 297.
13 295 Va. 506, 814 S.E.2d 183 (2018).
14 *Id.* at 515, 814 S.E.2d at 188.
15 No. 118CV756LMBMSN, 2018 WL 5270331 (E.D. Va. Oct. 23, 2018).
16 *Id.* at *3.
17 *Id.* at *1.