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Government Contracts Update

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# The *Cyberlock Decision*: District Court Rules That Non-Specific Teaming Agreements Are Unenforceable


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Government contractors will want to review their teaming agreements following the recent decision in ***Cyberlock Consulting, Inc. v. Info. Experts, Inc.***. In *Cyberlock*, the U.S. District Court for the Eastern District of Virginia held that a teaming agreement expressing that the parties would negotiate a subcontract in the future was just an "agreement to agree" and thus unenforceable. As a result, Cyberlock, the prospective subcontractor on a contract award from the U.S. Office of Personnel Management ("OPM"), could not require Information Experts, its teaming partner and the prime contractor under the contract, to agree on a subcontract providing Cyberlock 49 percent of the work from OPM. The *Cyberlock* decision confirms government contractors cannot rely on generic teaming agreements to guarantee the promise of work under a subcontract. Instead they need to negotiate more definite subcontract terms and conditions that will be effective upon a prime contract award, or alternatively consider other pre-proposal contract vehicles such as joint ventures or GSA contractor teaming arrangements ("CTAs").

Government contractors generally form teaming agreements to cooperate in developing a proposal for an upcoming solicitation. The teammates usually agree to work together exclusively, and agree to negotiate a subcontract upon award of a prime contract to the team lead. Though specifics vary, a teaming agreement generally maps out what type of work each team member will perform, and the percentage of the overall effort each party will perform.

In *Cyberlock*, the parties agreed that upon award of a prime contract, they would execute a subcontract agreement in which 51 percent of the work would be performed by Information Experts, and 49 percent of the work subcontracted to Cyberlock. Attached to the teaming agreement was a three-page statement of work, giving details on the prime contract functions and work scope, but with no further detail as to which party would perform what functions. Further, the teaming agreement specified that a basis for terminating the agreement would be the "failure of the parties to reach agreement on a subcontract after a reasonable period of good faith negotiations." This provision is fairly common in teaming agreements.

The court denied Cyberlock's efforts to force Information Experts to award them a subcontract. In holding the teaming agreement was merely an unenforceable "agreement to agree" in the future, the court noted the following specific factors, many of which are regular features of teaming agreements:

- The parties intended for a formal subcontract to be drawn up in the future.
- Under the termination clause, Cyberlock and Information Experts expressly contemplated that a subcontract might never come to fruition.
- The teaming agreement referred to the subcontract in "uncertain, tentative terms," for example:
  - It described the work to be subcontracted to Cyberlock as "work anticipated to be performed," and
  - It qualified Cyberlock's role in the program as "presently understood by the parties."
- The court also noted that any subcontract entered into by the parties would be subject to the approval of OPM, regardless of the provisions of the agreement.

On the basis of these factors, the court held the teaming agreement was merely an agreement to agree in the future and thus Cyberlock could not use it to force its teaming partner to agree on terms of a subcontract.

The *Cyberlock* decision confirms a 1997 holding by the Virginia Supreme Court in ***W.J. Schafer Assocs., Inc. v. Cordant, Inc.***, (holding mere "agreements to agree in the future" are "too vague and too indefinite to be enforced."), a 2002 decision by the U.S. District Court in the Eastern District of Virginia in *Beazer Homes Corp. v. VMIF/Anden Southbridge Venture*, (holding that it is "well settled under Virginia law that agreements to negotiate at some point in the future are unenforceable."), and a 2004

decision by the District of Maryland in *Glynn Interactive, Inc. v. iTelehealth Inc.*, (holding that a teaming agreement that contemplated future negotiations between the parties was an unenforceable letter of intent with a purpose "to merely provide the initial framework from which the parties might later negotiate a final binding agreement."). Thus contractors in and outside of Virginia should be aware that *Cyberlock* reflects a reaffirmation of general principles applied by courts in different jurisdictions.

The *Cyberlock* decision also clarifies how a court will analyze contract language to ascertain the parties' intent. When parties dispute the meaning of a contract, the court will analyze the contract to determine if, taken as a whole, the document is unambiguous. The court will conclude the contract is unambiguous when its various provisions can be read together without conflict. If the language of the contract is unambiguous, the court will not consider any evidence of prior agreements or conduct, such as communications or negotiations, to determine the meaning of the contract. Thus, contractors cannot assume they can rely on prior discussions, meeting notes, e-mails or other correspondence to clarify their intent in a potential agreement. The language of the teaming agreement, if unambiguous, will likely be all that a court relies on when discerning the parties' intent.

Cyberlock recently filed its notice of appeal of the District Court's decision. Thus there may yet be further input on this issue from the U.S. Court of Appeals for the Fourth Circuit. Depending on how the Fourth Circuit rules, *Cyberlock* could have an effect on similar disputes coming before federal courts throughout the Fourth Circuit, including Maryland, Virginia, West Virginia, North Carolina, and South Carolina. Venable will continue to provide further updates on the matter as it proceeds.

**Tips for Contractors**

Following the *Cyberlock* decision, contractors that work together to secure a contract award should make the terms of their agreements as definitive as possible. Some basic considerations include:

Think "specific" when you enter a teaming agreement:

- Develop subcontract terms and conditions for inclusion in the teaming agreement, specifying which contractor will perform what type of work.
- Include subcontract terms and conditions in the actual teaming agreement or as an attachment to the teaming agreement. Negotiating subcontract terms and conditions up front may take more time, but it will better support enforceability; it will also expedite subcontract negotiations post-award.
- Clarify that the teaming agreement is more than just an agreement to agree in the future, but a promise by the prospective prime to award specific, identifiable work to the subcontractor upon award of the contract by the Government. Demonstrate that both parties agree to bring their specific skills, experience, and abilities to the team to secure an award. Also, specify that, by entering into the teaming agreement, the parties are foregoing the opportunity to work with other contractors or otherwise to pursue the work independently so that the consideration and bargain of the teaming agreement is clearly identified.

Consider alternative arrangements such as **joint ventures, GSA Contractor Teaming Arrangements, or negotiation of a subcontract**, in lieu of a teaming agreement:

- **Joint Ventures:** The Federal Acquisition Regulation ("FAR") at subpart 9.6 considers joint ventures as another type of "teaming arrangement" that two or more contractors can enter into in order to pursue a contracting opportunity.
  - A joint venture differs from prime contractor/subcontractor relationships because it creates a separate entity with which an agency will contract. A joint venture must be formed before a proposal may be submitted, thus there is much less risk that terms of a joint venture agreement will be held unenforceable.
  - Whereas only the prime contractor has privity of contract with the agency under a prime contractor/subcontractor relationship, all parties to a joint venture have equal access to a customer agency. This helps to ensure there is little doubt about the amount and type of work to be performed by each of the joint venture partners.
- **GSA Contractor Teaming Arrangements:** Contractors holding General Services Administration Schedule contracts (for instance, the Information Technology Schedule 70 contract) may want to consider entering into a Contractor Teaming Arrangement ("CTA").
  - Under a CTA, each partner has privity of contract with the government, and thus may be in a position to interact directly with the ordering agency.
  - As with joint ventures, CTAs must be submitted as part of a proposal package. Thus, partners under a CTA must agree to the terms and conditions of the CTA as a prerequisite to competing for a Schedule purchase. That helps reduce the risk that the parties cannot agree to a subcontracting arrangement post-award.

- **Subcontract In Lieu of Teaming Agreement:** Contractors who want to use a prime/subcontractor structure may wish to go ahead and negotiate a subcontract, rather than the teaming agreement. In such a structure, the subcontract would establish certain conditions precedent as triggers to the parties' obligations, such as winning a contract award, and securing the Government's approval of the subcontractor. Such an approach will bolster an argument that the agreement is enforceable. It may also reduce some of the rounds of teaming agreement and then subcontract negotiations. Finally, having a pre-negotiated subcontract in place may distinguish your team from other competitors' teams in competitive procurements.

For questions on teaming agreements, subcontracts, joint ventures, or other government contract related matters, or copies of any of the cases cited above, please contact **Becky Pearson**, **Keir Bancroft**, **James Boland**, **Marina Blickley** or the other attorneys in Venable's **Government Contracts Practice Group**.