

The Devil Is in the Details: The Importance of Specificity in Teaming Agreement Terms

Summer 2013

The recent decision in *Cyberlock Consulting, Inc. v. Information Experts, Inc.*, –F.Supp.2d –, 2013 WL 1395742 (E.D. Va. Apr. 3, 2013), has caused a number of commentators to question whether teaming agreements are still enforceable under Virginia law. Although there are important lessons to be gleaned from the Eastern District of Virginia's decision in *Cyberlock*, reports of the demise of enforceable teaming agreements in Virginia are greatly exaggerated. For one, *Cyberlock* involved only one aspect of a teaming agreement—the obligation to execute a subcontract. Teaming agreements can contain a variety of other promises, such as exclusivity and confidentiality provisions, that are often prerequisites to the sharing of technical and pricing information for proposal preparation. Moreover, many team members do not wish to commit themselves to a subcontract and intend to defer negotiation of critical subcontract terms until after the prime contract award. *Cyberlock* does not question the enforceability of exclusivity or confidentiality provisions, but it does provide useful guidance as to what language is necessary to establish that the parties have moved beyond an “agreement to agree” and have committed to entering into an enforceable contract.

Under Virginia law, to enforce a promise to award or accept a subcontract, “there must be mutual assent of the contracting parties to terms reasonably certain under the circumstances.” *Allen v. Aetna Cas. & Sur. Co.*, 281 S.E.2d 818, 820 (Va. 1981). “Agreements to agree in the future,” however, remain “too vague and too indefinite to be enforced.” *W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 493 S.E.2d 514, 515 (Va. 1997). In deciding between these two classifications, Virginia courts consider whether the teaming agreement includes the requisite essential terms of a subcontract and whether the conduct of the parties and the surrounding circumstances evince the parties' intent to enter a subcontract. See *High Knob v. Allen*, 138 S.E.2d 49, 52-53 (Va. 1964). Among the essential terms of a services contract, Virginia courts hold that “an agreement for services must be certain and definite as to the nature and extent of service to be performed, the place where and the person to whom it is to be rendered, and the compensation to be paid, or it will not be enforced.” *Mullins v. Mingo Lime & Lumber Co.*, 10 S.E.2d 492, 494 (Va. 1940). Stated another way, in the context of a teaming agreement, Virginia courts have analyzed the parties' terms to see whether they describe: (1) the nature and scope of the work to be performed; (2) the compensation to be paid; (3) the place of performance; and (4) the duration of the contract. See *EG&G, Inc. v. Cube Corp.*, 63 Va. Cir. 634, 648, 2002 WL 31950215 (Va.Cir.Ct. Dec. 23, 2002).

One example of a teaming agreement containing these essential terms can be found in *EG&G*. The agreement in that case stated that, “if the Contract is awarded to [Cube], EG&G will be performing certain functional areas as a subcontractor . . . with the functions to be determined when the [Request For Proposal (RFP)] is released.” Following release of the RFP, the team members “divided up the [Statements of Work (SOWs)] according to each company’s abilities and areas of expertise,” and the parties further detailed their division of work in the proposal. With respect to compensation, the teaming agreement contemplated a cost-type contract, and both team members provided separate cost proposals to the Government estimating the costs of their portions of the work. With respect to duration, the teaming agreement established that the subcontract would be for the same duration as any prime contract. Although the parties’ subcontract negotiations broke down over the subcontractor’s willingness to accept an indirect rate cap and termination for convenience clause, the court found that the prime had proposed these terms in bad faith and that the parties’ disagreement on these points did not undermine their agreement on compensation and duration.

At the other end of the spectrum is *W.J. Shafer*, where the Virginia Supreme Court held that a particular teaming agreement was nothing more than an agreement to agree. The teaming arrangement in *Shafer* contemplated that Shafer would furnish certain products to Cordant as a subcontractor under Cordant’s prime contract. Shafer subsequently refused to provide those products after award, forcing Cordant to procure the products from an alternative source. The court rejected Cordant’s suit to recover damages, finding that the teaming agreement contained no mutual commitment by the parties, no obligation on the part of Shafer to sell its products to Cordant or on the part of Cordant to purchase those products from Shafer, no agreed purchase price for the products, and no assurance that the product would be available when needed.

Cyberlock falls squarely on the *W.J. Shafer* end of the spectrum. The teaming agreement at issue between Information Experts, the proposed prime, and Cyberlock Consulting, the proposed subcontractor, contained a “Responsibilities and Performance” section, in which the parties agreed “to exert reasonable efforts to obtain an [Information Experts] prime contract for the Program and to negotiate a subcontract for the Program in accordance with Exhibit A.” Exhibit A, however, was speculative, listing only an anticipated set of tasks “as presently understood by the parties” and providing generally that Cyberlock would “perform 49% of the functions and scope of work as relayed by the Government in the prime contract awarded to [Information Experts].” Further, although Information Experts “agree[d] to execute a subcontracting agreement to provide [Cyberlock] 49% of the prime contract for the work anticipated to be performed by Subcontractor,” the teaming agreement included a termination clause whereby the agreement would terminate if there was a “failure of the parties to reach agreement on a subcontract after a reasonable period of good faith negotiations.” The teaming agreement also contained an integration clause, stipulating that the agreement “constituted the entire agreement of the parties.”

The court in *Cyberlock* ruled that the teaming agreement was an unenforceable “agreement to agree” under Virginia law. Examining the terms of the agreement, the court determined that, although “there is some language suggesting that Information Experts was obligated to provide 49% of the prime contract to Cyberlock . . . the agreement as a whole indicates that this particular language was not meant to provide a binding obligation.” Instead, the court determined that the teaming agreement “set forth a contractual

objective and agreed framework for the 'negotiat[ion] [of] a subcontract in the future along certain established terms,'" which Virginia law considers to be merely an agreement to agree. The court based its conclusion on four factors:

- The award of a 49% portion of the prime contract "would require the negotiation and execution of a future subcontract";
- This future subcontract "was dependent on the success of such future negotiations";
- Any potential executed subcontract "was subject to the approval or disapproval of" the Government; and
- The provisions of the teaming agreement suggested "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."

Read together, these nebulous, qualifying aspects of the teaming agreement signified that the parties' intention—as expressed in the agreement—was only to agree to negotiate at a later time. Relying on Virginia law that "circumstances which show that the parties do intend a formal contract to be drawn up is strong evidence demonstrating that they did *not* intend the prior negotiations to amount to a[] [binding] agreement," the court in *Cyberlock* ruled that the teaming agreement at issue was unenforceable.

Cyberlock is notable because the court refused to consider extrinsic evidence that the plaintiff alleged would have supplied some of the missing essential terms, and instead focused its analysis solely on the terms as provided in the teaming agreement. The court concluded that the agreement unambiguously deferred resolution of key terms until future subcontract negotiations, and that the parties promised nothing more than to attempt formal negotiations of a subcontract within general parameters at a later date. In this regard, *Cyberlock* distanced itself from *EG&G*, which relied heavily on the parties' proposal to the Government in ruling that the parties had agreed to the essential terms of a subcontract. *EG&G* can be reconciled with *Cyberlock* in that the teaming agreement in *EG&G* expressly referenced the proposal, thereby inviting reliance on that document in determining the parties' intent. Regardless, *Cyberlock* reminds us that, because most teaming agreements contemplate some further negotiation following contract award, plaintiffs face an uphill battle convincing a court that the parties have agreed to sufficiently definite terms to create an enforceable promise to award or accept a subcontract.

Based on the case law described above, to create an enforceable obligation to award or accept a subcontract, contractors should consider the following:

- Include in the teaming agreement an unqualified obligation to award and accept a subcontract, and avoid stating this obligation in terms of a duty to negotiate in good faith, at least with respect to scope, payment, place of performance and duration. Conversely, if the objective is to avoid commitment to a subcontract, the teaming agreement should disclaim such an obligation, limit the parties' duties to good faith negotiation and provide for termination in the event that those negotiations are not successful.

- If possible, negotiate a draft subcontract and include it as an attachment to the teaming agreement. In many cases, teaming agreements are hurriedly executed in order to lock in promises of exclusivity, but team members should continue definitizing the scope and pricing terms that are necessary to create binding obligations to award and accept a subcontract. In most cases, the parties should be able to reach agreement on these terms by the time the proposal has been submitted to the customer or shortly thereafter, and the teaming agreement should be promptly amended.
- If a draft subcontract cannot be incorporated into the teaming agreement, ensure that the agreement addresses the essential terms as defined under Virginia law, including the subcontractor's scope of work, the compensation to be paid to the subcontractor, the duration of the subcontract and the place of performance. The terms should be sufficiently definite to allow for performance of the prime contract by the team while the team members are finalizing the subcontract.
- Provide that exclusivity and confidentiality obligations survive termination of the teaming agreement and are severable from other provisions of the agreement. Survival of these provisions may prevent a team member from pursuing an opportunity with another contractor even if an enforceable promise to subcontract cannot be established. This, in turn, may facilitate subcontract negotiation.

It remains to be seen whether the *Cyberlock* court's analysis of both intention and specific terms will become the applicable law in Virginia with regard to written teaming agreements. Thus far, this has been only one federal court's interpretation of Virginia law. Regardless, there is one simple solution for contractors to increase the likelihood that their teaming agreements are enforced: Include as many specific terms in the teaming agreement as possible. Doing so will fulfill both avenues of a court's inquiry into whether a particular teaming agreement is an enforceable contract. Including specific terms as to the envisioned future agreement will signal to a court that the parties have begun formal negotiations thereby indicating both their intent to be bound by the agreement and the scope of each parties' duties under the future subcontract. The more specific details the contractors can negotiate in the teaming agreement, the better.

For now, teaming agreements can still be enforceable contracts under Virginia law. But the parties must be willing to commit themselves to as many specific terms as can reasonably be negotiated prior to formal award of the prime contract by the Government. Specificity is key in these agreements because, as is often the case when a court is examining the terms of an agreement, the devil is in the details.