Is Your Teaming Agreement Enforceable?

Teammates who pursue a federal contract should agree up front and in detail regarding their respective obligations if the contract is awarded. Only agreeing to negotiate specific terms after an agency award is unlikely to create an enforceable contract. This is the lesson presented by the Cyberlock decision from the Eastern District of Virginia and the Charlotte Motor Speedway decision from the North Carolina Court of Appeals.

Teaming agreements are hybrid creatures under the law. While the Federal Acquisition Regulations recognize their validity, state law generally determines their enforceability as “contracts”. Except in very rare circumstances, federal law does not regulate the enforceability of teaming agreements or subcontracts between private parties.

In Cyberlock, the Virginia trial court refused to enforce a teaming agreement where the prime contractor agreed that its teammate would be subcontracted 49% of the work once the agency awarded the contract. The teaming agreement included a scope of work that the contractor would perform, but the agreement “did not set out any further details about the work anticipated to be performed” by the subcontractor/teammate. The teaming agreement also said it was subject to approval by the awarding agency and would terminate should the parties fail “to reach agreement on a subcontract after a reasonable period of good faith negotiations.”

The Virginia federal court concluded that the teaming agreement was an unenforceable “agreement to agree” under Virginia law and refused to provide the subcontractor/teammate with any relief against the prime contractor. “Mere ‘agreements to agree in the future’ are ‘too vague and to indefinite to be enforced,’” according to the Virginia court.

North Carolina courts also refuse to enforce “agreements to agree.” The North Carolina Court of Appeals affirmed this principle in the October 2013 Charlotte Motor Speedway decision. In the case, Cabarrus County and the City of Concord promised in writing to commit $80,000,000 in infrastructure improvements and transportation investments to encourage the plaintiffs to construct a motor sports dragway in Cabarrus County. The letter was not specific regarding how the improvements would be financed, but the letter expressed the Government’s “commit[ment] to partnering with you” and stated that “the $80,000,000 will be formalized in an agreement that will also provide an outline of a schedule to prioritize projects and identify the investment that [plaintiffs] plans to make through the construction of the drag strip . . .”
The plaintiffs built the drag strip but did not enter into a signed agreement with the County and City, and the City and County did not provide the promised improvements. The plaintiffs sued for fraud, specific performance and breach of contract, but the Court of Appeals found the trial court properly dismissed these claims because the letter was silent on several key terms, rendering it “void for indefiniteness.”

In particular, the Government’s letter was “silent as to any specific obligation on the part of Plaintiffs and unclear as to precisely when Defendant would be required to expend the $80 million.” The Court of Appeals also noted the preliminary nature of the letter, which said that a “formalized . . . agreement” would be negotiated at a later time. “It is wholly unclear what Plaintiffs were bound to do, or not do, by virtue of this document.” The contract claims therefore were dismissed. The non-contract claims were dismissed because there was no definite promise in the letter regarding when money would be paid by the city and county and how the money would be spent.

Contractors who team to pursue the award of a federal contract should clearly define each party’s obligations. An ideal teaming agreement might attach all the terms of the parties’ negotiated subcontract, specifying the responsibilities, payments and remedies of each party in case of a breach, and with the subcontract going into effect upon contract award. Alternatively, parties can team through a joint venture, a separate legal entity that requires the participation of both teammates. In either case, the teaming agreement should not be subject to further negotiations.

Negotiating a detailed teaming agreement takes more time, but a detailed agreement is more likely to be enforced. A detailed agreement also provides both parties with greater clarity in their respective obligations. This result is preferred to the outcome in Cyberlock, where a subcontractor who expected to team with a prime contractor was “frozen out” of the procurement because of the lack of an enforceable contract with the prime.

If a contractor has questions whether or not its teaming agreement is sufficiently specific to be enforceable, the contractor should engage a government contracting attorney to review the teaming agreement before the contractor agrees to participate in the team.