



# **GOVERNMENT CONTRACT TEAMING – A SUBCONTRACTOR PERSPECTIVE**

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# WHAT IS A TEAMING AGREEMENT?

## FAR 9.601

### - DEFINITION

- AN AGREEMENT TO POOL RESOURCES TO OBTAIN AND PERFORM A GOVERNMENT CONTRACT

### - TYPES

1. PRIME CONTRACTOR/SUBCONTRACTOR
2. JOINT VENTURE OR PARTNERSHIP

### - PRESENTATION FOCUSES ON PRIME/SUBCONTRACTOR TEAMING

# TEAMING AGREEMENTS AND SUBCONTRACTS COMPARED

- **TEAMING AGREEMENT TERMS**

- Proposal Preparation
- Exclusivity
- What Happens if Prime Contract Awarded
  - Is subcontract award required?
  - Splitting the pie
  - Subcontract Terms (maybe)

- **SUBCONTRACT TERMS**

- Statement of Work
- Pricing
- Flow down Clauses
- Disputes
- Termination (Convenience and Default)
- **INCLUDED IN BOTH**
  - Protection of Proprietary Data
  - Restriction on Solicitation of Employees
  - Duration

# DIFFERING OBJECTIVES

- **THE PRIME**

- Does not want required subcontract award
- Wants post-award off ramp
  - Option Years
  - Termination for Convenience
  - Provisions Limiting Damages for breach

- **THE SUBCONTRACTOR**

- Wants
  - Guaranteed award if prime receives award
  - No post-award prime contractor off ramps

# FIRST THINGS FIRST - EXECUTE A NONDISCLOSURE AGREEMENT

- **EXECUTE BEFORE DISCLOSING PROPRIETARY DATA**
- **READ BEFORE YOU SIGN**
  - All NDAs are not the same
  - Standard forms
    - Never required
    - A prime's "standard form" may protect only its proprietary data
- **MAY BE ROLLED INTO TEAMING AGREEMENT AND SUBCONTRACT**

# EXECUTE NONDISCLOSURE AGREEMENT

(continued)

## • KEY TERMS

- Reciprocal Protection
- No Reproduction
- Disclosure to designated persons only
- Use only for stated purposes
- Marking of covered data
- Return of documents
- Provide for protection of orally disclosed proprietary data
  - May require –
    - Identification when disclosed
    - Followed by written notification

# AN AGREEMENT TO NEGOTIATE OR AN AGREEMENT TO AWARD?

- **TYPES OF TEAMING AGREEMENTS**

- Agreements to award subcontract
- Agreements to negotiate if prime contract awarded

- **AGREEMENTS REQUIRING SUBCONTRACT AWARD PREFERABLE TO SUBCONTRACTOR**

- If potential subcontractor has the negotiating leverage it should insist on a required subcontract if prime contract awarded.



# CASE LAW - VIRGINIA

## *Cyberlock Consulting, Inc. v. Information Experts, Inc.*

939 F. Supp. 2d 572 (E.D. V.A. 2013) aff'd 549 F. Appx. 211 (4<sup>th</sup> Cir. 2014)

### • **FACTS**

- Teaming agreement for OPM contract

### • **Parties agreed**

- “[in] the event [IE] is awarded a prime contract . . . [IE] agrees to execute a subcontracting agreement to provide [Cyberlock] 49% of the prime contract for the work anticipated . . . In Schedule A.”
- IE will pass down terms required by prime contract
- Agreement **terminates upon** failure . . . to reach agreement on a subcontract after a reasonable period of good faith negotiation
- Work allocation subject to change
- **Merger/Integration clause** states agreement “constitute[d] the entire agreement of the parties . . . and supersedes all prior communications”

### • **Subcontract negotiations fail**

### • **IE sues for breach of contract**

# CASE LAW - VIRGINIA

## *Cyberlock Consulting, Inc. v. Information Experts, Inc.* (continued)

- **COURT HOLDS TEAMING AGREEMENT NOT BINDING CONTRACT**

- Interpreting agreement as a whole, it is a nonbinding agreement to agree rather than a binding contract
- “calling an agreement something other than a contract . . . implies “parties intended . . . a nonbinding expression in contemplation of a future contract.”
- even if the parties are in full agreement the fact that they intend a formal contract “is strong evidence . . . they did not intend the previous negotiations [to be] an agreement.”
- *E,G&G, Inc. v. Cube Corp.*, 63 VA. CIR. 634 (Va. Cir. Ct. 12/23/02) flawed
  - only case ordering specific performance
  - incorrectly decided to extent it suggests rules of contract interpretation inapplicable to teaming agreements

- **CYBERLOCK ENDORSED BY VA SUPREME COURT**

- *Navar, Inc.* 291 Va. 338 (2016)

# CASE LAW - PENNSYLVANIA

*ATACS Corp. v. Trans World Communications, Inc.*,  
155 F.3d 659 (3<sup>rd</sup>. Cir 1998)

- **FACTS**

- Teaming agreement for contract with Greece for military equipment
- **Parties agreed**
  - **TWC** to be prime and award ATACS a subcontract
  - **ATACS**
    - To be subcontractor for required shelters and generators
    - assist in proposal preparation
    - submit quotation on their portion of program
    - Introduce TWC to Greek agent to facilitate bid
- **No Agreement on Subcontract Price**
- **TWC Awards Subcontract to Another Firm**

# CASE LAW - PENNSYLVANIA

## *ATACS v. TWC (continued)*

- **TRIAL COURT**

- Teaming agreement enforceable, awards \$1 in damages

- **US COURT OF APPEALS**

- **Holds Teaming Agreement Enforceable**

- Parties manifested **intent to be bound** by its terms
  - Looked to parties actions in addition to language of agreement to establish intent
- **Sufficiently definite** to be enforced

- **AWARDS MINIMAL DAMAGES**

- **Expectation Damages (Lost Profits) Too Speculative**

- No Subcontract price and other variables

- **Entitled to Restitution Damages**

- Fair Value of ATACS contribution to TWC's Proposal
- Remands to trial court for fact finding hearing on issue

# CASE LAW – NEW YORK

*Teachers Insurance and Annuity Assoc. of America v. Tribune Co.*,  
670 F. Supp. 491 (S.D.N.Y. 1987)

## • FACTS

- Exchange of letters constitute commitment agreement for 14 year \$76 million loan at 15.25%
- States parties made “binding agreement” subject to:
  - Execution of documents satisfactory to both sides
  - Approval of Tribune’s Board of Directors
- Interest rates decline
- Tribune refuses to negotiate unless obligation to borrow subject to accounting contingency
- TIAA sues for breach of commitment agreement

# CASE LAW – NEW YORK

## *TIAA v. Tribune Co.*, (continued)

- **HOLDING –**

- There are 2 types of Preliminary Agreements

- **Type I**

- Complete agreement on all issues
- Preliminary because parties agreed to further formalization

- **Type II**

- Mutual commitment to contract on agreed major term
- Additional terms to be negotiated good faith

- Commitment agreement a Type II agreement mandating good faith negotiations

- Tribune's reservation of rights to its Board of Directors did not leave it free to walk away.

- **SIGNIFICANCE-**

- Favorably cited in cases applying **NY, PA, DE** and **WV** law

# HOW TO NEGOTIATE AN ENFORCEABLE TEAMING AGREEMENT

- **Negotiate Up Front**

- Negotiate Favorable Subcontract Terms as Part of the Teaming Agreement
- A Potential Subcontractor Loses Negotiating Leverage Once Prime Contract Awarded

- **Bring Something Unique to the Table**

- **Negotiate With the Decision Maker**

- **Use Recent Developments as Advocacy Points**

- Bid Protest Cases (see slide 18)
- Small Business Jobs Act of 2010, P.L. 111-240 (see slides 19-20)

# HOW TO NEGOTIATE AN ENFORCEABLE TEAMING AGREEMENT (continued)

- **Require subcontract if prime contract awarded**
- **Provide necessary contract terms**
  - description of work to be performed
  - price or a means of determining price
  - delivery
  - quantity or a means of determining quantity
    - all x type work ordered by the Government
- **Negotiate subcontract as part of teaming agreement**
- **Call “TEAM CONTRACT” – not a “TEAMING AGREEMENT”**
  - *Cyberlock*
- **Require Prime to Identify Sub in Subcontracting Plan and Proposal**



# HOW TO NEGOTIATE AN ENFORCEABLE TEAMING AGREEMENT (continued)

- **Make subcontract contingent on government consent only if consent required**
- **If government consent required obligate prime to:**
  - Use its best efforts to obtain government consent
  - Include the subcontractor in discussions with Government concerning the subcontract
- **Avoid provisions limiting recovery for breach**
- **Make any disagreements subject to binding arbitration**
- **Do not agree to:**
  - VA law
  - an integration clause
  - to termination if parties fail to agree on subcontract
- **Provide for liquidated damages/specific performance**

# HELPFUL RECENT DEVELOPMENTS

- **RECENT BID PROTEST CASE LAW**

- ***Beretta USA Corp*, B-406376.2, 2013 CPD ¶ 186**

- RFP for sniper rifles –
  - stated proposals would be evaluated to determine commitments with key suppliers
  - required offerors to submit agreements with key suppliers
- Proposal rejection upheld because teaming agreements merely an agreement to negotiate

- ***Sentrillion Corp. v. U.S.*, 114 Fed. Cl. 557 (2014)**

- Solicitation for courthouse security services -
  - required submission of “evidence of a partnership agreement to provide services”
  - stated . . . “partnering agreement must be included at the time final proposals are submitted”
- Proposal rejection upheld because teaming agreements required negotiation with no obligation to perform.

# HELPFUL RECENT DEVELOPMENTS

(continued)

- **FAR 19.704 SUBCONTRACTING PLAN REQUIREMENTS**

- **Implements Small Business Jobs Act of 2010, P.L 111-240**

- **Requires subcontracting plan include assurances offeror will:**

- make a good faith effort to subcontract with SBs used in preparing and submitting its proposal at least to the extent used in preparing and submitting its proposal
- provide the CO written explanation if it does not award a subcontract to the SB in the same or greater scope

# HELPFUL RECENT DEVELOPMENTS

## (continued)

- **An offeror used an SB in preparing its proposal if:**
  - It identified the SB in its proposal or subcontracting plan to perform certain work; or
  - Used SB's pricing, cost information or expertise in preparing its proposal with written evidence of an understanding the SB will be awarded a subcontract for related work.

# ESTABLISH FAVORABLE SUBCONTRACT TERMS

- **Provisions to be considered:**
  - prohibition against **employee raiding**
  - requirement to exercise **subcontract option** if prime contract option exercised
  - limiting primes right to **terminate for convenience** to that terminated by the Government
  - same duration as prime contract, including options
  - **substitute work** if work subcontractor is to perform is eliminated from the program
  - protection of **proprietary rights**
  - prime contractor **sponsorship of subcontractor claims** against the Government
  - Prohibition of subcontract provisions absolving prime of liability for breach of contract

# RISK BENEFIT/ANALYSIS

- Large primes often refuse to alter their standard teaming agreement or subcontract forms for small business teammates
- Many subcontractors make substantial sums working under onerous subcontracts
- On the other hand primes sometimes use subcontractors to get the work and then dispose of them
- Whether to enter a subcontract with unfavorable terms and conditions requires a risk/benefit analysis

# THANK YOU *QUESTIONS:*

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