VIRGINIA SUPREME COURT HOLDS THAT TEAMING AGREEMENT IS UNENFORCEABLE "AGREEMENT TO AGREE" IN THE FUTURE

Authored by Attorney Patrick Genzler, pgenzler@vanblacklaw.com; 757.446.8631

VANDEVENTER BLACK LLP
ATTORNEYS AT LAW

Teaming arrangements are becoming more common in the construction industry, particularly with the increasing use of alternative project delivery methods such as design-build and P3 programs, and as projects increase in size and cost. When two or more companies enter into a teaming arrangement[1] to pursue and perform a large project, whether it is as a "prime contractor-subcontractor" team or a "design-builder/designer team," the parties customarily execute a "teaming agreement" containing a general outline of their expected contributions to the pursuit of the project and their expectations for the allocation of work if the team is successful. Unfortunately, disputes can develop among team members when those expectations are not met. Companies contemplating teaming arrangements should understand what their rights are in the event of a dispute, or if the teaming arrangement is terminated after contract award. To that end, the Supreme Court of Virginia's decision issued on June 7, 2018, in the case CGI FEDERAL INC. v FCi FEDERAL, INC.,[2] is instructive.

FCi was a small business that submitted a proposal to the U.S. Deptartment of State for a visa processing contract ("the prime contract") that was set-aside for small businesses. CGI Federal was a large business that agreed to assist in preparation of the FCi proposal, agreed that its assistance to CGI would be "exclusive," and agreed it would not otherwise participate in another proposal for the prime contract. The teaming agreement provided that if FCi received the contract award, CGI was to receive a specified percentage of the work under the contract (originally 45%, subsequently modified to 41% plus 10 management positions). The teaming agreement also provided that if FCi received the prime contract award, the parties were to enter into "good faith negotiations for a subcontract . . . subject to applicable laws, regulations, terms of the prime contract and . . . [CGI's] best and final proposal to FCi." Ultimately, FCi received the prime contract award, but offered CGI only 35% of the project work and no management positions. CGI did not accept a subcontract on these terms, and ultimately filed suit against FCi for breach of the teaming agreement, fraud, and unjust enrichment, seeking damages and lost profits.

On appeal from the trial court, the Supreme Court dismissed CGI's fraud and unjust enrichment claims on various legal grounds. On the fundamental question of whether FCi had breached the teaming agreement, the Supreme Court held that it is "well settled" in Virginia that contractual provisions that "merely set out agreements to negotiate future subcontracts" are unenforceable. Rejecting CGI's argument that the terms of the teaming agreement were very specific and sufficient to create an enforceable right to damages when FCi reneged on them, the court instead focused on the agreement provisions requiring "good faith negotiations for a subcontract" in the future, and that any ultimate subcontract was "subject to final solicitation requirements" of the prime contract. These and other terms that made any subcontract contingent upon future agreements and events, rendered the teaming agreement an unenforceable "agreement to agree in the future."

The language used in the CGI-FCi teaming agreement is commonly used in teaming agreements executed early in a proposal process, before the final design, specifications, cost, and other critical parameters of a project are known. Parties should understand that in executing teaming agreements containing this type of "agreement to negotiate in the future" language, it is likely that neither party to the agreement can be held to its commitments. If binding and enforceable obligations are intended, the parties will have to do more than use a "simple" teaming agreement. Other cases[3] have indicated that such enforceable arrangements can be created at the project pursuit stage, but they require more care and specificity in drafting.

For more information, please contact the author, Pat Genzler.

FN 1. "Teaming arrangements" and "joint ventures" can be similar in many ways, but they may also be different. Typically, the term "teaming arrangement" is used when one "team member" or participant on a project will be the principal or prime contractor, and the other participants will be subcontractors. Joint ventures typically involve the creation of a new entity (the "joint venture") that is considered separate from the participating joint venturers. However, depending on the language of a joint venture agreement, the principles discussed in this article could also apply to joint ventures and joint venture agreements.

FN 2. Supreme Court of Virginia; ___ S.E.2d ___, 2018 WL 2728726 (June 7, 2018).

FN 3. See, for example, *EG&G v. Cube Corp*., 63 Va. Cir. 634 (Fairfax 2002) holding that teaming agreement was sufficiently specific to create enforceable obligations, citing the specific terms of the agreement, the parties' conduct pursuant to the teaming agreement, and subsequent performance on the prime contract.
