

# ReedSmith

## Enforcing Teaming Agreements in Virginia

### PRACTICAL TIPS FOR ENFORCING TEAMING AGREEMENTS IN VIRGINIA

Contractors routinely sign teaming agreements to evidence collaboration in pursuit of government business. But, what's the value of a teaming agreement if you can't enforce it? The United States Court of Appeals for the Fourth Circuit's recent ruling in *CBX Technologies, Inc. v. GCC Technologies, LLC* illustrates that courts will closely scrutinize the enforceability of teaming agreement terms when at issue. In *CBX Technologies*, the Fourth Circuit vacated the lower court's ruling and found that the parties' intent to enforce and be bound by the terms of a teaming agreement was a critical issue to be determined after a trial on the merits.<sup>1</sup>

Virginia courts analyze and balance a number of factors in determining whether a teaming agreement is a binding contract, or simply an unenforceable agreement to agree. Below are key points that every contractor should consider when entering into, negotiating, or drafting a teaming agreement to be enforced under Virginia law.

- **Factors Supporting Enforceability of Teaming Agreements** – The likelihood of enforceability increases if some combination of these factors is included in the agreement:
  - **Exclusivity** – Language stating that an “exclusive relationship” will exist between the parties, or that a certain subcontractor “will” be working on the project, if the procurement is awarded, should be used.<sup>2</sup>
  - **Pricing Terms** – It is critical that the teaming agreement sets forth pricing terms such as the fee structure, method for calculating compensation, price of work, and, if possible, overhead costs, direct costs, labor costs, and general and administrative costs, if the procurement is awarded.<sup>3</sup>
  - **Division of Labor** – Detail regarding the amount of work to be performed and the division of labor between the parties, if awarded the procurement, is important to include in a teaming agreement.<sup>4</sup>
  - **Parties' Performance** – The parties' subsequent performance and dealings with one another after entering into a teaming agreement, but prior to finalizing a formalized contract, may be informative in determining whether an enforceable teaming agreement exists.<sup>5</sup>
  - **Key Subcontractor Capabilities** – If the proposed prime holds out the teaming partner to the government as the “principal subcontractor,” or as having unique capabilities or experience that differentiate the team, a court may infer an intent to award a subcontract.<sup>6</sup>
  - **Other Essential Terms** – Identification of the parties' responsibilities, nature and scope of work to be performed, and duration of the agreement, will further support enforceability if included in a teaming agreement.<sup>7</sup>

### • Factors Present in Teaming Agreements Deemed Unenforceable Agreements to Agree:

- **Agreement to Negotiate** – An agreement simply to negotiate a future subcontract agreement in good faith and in a timely manner is not enforceable.<sup>8</sup>
- **Non-exclusivity** – Teaming agreements that only “propose” that a subcontractor may be hired after procurement likely are not binding.<sup>9</sup>
- **Reservation of Rights to Withdraw** – A teaming agreement will likely be deemed unenforceable if either party reserves the right, in its sole discretion, to withdraw its participation before or after procurement, or to obtain replacement services or products.<sup>10</sup>

### WHO TO CONTACT



**Alexander “Sandy” Thomas**  
Partner  
+1 703 641 4276  
athomas@reedsmith.com



**Lorraine Mullings Campos**  
Partner  
+1 202 414 9386  
lcampos@reedsmith.com



**Brent R. Gary**  
Associate  
+1 703 641 4338  
bgary@reedsmith.com



**Gregory S. Jacobs**  
Associate  
+1 202 414 9480  
gjacobs@reedsmith.com

<sup>1</sup> 2011 U.S. App. LEXIS 24641 at \*9.  
<sup>2</sup> *EG&G, Inc. v. The Cube Corp.*, 2002 WL 31950215 at \*2 (Va. Cir. Ct. Fairfax Dec. 23, 2002).  
<sup>3</sup> *EG&G*, at \*10-11; see also *Aerotech, Inc. v. Tyonek Native Corp.*, 2007 WL 1052590 at \*3-4 (E.D. Va. Apr. 2, 2007).  
<sup>4</sup> *EG&G*, at \*2.  
<sup>5</sup> *Id.*, at \*9.  
<sup>6</sup> *Id.*, at \*17.  
<sup>7</sup> *Id.*, at \*10-11.  
<sup>8</sup> *W.J. Schafer Assoc., Inc. v. Cordant, Inc.*, 254 Va. 514, 517 (1997).  
<sup>9</sup> *Id.*, at 517.  
<sup>10</sup> *Id.*