



Teaming Up?

Avoid Unenforceable Agreements to Agree

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Teaming Up? Avoid Unenforceable Agreements to Agree

Written by Michael J. Baker

There is a growing trend in the construction industry wherein contractors, subcontractors and designers are working together to pursue large construction projects. This trend is accelerating as more public entities choose to use alternate delivery methods and negotiated procurements in the design-build and P3 space. There are many benefits to submitting joint proposals and bids. One significant benefit is to team up with compatible partners to pursue significant projects taking advantage of each team member's expertise and experience to give it a competitive edge to win the project. The terms of these collaborations are typically referred to as "teaming agreements" which are intended to define the relationships, rights and responsibility of all parties involved during both the pursuit of the work and, if ultimately successful, the performance of the project including the financial remuneration.

These "teaming agreements" are not without problems if they are not carefully thought out. What happens when one of the parties breaks the terms of the "teaming agreement?" Often times these "teaming agreements" are characterized as "agreements to agree" in order to avoid their enforceability. The breaching party typically wants to claim the "teaming agreement" is indefinite and, therefore, not a valid contract. On the other hand, the party

seeking to enforce the teaming agreement will try to establish that all contract elements are present such as the identity of the parties, subject matter and consideration in order to enforce the agreement. To be enforceable, "teaming agreements" are required to be reasonably complete, definite and clear and not merely agreements to agree.

Every contract is required to include the identity of the parties, the subject matter of the contract and consideration. Therefore, these elements at a minimum are required to be identified in every teaming agreement. Recognizing that each project is different and therefore the essential terms of any teaming arrangement would be different, you may want to consider carefully delineating basic responsibilities. The law in most jurisdictions holds that a contract may be enforced if it is sufficiently definite to ascertain the parties' obligations and to determine whether those obligations have been performed or breached. Stated otherwise, the contract may be enforced if it is possible to reach a fair and just result even if, in the process, the court is required to fill in some gaps. The modern trend of the law favors carrying out the parties' intentions and enforcing the contract and disfavors holding the contract unenforceable because of uncertainty. The difficulty in reaching the final terms is not necessarily fatal to a teaming agreement. So long as the essential contract terms are definite and set forth enforceable promises, the fact that a future financial term is not yet defined is not necessarily indicative of an indefinite agreement, particularly where such terms are not set until the proposal is ultimately accepted. Certain terms may not be essential elements of an agreement to jointly prepare and submit a bid if such terms are

dependent upon the acceptance of the proposal by the entity contracting to complete a project.

There are things you may want to consider avoiding when developing your teaming agreement. You may want to exercise caution when negotiating essential terms at a future date. Courts have found such language unenforceable particularly where a teaming agreement clearly sets out an agreement to negotiate future contracts in good faith. You may want to exercise caution when relying on oral statements or oral agreements. Reduce to writing the essential terms and execute the agreement or otherwise have documentation of mutual agreement on essential terms. You may be served well by avoiding uncertain terms. If it is necessary to obtain a price, then you may want to consider identifying that price in the teaming agreement. This may be particularly true among contractors and subcontractors when it comes to supplying items for project.

In order to avoid potential problems and unenforceability of your teaming arrangement, you may want to carefully consider the essential terms of what your collaboration is about and clearly incorporate them into a written agreement. Your goal in drafting these agreements is to define the relationship, the rights and responsibility of all parties involved on the "team" during both the pursuit of the contract and, if the contract is awarded, the performance of the project. If the teaming agreement contains sufficient specificity of terms, it will likely be found enforceable and the breaching party may be liable for damages.

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