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Va. Decision Casts Doubt On Contractor Teaming Plans

By **Dietrich Knauth**

Law360, New York (May 20, 2013, 10:54 PM ET) -- A recent decision in Virginia's federal court could alter the way companies team up to win federal contracts, by invalidating preaward subcontracting agreements as unenforceable "agreements to agree" in the future.

In Cyberlock Consulting Inc. v. Information Experts Inc., U.S. District Judge James C. Cacheris nixed a teaming agreement between two companies that planned to work together on a contract with the Office of Personnel Management's Federal Investigative Services division, which performs background checks for federal employees. Cyberlock had planned to do 49 percent of the work as a subcontractor, but sued IE in April 2012 after IE won the contract but pulled out of subcontract negotiations.

The decision is a reminder for contractors to be very clear in their agreements about their intent, and could force companies to include more detail, such as a proposed contract with the federal agency that breaks down the work between contractor and subcontractor. The teaming agreement was found to be unenforceable based on several qualifiers that are relatively common in such deals, including a clause saying the agreement was “subject to the negotiation and future execution of a subcontract” and another saying it “was subject to termination upon the failure of subcontract negotiations.”

Such terms are common enough that companies may think twice about using Virginia law, rather than change their approach to negotiating teaming agreements, according to John Chierichella of Sheppard Mullin Richter & Hampton LLP.

“I certainly would never use Virginia law if I had any of these elements in my teaming agreement; I think I'd be leading with my chin,” Chierichella said. "You may well be able to have an enforceable teaming agreement under Virginia law, but the fact of the mater is that many companies, at this stage in the relationship, are not willing or do not have the heart to engage in hard negotiations to make the agreement enforceable."

Prime contractors may be reluctant to agree to the binding terms that would pass muster under the standards laid out in the court's recent decision, Chierichella said, because they will want flexibility to adjust their prices and terms after negotiating with the government. If you sign a binding contract and agree to pay a certain price to a subcontractor, you might end up with the short end of the stick if the government bargains your prices down on the prime contract, he said.

Judge Cacheris evaluated the Cyberlock teaming agreement on its “plain meaning,” after initially

considering extrinsic evidence about the parties' intent when signing the agreement. He had changed course and explicitly corrected himself on the extrinsic evidence issue when granting IE's motion for summary judgment, saying he'd failed to take into account the agreement's integration clause, which said that the agreement's language superseded all other discussions and negotiations.

"The court has imported the 'plain meaning' rule to teaming agreements, which means that contractors have to be very careful with the terms of the agreement," said Raymond Monroe, a partner in Crowell & Moring LLP's government contracts group. "It all depends on whether you want a date or a marriage. If you want to have a marriage, you want to include the terms and conditions of the subcontract, and not make the agreement vague and open ended."

While the ruling interpreted Virginia law, many other states similarly hold that mere "agreements to agree" are unenforceable. Basing agreements on other state laws, or litigating them in other jurisdictions that may be more forgiving about allowing the consideration of extrinsic evidence, could allow subcontractors to avoid being cut out of a planned team, according to Tiffany Wynn, an attorney with Crowell & Moring.

"Moving forward, contractors need to be really careful about looking at the choice of law and choice of forum," Wynn said.

Teaming agreements are not commonly litigated, but used to be more common when questions about what types of teaming agreements were enforceable were less settled as a matter of law, according to Jessica C. Abrahams, a partner at McKenna Long & Aldridge LLP. Many subcontractors have since insisted on having more binding language in their teaming agreements, along the lines of an earlier an agreement between Cyberlock and IE, which the judge discussed in his decision, Abrahams said.

"There used to be a lot of handshaking in these teaming agreements, and often the companies didn't get their lawyers involved at that stage," Abrahams said. "This decision just reinforces the need to have all the material terms and detailed information in the team agreement, because otherwise it may not be enforceable."

Cyberlock has appealed the decision to the Court of Appeals for the Fourth Circuit.

Cyberlock is represented by Lawrence Quinn of Tydings & Rosenberg

Information Experts is represented by Jonathan David Frieden, Leigh Meredyth Murray and Stephen Andrew Cobb of Odin, Feldman & Pittleman, PC.

The case is Cyberlock Consulting Inc. v. Information Experts Inc., case No. 13-1599, in the U.S. Court of Appeals for the Fourth Circuit.

--Editing by Elizabeth Bowen and Chris Yates.

Correction: A previously published version of this article incorrectly misspelled attorney Tiffany Wynn's name. The error has been corrected.
