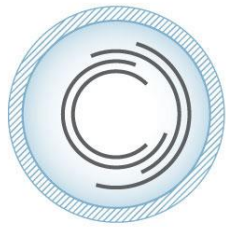


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A Foundation for Joint Ventures: The ConsensusDocs Teaming Agreement

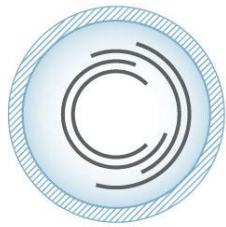
**Using the ConsensusDocs 296
Teaming Agreement**



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39 Leading Design and Construction Industry Associations are Members of the ConsensusDocs Coalition





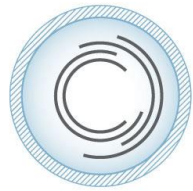
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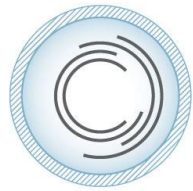
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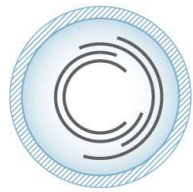
Overview

- ▶ Introduction to Teaming Agreements
- ▶ Critical Issues in Teaming Agreements
- ▶ ConsensusDocs 296 Teaming Agreement
- ▶ Legal Landscape / Practical Considerations



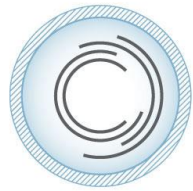
- ▶ Introduction to Teaming Agreements
 - ▶ What is a teaming agreement?
 - ▶ Federal Acquisition Regulation: “Contractor team arrangement means an arrangement in which (a) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or (b) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.”

48 C.F.R. 9.601

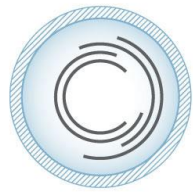


- ▶ Introduction to Teaming Agreements
 - ▶ What is a teaming agreement?
 - ▶ General Services Administration: “A GSA Schedule Contractor Team Arrangement (CTA) is an arrangement between two or more GSA Schedule contractors to work together to meet agency requirements. The CTA document is a written agreement between team members detailing the responsibilities of each team member”

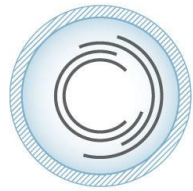
GSA Website



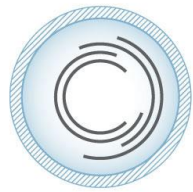
- ▶ Introduction to Teaming Agreements
 - ▶ Why team in the first place?
 - ▶ Common for governmental and design-build projects
 - ▶ ConsensusDocs 498 - Teaming Agreement for Design-Build
 - ▶ Prime Contract / Subcontractor relationship is most common
 - ▶ May or may not be enforceable
 - ▶ Binding agreement or agreement to agree?
 - ▶ *Cyberlock* Issues



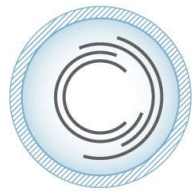
- ▶ Introduction to Teaming Agreements
 - ▶ What a team arrangement *can* do:
 - ▶ Leverage capabilities and opportunities
 - ▶ Reduce financial or technical risk
 - ▶ Facilitate market entry
 - ▶ Resolve financial difficulties
 - ▶ Address experience or performance requirements



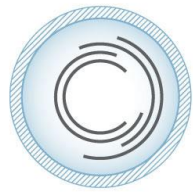
- ▶ Introduction to Teaming Agreements
 - ▶ A team arrangement *cannot/should not* be used to:
 - ▶ Reduce competition
 - ▶ Eliminate risk
 - ▶ Obtain another company's proprietary technology
 - ▶ Eliminate financial problems
 - ▶ Cover up for the past sins of one team member



- ▶ Introduction to Teaming Agreements
 - ▶ Alternatives to team arrangements?
 - ▶ Confidentiality Agreements
 - ▶ Letters of Intent / Memorandum of Understanding
 - ▶ Joint Venture Agreements / LLCs
 - ConsensusDocs 298 – Joint Venture Agreement
 - ConsensusDocs 297 – Joint Venture Line Item Agreement
 - ConsensusDocs 299 – Joint Venture LLC Operating Agreement
 - ▶ Teaming Agreements vs. Joint Ventures



- ▶ **Critical Issues in Teaming Agreements**
 - ▶ **Pre-Award / Proposal Issues:**
 - ▶ Team Relationship and Responsibilities
 - ▶ Submission of the Proposal
 - ▶ Confidential Information / Ownership of Documents
 - ▶ **Post-Award Issues:**
 - ▶ Negotiations of Prime Contract
 - ▶ Awarding of Subcontracts to Team Members
 - ▶ Dispute Resolution / Damages
- ▶ **Withdrawal of Team Member**

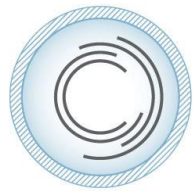


▶ Critical Issues in Teaming Agreements

▶ Pre-Award / Proposal Issues:

▶ Team Relationship and Responsibilities

- What is the intended organizational structure of the Team?
 - CD 296 – Uses Team Leader/Team Member concept
 - Team Leader shall provide overall direction and leadership
- What are the duties of the Team Leader/Team Members?
 - CD 296 - Team Leader decides by default
 - Ex. A - Proposal effort responsibilities / anticipated scope of Services



▶ Critical Issues in Teaming Agreements

▶ Pre-Award / Proposal Issues:

▶ Submission of the Proposal

- Who controls final content/submission of the Proposal?

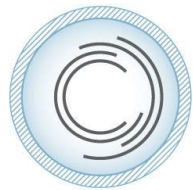
- CD 296 – Team Members jointly prepare Proposal.

- Team Leader makes final determinations as to form and content of Proposal.

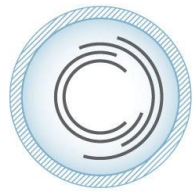
- Exclusivity / Non-Competition

- CD 296 – No Team Member can participate in Owner's selection process except as a member of the Team.

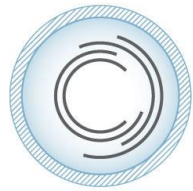
- Exceptions: Mutual agreement or Owner Agreement requires otherwise



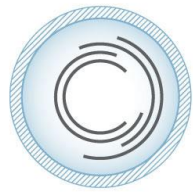
- ▶ Critical Issues in Teaming Agreements
 - ▶ Pre-Award / Proposal Issues:
 - ▶ Confidential Information
 - How will confidential information be protected?
 - CD 296 – Confidential information may not be shared with third parties except as required to submit Proposal;
 - Team Members supplying confidential information can require separate confidentiality agreement
 - Return of confidential Information
 - CD 296 – Team Members must return confidential information within 30 days of contract completion, termination, or non-award by Owner



- ▶ **Critical Issues in Teaming Agreements**
 - ▶ Pre-Award / Proposal Issues:
 - ▶ Ownership of Documents
 - Who owns the property rights and copyrights to documents generated by the Team?
 - CD 296 – Each Team Member retains ownership of property rights, including copyrights to all documents provided in furtherance of the Proposal
 - Team Members must transfer non-exclusive, limited license to Team Leader for the Project



- ▶ Critical Issues in Teaming Agreements
 - ▶ Post-Award Issues:
 - ▶ Negotiations of Prime Contract
 - How does the Team conduct its negotiations among the team members and with the Owner?
 - CD 296 – Team Leader is conduit for all communications with Owner
 - Team leader has lead responsibility for negotiation of the Owner Agreement.

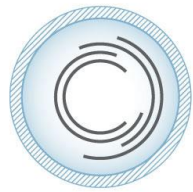


▶ Critical Issues in Teaming Agreements

▶ Post-Award Issues:

▶ Awarding of Subcontracts to Team Members

- Is the Team Leader obligated to subcontract to its Team Members?
 - CD 296 – if Owner Agreement includes work proposed by Team Member, then Team Leader and Team Member are required to negotiate a subcontract in good faith.
 - If good faith negotiations are not successful, Team Leader has the right to enter into a subcontract agreement with another.
- Is the Teaming Agreement enforceable?
 - *Cyberlock Consulting Inc. v. Information Experts, Inc.*



▶ Critical Issues in Teaming Agreements

▶ Post-Award Issues:

▶ Dispute Resolution

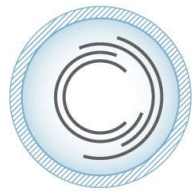
- What is the governing law?

- CD 296 – Applicable law in effect at the location of Team Leader's office.

- What is the procedure if there is a dispute among the Team Members?

- CD 296 – Nothing specified

- Forum/Venue – Nothing specified

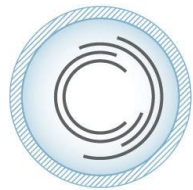


▶ Critical Issues in Teaming Agreements

▶ Post-Award Issues:

▶ Damages

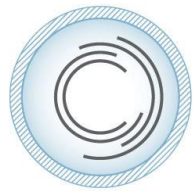
- What damages/remedies are available?
 - Confidentiality Agreement
 - Non-Solicitation of Employees
 - Post-Award (Enforceability)
- Is there a limitation on damages?
 - CD 296 – Limited Waiver of Consequential Damages
 - Exceptions: Insurance; Owner Agreement; Other



▶ Critical Issues in Teaming Agreements

▶ Withdrawal of Team Member

- ▶ What role does a former team member have in the project?
 - CD 296 – No former team member shall participate in any way relating to the Project.
- ▶ What becomes of documents owned by a former team member?
 - CD 296 – Former team member must transfer to Team Leader a non-exclusive, limited license for the Project.
- ▶ What becomes of any confidential information that the former team member has obtained as part of the Team?
 - CD 296 – Former team member must return within 7 days of removal or withdrawal from the Team.

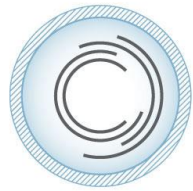


▶ Legal Landscape

▶ Recent Decisions:

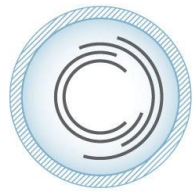
- ▶ *Cyberlock Consulting, Inc. v. Information Experts, Inc.*,
No. 1:12cv396, 2013 WL 1395742 (E.D. Va. Apr. 3, 2013)
 - District court held that a teaming agreement was an agreement to agree that was unenforceable under Virginia law.

- ▶ *X Technologies, Inc. v. Marvin Test Systems, Inc.*
No. 12-50230, 2013 WL 2493735 (5th Cir. June 11, 2013)
 - Court affirmed jury verdict finding that there had been a breach of an enforceable teaming agreement.

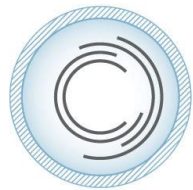


▶ Practical Considerations

- ▶ Enforceability of teaming agreements varies, depending upon applicable state law.
- ▶ Essential terms commonly necessary to form a binding commitment:
 - ▶ (1) Description of work to be performed
 - ▶ (2) Compensation amount for work and payment terms
 - ▶ (3) Quantity of goods or services to be provided
 - ▶ (4) Duration of performance
 - ▶ (5) Delivery or performance dates



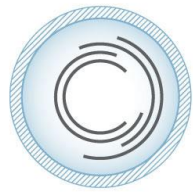
- ▶ **Practical Considerations**
 - ▶ Prime Contractor or Team Leader's Perspective
 - ▶ Often desire to limit obligation to award subcontracts to Team Members though vague and non-committal language.
 - ▶ Examples:
 - ▶ Make the subcontract “subject to negotiation” or “subject to mutual agreement.”
 - ▶ Include references only to “a subcontract” or a “proposed subcontract,” but with no additional description of the subcontract’s prices, payment, terms, etc.



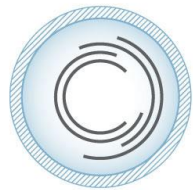
▶ Practical Considerations

▶ Prime Contractor or Team Leader's Perspective

- ▶ More Examples:
- ▶ Provide for termination of the teaming agreement if negotiation and execution of a definitive subcontract are not concluded within a specified time period (e.g., 30 days) after award of the prime contract.
- ▶ Reserve right to unilaterally withdraw from or terminate the teaming agreement in the prime's "sole discretion."
- ▶ Include a disclaimer of consequential damages.



- ▶ Practical Considerations
 - ▶ Non-Team Leader / Subcontractor's Perspective
 - ▶ Typically want to include an enforceable commitment that the Team Leader award the subcontract.
 - ▶ Potentially Helpful Considerations
 - ▶ Include an unqualified commitment from the prime to “place” or “award” the subcontract to the subcontractor.
 - ▶ Delete any time limit placed on the negotiation of a definitive subcontract.
 - ▶ Include a provision in the teaming agreement that provides that failure to agree to the price or other terms and conditions of the subcontract is subject to resolution under the “Disputes” clause in the teaming agreement.

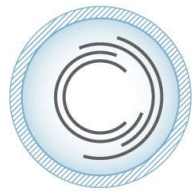


▶ Practical Considerations

▶ Non-Team Leader / Subcontractor's Perspective

▶ More Potentially Helpful Considerations

- Include enforcement and/or damages provisions for the prime's failure to award the subcontract, such as specific performance or liquidated damages.
- Include the subcontract's negotiated prices, or the parameters or formula under which the prices will be negotiated, and as many other subcontract terms and conditions as possible.
- Include in a governing law provision of a state that is likely to enforce teaming agreements.

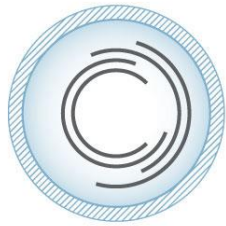


▶ Practical Considerations

▶ Non-Team Leader / Subcontractor's Perspective

▶ Even More Potentially Helpful Considerations

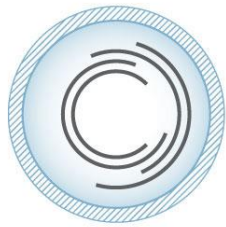
- Delete or do not adding boilerplate “integration” clauses.
- Include an express provision making it clear that the parties intend it to be a binding agreement to award the subcontract and not merely an agreement-to-agree.
- Include a provision that provides that, by entering into the teaming agreement, the parties are forgoing the opportunity to work with other contractors or subcontractors or to pursue the work independently so that the consideration provided by both parties that makes the agreement binding is clearly identified.



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Questions for Kory and Kerry?

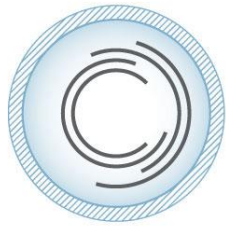




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