



## Teaming Agreements *Traps, Pitfalls, and Other Entanglements*

A Teaming Agreement (and its sibling, a Memorandum of Understanding, “MOU”) is much beloved by the industry – contractors, subcontractors and design professionals alike – when competing for work. An instrument to record a “relationship” to pursue a project, it may or may not have legal significance.<sup>1</sup> It can either represent a casual date with no strings attached or you may be secretly married without even knowing it. Understanding the distinction is critical to understanding your rights, remedies and exposure when the promises outlined in the teaming agreement go unfulfilled.

A perception exists that if a document is called a “teaming agreement” (or MOU, or even something else) that it is not a contract. False. A contract is not defined by its title. A Design Agreement is a contract, even though the term “contract” may never appear. A Subcontract is a contract which simply includes a title that expresses some understanding of the relationship. Calling a written instrument a “Teaming Agreement” does not change its function in the eyes of the law. Rather, the courts will consider the basic rules of contracting to determine whether an enforceable contract has been formed.

A contract is formed when an offer is accepted which is supported by consideration. The contract must include enforceable obligations and not be for illegible purposes, but the basics are offer, acceptance, and consideration.<sup>2</sup> “I agree to develop a conceptual design and you agree to pay me a \$1,000 stipend.” (Sound familiar?). Has a contract been formed? Yes. An offer was made (production of a conceptual design); which was accepted (you agreed); and, which is supported by consideration (I promise to help and you promise to pay me – an exchange of promises). This contract also has enforceable obligations.

The issue with teaming agreements, MOUs, etc. is that they are often not as clearly written to include an enforceable obligation. “We agree that if the proposal is accepted, we will enter into a subcontract.” There is no enforceable obligation in that statement. A court is not going to require one party to enter into a contract if they decide not to do so. Courts are designed to enforce agreements, not create them. This is an example of an “agreement to agree” which has no teeth.

On the other hand, if you agree to “indemnify” your team member for your failings and they agree to do the same for you, what then? Or, let’s suppose you both agree to waive consequential damages (whatever those are), is that an enforceable “obligation” creating a “contract?” According to a court in Utah, it was. The teaming agreement was an enforceable contract in which the parties waived consequential damages.

Which brings us to another concern. The later contract which states that “all prior negotiations and agreements are merged herein” (Merger clause) may not subsume the teaming agreement as expected. As the Utah court above noted, the purpose of the teaming agreement was to pursue the work through the development of a proposal. The purpose of the later subcontract was to do the work – two different purposes, two different contracts. And, the first did not merge into the second.

Teaming Agreements have their place in the industry. However, they can be complex legal documents which have significance – whether for or against you. Which begs a question, if the document has no legal significance, why sign it at all?

1. To lawyers, the phrase “may or may not” is only seconded by “it depends” when wanting to equivocate.
2. As always, other nuances exist. For example, to enter an enforceable contract for the sale of real property, the contract must be in writing (for the legal nerds, the Statute of Frauds).

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### What This Means For You

Teaming Agreement, MOUs, etc. have grown beyond what the industry first contemplated. They include many of the same terms and conditions the ultimate “contract” includes. Don’t believe the line, “Hey, this just means we agree not to see anyone else” when it turns out that you have been to the altar and back without even knowing it.

### SIDE BAR

*Please join us in welcoming:*

– **Brikena Isai Tomasic  
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– **Randy R. Cardoza  
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