

**LEGAL
CORNER****Board Gives Effect to GSA Contractor Teaming Agreement**

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The Civilian Board of Contract Appeals (“Board”) recently issued an important decision involving GSA Contractor Teaming Agreements (“CTA”). In Key Federal Finance v. General Services Administration, CBCA 411, 412, 2007 WL 1197779 (CBCA Apr. 19, 2007), the Board upheld the principle that each member of a GSA CTA has a contractual relationship with the user agency and can assert a claim against the agency under the Contract Disputes Act (“CDA”), 41 U.S.C. §§ 601, et seq. (2006). This decision should give additional certainty to GSA Federal Supply Schedule (“FSS”) contractors who use GSA CTAs to fulfill requirements that they otherwise could not fill alone.

Background

The dispute in Key Federal arose out of a RFQ issued by the Department of Commerce (“Commerce”) for high performance computing equipment to be supplied under GSA FSS contracts. The RFQ called for the items to be priced on a 36-month lease-to-own basis. James River Technical, Inc. (“JRTI”), a FSS contractor whose contract provided for the sale of computer equipment wanted to respond to the RFQ. However, because its FSS contract did not provide for equipment leasing, JRTI entered into a GSA CTA with Key Federal, which had a leasing provision in its FSS contract.

JRTI submitted a proposal to Commerce, explaining that it would team with Key Federal to provide the requested equipment and leasing options. With the proposal, JRTI submitted a copy of the teaming agreement and a detailed proposal by Key Federal describing the leasing options available under its FSS. After Commerce’s request for clarification regarding the teaming agreement, a revised agreement, designating JRTI as the “prime contractor” and making other changes, was entered and submitted to Commerce. Key Federal’s detailed, leasing proposal was not resubmitted with the revised agreement.

Commerce then issued a \$455,000 order to JRTI for lease-to-own computer equipment for the base period of September 1, 2003 through September 30, 2004, and option periods of October 1, 2004 to September 30, 2005 and October 1, 2005 to September 30, 2006. The order referred to the “Contractor Teaming Arrangement between JRTI and Key Federal,” but did not incorporate the terms of Key Federal’s detailed, leasing proposal.

In July and August 2004, Commerce notified JRTI and Key Federal, respectively, that it would not exercise its option for 2005 and that the lease would terminate after the base period. JRTI and Key Federal both contended that this action was a termination for convenience. Commerce, purportedly relying on a clause in Key Federal’s FSS contract, responded that the termination was for non-appropriation of funds, at no cost to the Government. Commerce subsequently stated that the termination was also appropriate based on other grounds.

Key Federal filed claims with Commerce and GSA. Commerce denied Key Federal’s claim, and the GSA did not issue final decision. Key Federal appealed Commerce’s denial of the claim and GSA’s failure to issue a final decision.

Commerce moved to dismiss the appeal for lack of jurisdiction on the ground that Key Federal was not a contractor under the CDA. Commerce asserted that only JRTI, as the designated “prime contractor,” was in privity of contract with the Government. Key Federal argued that the incorporation of the teaming agreement in the delivery order placed it in privity with Commerce.

Rationale of the Decision

The CDA sets out requirements and procedures for resolution of claims under Government contracts. This includes the right to litigate claims against the Government. To take advantage of the CDA’s remedies, however, a party must be a “contractor,” which is defined as “a party to a Government contract other than the Government.” 41 U.S.C. § 601.

Typically, Courts and Boards have interpreted the term “contractor” very narrowly to preserve the Government’s sovereign immunity from suit. Subcontractors, for example, are not generally considered “contractors” and have been required to get the prime contractor to sponsor any claim. Exceptions to this general rule occur in only “rare, exceptional” circumstances.” Floorpro Inc., 04-1 BCA P 32571, ASBCA No. 54143 (Mar. 30, 2004).

As discussed below, GSA’s Guidance regarding FSS CTAs provides that each team member has privity of contract with the Government. The Board’s decision gives effect to this element of the Guidance in holding that the GSA CTA created a “special relationship” which established privity of contract between Key Federal and Commerce and that Key Federal, which had not been designated the prime contractor in the GSA CTA, was a “contractor” and could bring a claim on its own under the CDA.

The Board's analysis focused on the particular facts and circumstances surrounding the RFQ, rather than on the formal structure of the arrangement, which named only JRTI as the "prime contractor." One of the most significant facts identified by the Board was that the RFQ itself referenced and anticipated that GSA CTAs could be needed to fulfill the requirements. The RFQ stated, "[i]f each required item is not currently on the company's GSA FSS contract and/or your company's GSA FSS Contract does not include appropriate leasing terms and conditions, then your company *must* enter into a GSA FSS contractor Teaming Agreement with additional GSA FSS Contractor(s) as part of your quote." Key Federal, CGCA 411, 412, at 3 (emphasis added).

The RFQ also required submission of the CTA with the quote and told offerors that they had to follow guidelines for CTAs set out on the GSA web site. Consistent with those Guidelines, the RFQ required, among other things, that any teaming agreement identify the participants and the FSS schedules under which they will be supplying goods or services and set forth each participant's roles, responsibilities, and obligations. Id. at 3-4; see also "Elements of a Contractor Team Arrangement (CTA) Document" *available at* www.gsa.gov/contactorteamarrangements (last visited 5/13/07).

The Board also noted that the GSA web includes a list of "Frequently Asked Questions" relating to CTAs, one of which distinguishes GSA CTAs and Prime Contractor/Sub-contractor Arrangements and states that for CTAs, "[e]ach team member has privity of contract with the government and can interact directly with the government." "Frequently Asked Questions," *available at* www.gsa.gov/contactorteamarrangements (last visited 5/13/07); see Key Federal, CGCA 411, 412, at 2-3 (quoting this Q&A). The Board went on to conclude that by referencing the GSA web site in the RFQ, Commerce had incorporated that representation into the solicitation. See id. at 8.

The Board's decision also noted several additional facts which indicated that Commerce intended to deal with Key Federal on a first-party basis. These included (1) Commerce's having dictated that one of the team members be designated as the "prime contractor" and its subsequent acknowledgment that either of them could have been the "prime;" (2) reference to the CTA in the purchase order; (3) certain communications between Commerce and JRTI relating to assignment of the proceeds of the contract to Key Federal and Commerce's recognition of JRTI's assignment of those proceeds to Key Federal; and (4) Commerce's reliance on a provision in Key Federal's FSS contract for its initial rationale for terminating the contract. See id.

Based on the totality of the circumstances presented to it, the Board concluded that Key Federal was a "contractor" for CDA purposes, stating:

[A] special relationship was created between Commerce and Key that went beyond the normal contract structure in which the Government only deals with the named contractor and that contractor deals with its subcontractor. Both the requirements of the solicitation and Commerce's actions before and after award created a contractual relationship between it and Key and permitted the two parties to deal directly with each other. By these actions, the parties indicated an intent to be in privity under the contract. Commerce may not now deny the relationship it created. Key is in privity with Commerce under this purchase order. ***Key is a contractor as that term is used in the CDA.***

Id. (emphasis added).

Key Federal is an important clarification of the rights of parties to GSA CTAs. However, the decision also indicates that FSS contractors should carefully follow the GSA Guidance in structuring CTAs if they want to be considered "contractors" with the right to bring their own claims. The decision also suggests other steps that might be taken to enhance certainty on this issue such as, for example, submission of the CTA to the ordering agency, having the ordering agency acknowledge the CTA in the delivery order, and avoiding the use of the term "prime contractor."



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