



GOVERNMENT CONTRACTS

update

Nuances of Contracting Relationships

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The Government – Prime Relationship

- Government's authority and contract terms arise out of Federal statutes and regulations.
 - Interpreted through decisions of:
 - Federal Circuit
 - Court of Federal Claims
 - Boards of Contract Appeals

The Prime – Subcontractor and Teaming Relationships

- Arises out of agreement between the parties
 - Governed and Interpreted under State law.
 - Disputes addressed in State or U.S. District Courts.
 - Government has no “privity of contract” (contractual relationship) with the subcontractor.
 - Government has no stake in a teaming agreement.

The Prime – Subcontractor and Teaming Relationships

- Set out Key Terms
 - Rule of thumb: The greater the risk, the greater the detail.
- “Agreements to Agree” are unenforceable.
- Comes up mostly at the “Teaming” stage.

A Common Story . . .

- *Cyberlock Consulting, Inc. v. Information Experts, Inc.*, 2013 WL 1395742, April 3, 2013 (E.D. Va).
 - First Teaming Agreement
 - Subcontract and SOW attached.
 - Second Teaming Agreement
 - Upon award, prime to perform 51 percent of the work; subcontractor to perform 49 percent.
 - Parties to “exert reasonable effort” to obtain prime contract and negotiate a subcontract.
 - Teaming agreement to terminate in certain events, including where there is a “failure of the parties to reach agreement on a subcontract after a reasonable period of good faith negotiations.”

A Common Story . . .

- *Cyberlock Consulting, Inc. (cont.)*
 - After contract award:
 - Parties exchanged draft subcontracts; disagreed on terms.
 - Prime concluded negotiations after one month.
 - Subcontractor sought relief in U.S. District Court.
 - Court: *“The post-award obligations in the Second Teaming Agreement unambiguously set out an agreement to negotiate in good faith to enter into a future subcontract – precisely the type of agreement to agree . . . that [is] unenforceable.”*

Lessons Learned

- Memorialize your entire agreement(s).
 - Attach detailed subcontract agreement to teaming agreement.
- Beware of using forms.
- Beware of vague terms: “reasonable efforts,” “good faith,” “reasonable period.”
- Include key terms, including:
 - Obligations of each party - Be specific!
 - SOW – Be specific!
 - Payment terms
 - Delivery schedule
 - Changes
 - Exclusivity
 - Subcontractor claims to the Government
 - Termination/Default/Disputes
- Address ambiguities

Thank You

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