

“INCOMPLETE, INACCURATE, AND UNVERIFIABLE”:

An Evening with the OIG’s Recent Audit Report on GSA’s Administration of Contractor Team Arrangements

I acknowledge it runs counter to the traditional, universally-accepted, ultra-cool image of a DC Government Contracts lawyers, but I must admit I like reading GSA OIG Audit Reports. So it was with great anticipation that I poured myself a generous glass of milk the other night and curled up in front of a warm desk lamp to devour the pages of the OIG’s latest commentary, engagingly titled “Audit of Contractor Team Arrangement Use.”

As its title foreshadows, the Report, dated September 8, 2014, recounts the exhilarating tale of the OIG’s exploration of GSA Contractor Team Arrangements (“CTAs”). The noble objectives of the audit team, established in the Report’s opening pages, were to “(1) determine the extent to which contracting officers follow existing guidance and regulation in the administration of contractor team arrangements and (2) assess contracting officer awareness of risk in improperly administering team arrangements.” They had me at “objectives.” Snuggling up closer to my desk lamp, I read on.

Because GSA’s CTA records were “incomplete, inaccurate, and unverifiable” (a finding, incidentally, that would spell disaster for a contractor), the OIG’s audit was performed on a limited sample of GSA task orders – 7 orders, to be exact. The auditors, however, did interview numerous contracting officers and supervisors, and the conclusions they were able to draw from their review are nothing short of hair-raising. According to the auditors – wait for it – GSA’s contracting officers “have been provided minimal instruction and have received no formal training relating to the award and administration of team arrangements.” The auditors also concluded GSA has provided inadequate guidance regarding the use and administration of CTAs. I was pulled deeper and deeper into the story with each new paragraph. As I flipped the pages with zest, hungering for the surprise around the next corner, I

Okay, I give up. The truth is, there is absolutely nothing surprising, engaging, hair-raising, or even particularly interesting about the OIG’s audit findings. We all have

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known for years that GSA contracting officers don’t understand Contractor Team Arrangements – and, frankly, most contractors don’t either.

For the last 15 years or so, I’ve taught an *Advanced Issues in MAS Contracting Course* – previously with Carolyn Alston (currently with the Coalition) and currently with Larry Allen (previously with the Coalition) – and the issue of CTAs comes up in every class. The pervasiveness of the confusion among Government COs and contractors never ceased to amaze me – at least until I attended a CTA course at GSA Expo a few years back taught by a now-retired CO. With due respect (and apologies) to the many good COs and Government teachers out there, the course was awful. The information was vague, not useful, and, in many ways, just

plain wrong. Thus, it came as no surprise to me, as it probably didn't to you, that the GSA OIG auditors concluded COs are not being well educated on this topic.

I was more interested in the OIG's view of the *consequences* of the lack of training and guidance. The consequences identified by the auditors, however, were presented through the lens of a Government actor – not a contractor. While I don't quibble with the correctness of the auditors' findings, I do regret they ignored most of the risks *to the contractor* of misunderstanding CTAs. And there are several. But before getting to that, let's get some basics out of the way.

A CTA is an agreement between two (or more) GSA Schedule contractors to provide a solution to an authorized Schedule purchaser that neither could provide on its own. In GSA's words, a CTA allows Schedule contractors "to meet the government agency needs by providing a total solution that combines the supplies and/or services from the team members' separate GSA Schedule contracts. It permits contractors to complement each other's capabilities to compete for orders for which they may not independently qualify." Here are a few other important elements of CTAs:

- All participants in a CTA must have their own Schedule contract, and must contribute something to the CTA.
- The products or services offered through the CTA must be "on Schedule" just as they would have to be if offered by a sole Schedule holder. (Open market items may be offered only as provided in FAR Part 8.)
- Notwithstanding the penchant of Schedule contractors to characterize one member of the CTA as the prime and the other member as the sub, in fact, all CTA participants are primes. The leader commonly is known as the "Team Lead," while the others commonly are known as "Team Members." But, legally speaking, they all are primes. As the OIG pointedly reminded GSA in its Audit Report, "each team member is a prime contractor and should be treated as such." The point is critical for reasons discussed further below.
- As prime contractors, all CTA participants have "privity of contract" with the Government. In other words, all participants assume the rights of, take on the obligations of, and subject themselves to the risks of being a prime contractor.
- All CTA participants are responsible for complying with the terms and conditions of their respective Schedule contracts, including pricing terms, TAA requirements, Price Reductions Clause obligations, labor qualification requirements, etc.
- Each CTA participant is responsible for reporting its own revenue and paying its own IFF.

And importantly, each CTA participant – whether it views itself as the lead or as a member – is at risk for any non-compliance, including breach risk for its or its teammates' non-compliance, past performance risk for its or its teammates' performance failures, False Claims Act risk at least for its own recklessness (and possibly for its teammates' recklessness if it was known), and, as a practical matter, reputational risk for most anything that goes wrong regardless of fault.

With that as background, let's now take a look at the aspects of a CTA that create some of these risks *from the perspective of the contractor*.

Billing Errors Risk

In the context of a Subcontract, the prime contractor must have all products/services on its Schedule and must bill the Government at or less than its Schedule price – even if the products/services are provided by a subcontractor. This means that, unless a unique solicitation provision directs otherwise, the prime contractor can "mark up" the subcontractor's price to the prime's Schedule price. In the context of a CTA, however, each participant is beholden to its own price list. Thus, the team lead cannot "mark up" a team member's products/services beyond that team member's Schedule price. Failure to appreciate the difference between a Subcontract and a CTA can create the risk of pricing errors and, at the very least, the risk of confusion among COs and auditors.

IFF Reporting Risk

Each team member is responsible for paying its own IFF on sales made through a CTA. Where CTAs are structured so the Team Lead handles all interactions with the customer, however, the Team Lead sometimes pays the entire IFF obligation and, consequently, the Team Members may lack visibility into the timing or even the amount of Schedule revenue. While GSA typically receives its due tribute in any case (since, as noted, the Team Lead sometimes pays the full IFF amount), the absence of a specific, traceable payment by the Team Member can create all sorts of problems when it comes time for IOA reviews and/or OIG audits.

Labor Qualification Risks

A prime contractor must ensure all personnel working on the project meet the labor qualification requirements set out in the prime contractor's GSA Schedule contract – whether or not the individual performing the work is employed by the prime contractor or a subcontractor. In contrast, each participant in a CTA must ensure its personnel meet the labor qualifications set forth in *its own* Schedule contract. Here again, a clearly written CTA is essential. Lack of clarity regarding the nature of the contracting relationship can increase the risk of an inadvertent contract breach in an area (*i.e.*, labor qualification issues) that increasingly is a favorite among auditors.

Ability-to-Offer Risk

As GAO has made clear again and again over the years, except in very limited situations, Schedule procurements require the proposal of Schedule items. The failure to offer products or services on the offer's valid Schedule contract can result in rejection of the proposal, or, if it does not, will provide fodder for an easy bid protest. While a contractor bidding under a CTA can pull from any/all of its teammates Schedule contracts to prepare a compliant 100%-Schedule solution, a prime contractor cannot pull from its subcontractor's Schedule if the prime does not have the product/service on its own Schedule. The prime contractor must have 100% of the items on its own Schedule. One unlucky contractor found this out the hard way back in 2007 when it submitted a quotation in response to a management operations RFQ, but didn't make clear it was proposing as a Contractor Team. Consequently, GSA rejected the quotation, finding it not to be a CTA and finding the offeror did not independently hold all of the necessary Schedule items required by the RFQ.¹

Price Reductions Clause Risk

This one is best described through the ancient and time-honored art of a war story. I had a client years ago that entered into what it thought was a prime/sub relationship with another Schedule holder. It was a service contract for the military and the "prime" didn't have all the necessary labor categories on its Schedule so it "subbed" to my client. As many companies do, the companies structured their relationship as a prime/sub arrangement, with the "sub" providing personnel at a discount to the "prime," and then the "prime" marking up the personnel to its Schedule price; the markup serving as the "prime's" fee.

A year or so after the project came to an end, the "sub" was hit with an OIG audit. The auditor saw the "discounts" to the "prime" and accused it (the "sub") of violating its Price Reductions Clause. (The company's Basis of Award included prime contractors.) The auditor did not particularly care that the Government was the ultimate customer. He saw only a discount to a BOA customer and, to him, that spelled PRC violation.

Nor was the auditor taken by the company's argument that the relationship actually was a CTA and, therefore, the sales to the "prime" actually were sales to the Government because (as you know if you've read this far) each CTA member is a prime contractor. The company's argument was not made any easier when the auditor reviewed the order (which only

referenced the "prime"), reviewed the agreement between the "prime" and the "sub" (which was titled a "Subcontract" and referenced only a "prime" and a "sub"), and recognized that the "prime" had paid the totality of the IFF (an action consistent with a prime/sub relationship, not a CTA). Had the parties clearly identified the agreement as a CTA, employed the correct terminology, and acted consistent with GSA's CTA guidelines, there would have been no PRC violation allegation.

The moral of this little tale is this: Words matters. Contractors should use prime/sub when dealing with a subcontract, and use lead/member when dealing with a CTA.²

Risk Mitigation Techniques

Add to the foregoing risks the additional, mostly-Government-facing risks identified in the OIG's Audit Report and you have yourself one very confusing, very misunderstood, and very risky contract vehicle. This is not to say, of course, you should avoid entering into CTAs. But you should look before you leap, understand the rules and the risks, and take compliance seriously. And, oh yes, don't read the OIG Audit Report as though it sets forth *all* the risks!

In its Audit Report, the OIG identified a number of measures GSA can/should take to help reduce some of the confusion around CTAs. These involved better training for COs, better internal record keeping systems within GSA, and better policies. While industry awaits these enhancements, there are things contractors can do to protect themselves. Here are a few:

- Understand the difference between a Subcontract and a CTA, and clearly identify which vehicle you are employing. Be clear internally, be clear to your teammates/ subcontractors, and be clear to the Government.
- Do not rely on oral CTAs (or oral subcontracts for that matter). Prepare properly crafted CTAs in writing. While, as confirmed by the OIG, GSA historically has paid little attention to the content of CTAs, the agency's website does offer a pretty good list of what contractors should include in their CTAs. See www.gsa.gov/portal/content/202253. While GSA identifies these elements as *requirements* of a CTA (*i.e.*, "The CTA document must address" X or Y), they are not. They are, however, quite good recommendations.

¹ The *Computer Cite* protest (B-299858) is an interesting one and a good read for contractors participating in CTAs. In the bid protest that followed GSA's rejection of the offer, the offeror contended its teaming agreement satisfied "the essential requirements for a CTA. . . ." GAO disagreed.

² For those interested, the audit actually came to a very interesting and successful conclusion. Since the "prime" did not have the necessary labor categories on its Schedule and the "sub" did, we explained to the auditor that either (1) the prime and the Government agency violated the procurement rules by providing/procuring non-Schedule services under a Schedule procurement or (2) the parties actually had intended to establish a CTA, but simply failed to use the proper language. Ultimately, the auditor went with door number two, which, legally, was the correct result. The parties' poor terminology and documentation, however, caused what should have been a simple audit to turn into a very expensive one.

- Share the CTA with the contracting officer. GSA “strongly encourages” contractors to do so, and so do I.
- Use correct terminology. If you are establishing a CTA, call it a CTA and identify one company as the Lead and the other as the Member. If you are establishing a subcontract, call it a subcontract and identify one company as the prime and one as the sub. Do not use the terms interchangeably.³
- Try to have the award issued in the name of the CTA rather than in the name of one member of the CTA. If this is not possible (*e.g.*, because the agency, for whatever reason, resists), then try to have the CTA identified on the face of the award document. As the OIG recognized in its Audit Report, contracting officers often do not remember to do this on their own.
- Identify clearly in the CTA (and in the proposal and/or contract) which team member will submit invoices and how payment is expected to be made. Remember, while the Government should pay each team member independently, agencies rarely want to take that approach, and GSA does not force them to. Failure to deal with invoicing and billing issues early can create great confusion down the road as auditors struggle with reconciling reported revenue to internal records. The OIG correctly recognized this issue in its Audit Report as well.

In hindsight, perhaps I was too hard on the OIG in my introduction. While GSA’s CTA files may be incomplete, inaccurate, and unverifiable, the Audit Report nonetheless got it right. CTAs are misunderstood by the contracting community – industry-wise, CO-wise, and otherwise. So maybe the Audit Report was not as exciting as I had hoped, but it did provide a good opportunity to reflect upon a risky area of GSA Schedule contracting. Perhaps the sequel will be more riveting. GSA estimates it will publish updated CTA regulations by April 2016. I plan to be the first in line to get a copy so I once again can curl up in front of my warm desk lamp with a nice glass of milk and get lost in the world of GSA Schedule contracting. Oh, what a life!

~Jonathan Aronie



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To add to the confusion, in the context of a CTA, either team member also may have subcontractors of its own. But that’s an article for another time.