



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION TO DISMISS DENIED: April 19, 2007

CBCA 411, 412

KEY FEDERAL FINANCE,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent in CBCA 411,

and

DEPARTMENT OF COMMERCE,

Respondent in CBCA 412.

Joseph J. Petrillo of Petrillo & Powell, PLLC, Washington, DC, counsel for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent in CBCA 411.

Fred Kopatich, Office of General Counsel, Department of Commerce, Washington, DC counsel for Respondent in CBCA 412.

Before Board Judges **DANIELS** (Chairman), **STERN**, and **HYATT**.

**STERN**, Board Judge.

Key Federal Finance (Key or appellant) filed this appeal after the Department of Commerce's National Institute of Standards and Technology (Commerce) terminated a contract for the lease and purchase of computer equipment. The named party on that contract was James River Technical, Inc. (JRTI), a company with which Key, as is further explained

below, held a teaming agreement for performance of the contract work. Appellant filed a claim with Commerce. That claim was denied. Appellant also filed a claim with a contracting officer of the General Services Administration (GSA). To date, GSA has not issued a final decision on that claim. Key appealed Commerce's decision and GSA's failure to issue a decision to the General Services Administration Board of Contract Appeals (GSBCA). That board consolidated the two appeals.<sup>1</sup> Pursuant to statute all the cases pending before the GSBCA were transferred to the Civilian Board of Contract Appeals on January 6, 2007. Pub. L. No. 109-163, § 847, 119 Stat. 3136 (2006).

We have before us Commerce's Motion to Dismiss for Lack of Jurisdiction. Commerce alleges that Key is not a "contractor" that entered into a contract or order with the Government, a requirement for our jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 601-613, *et seq.* (2000). Commerce contends that the Board lacks jurisdiction over the appeal. For the reasons set forth below we deny Commerce's motion.

#### Background

1. On June 26, 2003, Commerce issued a request for GSA Federal Supply Schedule (FSS) quotations (RFQ) for high performance computing equipment for use at Commerce's Gaithersburg, Maryland, facility. Appeal File, Exhibit 2.<sup>2</sup> One of the vendors that was provided the RFQ was JRTI.
2. The RFQ (as amended) required the items to be procured to be priced on a thirty-six-month lease-to-ownership basis. The RFQ also stated that certain equipment compatibility requirements were set forth so that Commerce could complete "the building and fire safety investigation of the World Trade Center disaster by September 2004." Appeal File, Exhibit 2 at 2.
3. The RFQ emphasized that only GSA FSS contract quotes were sought. The following additional guidance was provided in the RFQ:

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<sup>1</sup> The issues in the two cases are identical. We do not now decide whether both appeals are properly before us.

<sup>2</sup> The facts herein are taken from the Appeal File, the pleadings, and the various other documents, including an affidavit by appellant's vice president, filed by the parties in this appeal. The findings herein are solely for the purpose of resolving the subject motion.

- (1) Your company may submit its own GSA FSS Contract quote (i.e., not be required to enter into a GSA FSS Contractor Teaming Arrangement with additional GSA FSS Contractor(s)) if your company's GSA FSS Contract currently contains all required items AND your company's GSA FSS contract contains leasing terms and conditions that could be used for the items to be procured.
- (2) If each required item is not currently on the company's GSA FSS contract and/or if 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 Arrangement with additional GSA FSS Contractor(s) as part of your quote. All items, terms and conditions must be satisfied among the collective Contractor Teaming Arrangement's GSA FSS Contracts.
- (3) If your company plans to enter into a GSA FSS Contractor Teaming Arrangement with one or more other GSA FSS Contractor companies for this request for quote, it must follow the guidelines set forth at [http://www.gsa.gov/Portal/content/offerings\\_content.jsp?contentOID=116432&contentType=1004](http://www.gsa.gov/Portal/content/offerings_content.jsp?contentOID=116432&contentType=1004).
- (4) If your company elects to enter into a GSA Federal Supply Schedules Contractor Teaming Arrangement for this quote, then your company must submit a signed copy of that agreement in .pdf format with the quote. **ALL COMPANIES MUST HAVE THEIR OWN COMPANY GSA FSS CONTRACT TO BE ELIGIBLE TO ENTER INTO SUCH A GSA FSS TEAMING ARRANGEMENT WITH ANOTHER GSA FSS CONTRACTOR.** The Contractor Teaming Agreement **must** include the following information, at a minimum:
  - Identifies which company that is part of the GSA FSS Contractor Teaming Arrangement that, for order award purposes for the Government, should be considered the prime Contractor
  - Identifies participants, Schedules, and services and products covered by the arrangement and how additions/deletions will occur

- Identifies which items being quoted and/or which terms and conditions are on which of the individual GSA FSS contracts.
- Defines terms
- Sets forth each participant's roles, responsibilities, and obligations
- Identifies scope, period of performance (for specific, limited purposes or longer periods covering several transactions), and termination of the arrangement
- Identifies remunerations for functions performed, if any
- Identifies the process that will be used to quote, accept, and administer orders. This may include prices, terms and conditions, invoicing, payment, taxes, reports, etc.
- Establishes scope and limitations of any licenses or proprietary rights
- Establishes representations and warranties among the parties
- Identifies confidentiality requirements, obligations, disclosures, and remedies
- Identifies damages, liability/limitation of liability, and any indemnification requirements among the parties
- Addresses administrative requirements (e.g., assignments, how notices will be conveyed and recognized, how changes or amendments will occur)
- Identifies any terms that survive the arrangement or termination
- Identifies governing laws, venues, etc.
- Establishes how disputes will be addressed and resolved

- Addresses force Majeure

(5) **THE GOVERNMENT IS NOT SEEKING A GSA FSS CONTRACT QUOTE FROM ANY OFFEROR THAT CONTAINS ANY OPEN MARKET ITEMS;**

....

(13) The quote must state whether any of the items are **not** currently included on the Offeror's GSA FSS Contract; if one or more of the items are **not** on the Offeror's GSA FSS Contract, then the Offeror must enter into a Contractor Teaming Arrangement with another GSA FSS Contractor whose GSA FSS Contract **does** currently include those items for the quote to be considered;

....

The Government may award a GSA FSS order to the GS FSS Contractor whose technically acceptable individual quote or technically acceptable Contractor Team Arrangement quote represents the lowest overall cost to the Government.

Appeal File, Exhibit 2 (some emphasis omitted).

4. The guidelines at the Frequently Asked Questions section of the GSA website regarding Contractor Team Arrangements, referenced in the RFQ by Commerce, provided:

How do GSA Schedule Contractor Team Arrangements (CTAs) differ from Prime Contractor/Subcontractor Arrangements under Schedule contracts?

In prime/sub arrangements, the relationship is very tightly defined and controlled by the prime contractor; whereas in CTAs, the roles and responsibilities are defined by the team, as accepted by the government. The following chart summarizes key differences:

<b>Contractor Team Arrangement (CTA)</b>	<b>Prime Contractor/Subcontractor Arrangement</b>
Each team member must have a GSA Schedule contract.	Only the prime contractor must have a GSA Schedule contract.
Each team member is responsible for duties addressed in the CTA document.	The prime contractor cannot delegate responsibility for performance to subcontractors.
Each team member has privity of contract with the government and can interact directly with the government.	Only the prime contractor has privity of contract with the government and can interact with the government. The prime contractor is responsible for its subcontracting activities. (Ordering activities are encouraged to specify in the Request for Quotation (RFQ) that the use of subcontractors requires prior approval by the ordering activities.)
The ordering activity is invoiced at each team member's unit prices or hourly rates as agreed in the task or delivery order or GSA Schedule BPA.	The ordering activity is invoiced in accordance with the prime contractor's GSA Schedule contract, including any applicable price reductions.
Total solutions, otherwise impossible under individual GSA Schedule contracts, can be put together quickly and easily.	The prime contractor is limited to the supplies and/or services awarded on its GSA Schedule contract.

Appeal File, Exhibit 1.

5. JRTI held an FSS contract for the selling of computer equipment to the Government. JRTI did not have a provision for leasing in its FSS contract. Appellant, Key Federal Finance, held an FSS contract for leasing of computer equipment to the Government. Since

Commerce wanted to lease the computer equipment, and because JRTI's FSS contract did not provide for such leasing, JRTI and appellant agreed to enter into a teaming arrangement to provide the sought-after products and services to the Government.

6. Key's FSS contract for leasing stated in part:

#### CONTRACTOR TEAM ARRANGEMENTS

Federal Supply Schedule Contractors may use "Contractor Team Arrangements" (see FAR [Federal Acquisition Regulation] 9.6) to provide solutions when responding to customer agency requirements. The policy and procedures outlined in this part will provide more flexibility and allow innovative acquisition methods when using the Federal Supply Schedules. See the additional information regarding Contractor Team Arrangements in this Schedule Pricelist.

Key Federal Finance agrees to lease equipment listed on GSA schedule contracts held by contractors other than Key Federal Finance provided that the other contractor can reach a Teaming Agreement with Key Federal Finance on terms and conditions satisfactory to Key Federal Finance. The Government agrees that Key Federal Finance may enter into such Teaming Agreements without any prior consents or approvals by the Government.

Appeal File, Exhibit 13 (emphasis omitted).

7. Key's FSS contract contained two leasing options. Option 1 was for orders issued under the negotiated terms and conditions of the FSS contract. Orders placed under Option 1 were subject to a termination provision that incorporated the FAR's termination for convenience and default clauses. Option 2 was for ordering offices that desired to negotiate other pricing terms. Under Option 2, an agency could terminate a lease for convenience or at no cost for non-appropriation of funds. Appeal File, Exhibit 13.

8. In response to the RFQ, JRTI submitted its proposal to Commerce. JRTI stated:

James River Technical is a platinum-level partner with SGI and is the primary contact for SGI products and services at NIST [Commerce]. Because of our experience and relationship at NIST, we fully understand the intent of the proposed computer upgrade and the goal of replacing the three aging 32 CPU [central processing unit] SGI servers with a single 96 CPU system at a reduced overall cost of ownership. The quoted system reduces the support costs and

allows us to provide this upgrade at a cost only slightly higher than the current support contract. NIST will enjoy a significant performance improvement as a benefit of this upgraded system.

Included in JRT's proposal are several leasing options for the requested equipment and JRT is willing to explore additional options at your request. The following options have been presented for your consideration:

- LTO [lease to ownership]-Lease to own as requested in your RFQ
- LWOP [lease with option to purchase]-Lease with option to own (fair market lease) which allows for lower monthly payments and maintains the flexibility of future technology upgrades
- Step lease-LWOP lease with a larger initial payment to reduce the monthly lease costs.

James River Technical has partnered with Key Federal Finance to provide its leasing options. Key has had a long-term relationship with SGI and has been very successful in providing these programs to a number of government agencies.

Appeal File, Exhibit 7.

9. Attached to the JRTI submittal was the teaming agreement and Key's detailed proposal for leasing to Commerce dated July 3, 2003. Key's detailed proposal stated that Key was offering Commerce the lease under option 2 of its FSS contract, that Commerce agreed that its order would include certain language incorporating Key's proposal, and that Key and Commerce had certain obligations regarding payment.

10. During the period of time between issuance of the RFQ and award of the contract, numerous e-mail communications regarding the terms and conditions of the procurement were exchanged between Commerce and JRTI. Appeal File, Exhibits 2, 3, 4, 8-12, 14. The record does not reflect any Key involvement in these exchanges.

11. On July 16, 2003, Commerce requested clarifications of various aspects of the JRTI proposal and pointed out that the teaming arrangement with Key Federal Finance did not include all elements required by the solicitation. Commerce listed the items that needed to be added to the teaming agreement. Appeal File, Exhibit 10.



12. In response to Commerce's request, modifications were made to the teaming agreement of July 3, 2003 (Finding 9), and a new teaming agreement between JRTI and Key was executed on July 24, 2003. JRTI was designated the "Prime Contractor/Seller" and Key was designated the "Buyer." The teaming agreement along with a number of other documents were resubmitted to Commerce by JRTI on July 25, 2003. Key's proposal to Commerce that was part of the initial submittal on July 3, 2003, was not resubmitted. The revised Teaming Agreement stated:

**1.1** Prime Contractor [JRTI] shall take principal charge of preparing and submitting the proposal (the "Proposal") in response to the RFP and performing the work entailed in the resulting prime contract (the "Program"). Buyer [Key] shall prepare those portions of the Proposal relating to, and provide the services entailed in, the services described in Exhibit A [set forth below], subject to the assignment of such additional responsibilities by mutual agreement between the parties from time to time. Buyer shall submit its portion of the Proposal to Prime Contractor (including all necessary schedules relating to price, terms and condition, etc.) no later than July 7th, 2003, and Prime Contractor shall have the final authority for the preparation, evaluation, and submission of the Proposal to NIST. Prime Contractor shall direct and coordinate all contacts with NIST pertaining to the preparation of the Proposal.

**1.2** The Proposal submitted to NIST shall contain and identify Buyer's contribution to the Proposal and shall also indicate that Prime Contractor intends to team with Buyer for the services identified as Buyer's responsibility in Exhibit A hereto. Nothing contained in this Agreement shall preclude or affect NIST's ability to procure directly from either Team Member its respective portion of the requirements contemplated herein.

.....

**2.1** The division of work and responsibility between the Team Members in executing the program is set forth in Exhibit A hereto. Cost or pricing data will be submitted in accordance with the requirements as specified in the RFP. The cost or pricing data provided by Buyer shall be presented in the format prescribed by NIST.

.....

**5.1** This Agreement does not constitute a partnership, joint venture, or any other form of business association. The relationship between the Team members shall be that of a contractor team arrangement in accordance with GSA regulations. Neither Team Member is the agent of the other, and except as expressly provided in this Agreement, neither may bind the other. No profits, losses, or costs will be shared under any provision of this Agreement. There are no fees being paid by either of the Parties to the other which are not fully disclosed in this Agreement.

Appeal File, Exhibit 14.

13. The parties set out their responsibilities in “Exhibit A” as follows:

This Exhibit will set forth the responsibilities of the parties. Any modifications to this proposal are subject to mutual written approval.

*Prime Contractor/Seller:* James River Technical (JRT)

*Buyer:* Key Federal Finance, or its assigns (KFF)

*Customer:* NIST

*Customer Contract:* JRT GSA Schedule for equipment (GS-35F-0392L) teamed with KFF GSA Schedule for leasing (GS-35F-0346L) as described in the attached JRT-SGI-NIST proposal.

Please note that leasing terms, conditions and responsibilities are defined in the KFF GSA Schedule.

*Structure:* Seller will sell and assign to Buyer good and unencumbered title to the equipment described in the User Contract and the contract lease or service contract payments relating thereto. The closing will occur approximately 30 days after Buyer receives the unconditional acceptance by the User of the equipment.

*Equipment Cost:* Approximately \$1,434,416.38

- Lease Rates:* Proposals with requested leasing options and pricing would be submitted to Customer by Prime Contractor.
- .....
- Maintenance:* The equipment will remain under a Prime Contractor sponsored maintenance program for the full duration of the User Contract.
- Seller Liaison:* Seller will serve as Buyer's representative and agent with respect to issues involving the equipment, and will serve as a Liaison between the User and Buyer for all service, warranty or other claims made by the User in connection with the equipment.
- Remarketing:* Seller will provide for the reinstallation and removal of the equipment in the event of early termination of the User Contract and will assist buyer through a best efforts remarketing covenant.
- Insurance:* Seller will keep in force all-risk property and liability insurance policies naming Buyer and its assigns as loss payee and additional insured. Or may purchase such insurance from Buyer.
- Taxes:* Seller will be responsible for payment of all applicable federal, state and local taxes for the duration of the User Contract.
- Right to Finance:* Buyer will have the exclusive right to provide financing for all equipment ordered under the User Contract, including all amendments, modifications, and extensions, and by its execution and return of this letter or a telecopy hereof, Seller hereby grants Buyer such right.

*Ordering Procedures:*

When NIST expresses an interest in leasing a product(s), the Contract[ing] Officer will provide the following information to the Prime Contractor:

- (i) Which product(s) is (are) required.
- (ii) The required delivery date.
- (iii) The proposed lease plan and term of the lease.
- (iv) Where the product will be located.
- (v) Description of the intended use of the product.
- (vi) Source and type of appropriations to be used.
- (vii) Agreement to assign payment stream to Buyer.

Appeal File, Exhibit 14.

14. Based on the submission, Commerce on July 31, 2003, issued an order to JRTI in the amount of \$455,000 for the “lease to own” of computer equipment for the base period of September 1, 2003, to September 30, 2004, and the option periods of October 1, 2004, to September 30, 2005 (Option 1), and October 1, 2005, to September 30, 2006 (Option 2). Appeal File, Exhibit 16. The order stated, “This is a firm-fixed-price lease, with an option to purchase, of the items referenced in the Schedule section of this delivery order.” *Id.* The order also referred to the “Contractor Teaming Arrangement between James River Technical, Inc. and Key Federal Finance[.]” *Id.* The order did not incorporate the terms and conditions of Key’s proposal dated July 3, 2003. See Finding 9.

15. Upon receipt of the order, the executive vice president of JRTI sent an e-mail communication to Commerce stating:

I have done a quick review of the Purchase Order and I do not see any language which addresses the assignment of lease payment stream to Key Federal Financial. I had assumed that such would be indicated in the body of the Purchase Order. Please give me a quick read on this.

Appeal File, Exhibit 17.

## 16. Commerce replied:

Since the award can only be made to one company, I asked, in the solicitation, that the proposal specify which company would be the [P]rime Contractor for award purposes since, for any contract, there can only be one company specified as the prime contractor (and, for legal reasons absent an assignment of claims, that is the only company that can invoice and receive payment). The JRT proposal specified that the prime would be JRT. Therefore, the award was made to JRT, but recognized the Contractor Team Arrangement between JRT and KFF.

As noted in the assignment of claims regs, assignment of claims can be made to a financial institution. The regs say that the Contractor can pursue an assignment of claims for a particular contract awarded to them. (“Contractor” is a post award word . . . companies are referred to as “offerors” in the preaward phase.) Also, before award, the Government would not ask for assignment of claims paperwork because no Contractor would have been selected before an actual award is made, and it would pose unnecessary administrative burden and cost on unsuccessful offerors. The Government always strives to eliminate or reduce incurrence of unnecessary costs for unsuccessful offerors.

I can do a mod to the order, if need be, to recognize KFF’s GSA Schedule Contract Number as part of the Contractor Team Arrangement. I’d have no problem doing that. I’d have to do that as Modification No. 0001 to the order, though, since I can’t modify the format or content of the original order that has already been generated. Let me know if that option appeals to you.

Insofar as we get the assignment of claims documentation that is required by FAR 32.8, there should be no problem, at all, in us executing the assignment of claims. We do these routinely, and by DOC [Department of Commerce] regulation, we have to have them reviewed by the DOC Office of General Counsel, Contracts Law Division. They’re simply going to do the same thing I do when I receive it . . . make sure it complies with FAR 32.8 requirements.

It may take 30 days to get an assignment of claims done after we get the required documentation, so I’d request that it be sent to us as soon as possible.

17. JRTI answered Commerce that Key was concerned --

that there was no reference to their “proposal” (aside of [sic] the teaming agreement) in the Purchase Order. They believe that such is a requirement for the use of the Key GSA schedule. I do not purport to be an expert on such technicalities so I am seeking your guidance in such. I understand that the assignment documents do come after the [Purchase Order].

Appeal File, Exhibit 19.

18. On September 2, 2003, JRTI executed a “Notice of Assignment,” assigning moneys due or to become due under the contract, to Key. Appeal File, Exhibit 20. The actual “Instrument of Assignment” between JRTI and Key assigned all monies due under the contract to Key and further stated that Key “shall not be held responsible for the performance of any obligations of JRTI under the contract.” *Id.* The contracting officer signed an acknowledgment of the assignment on September 10, 2003. *Id.*

19. Although this assignment was executed, the delivery order was not modified to include Key as the contractor. As set forth above, JRTI was listed as the prime contractor. On July 30, 2004, Commerce notified JRTI that it would not exercise its option for 2005, and that the lease would terminate on September 30, 2004. Appeal File, Exhibit 33. Commerce provide the same notice to Key on August 4, 2004. *Id.*, Exhibit 34. JRTI and Key responded that this action was a termination for convenience. *Id.*, Exhibit 36. On September 30, 2004, Commerce advised JRTI that the order was being terminated, for non-appropriation of funds, at no cost to the Government. *Id.*, Exhibit 40. This termination was purportedly exercised under the authority of a clause in Key’s FSS contract. Key maintained that the termination for non-appropriation was erroneous. Later, Commerce wrote JRTI that the termination was also appropriate on other grounds. *Id.*, Exhibit 46. Key then filed its claims with both Commerce and GSA.

#### Contentions of the Parties

Commerce argues for dismissal on the basis that Key is not a “contractor” authorized to file an appeal under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (2000). Commerce claims that the structure of the transaction made JRTI the contractor and the only company in privity of contract with the Government.

Key replies that the delivery order incorporated the teaming arrangement. Key claims that this placed it in privity with Commerce. Key maintains it has standing to file this appeal.

In the alternative, Key requests reformation of the contract to reflect the intent of the parties, which it alleges was that Commerce and Key would be in privity.

### Discussion

In deciding this motion to dismiss for lack of jurisdiction, we accept as true the facts alleged by the non-moving party (appellant). If, based on those facts, Key might prevail, we must deny the motion. *W. R. Cooper General Contractor, Inc. v. United States*, 843 F.2d 1362, 1364 (Fed. Cir. 1988); see *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 747 (Fed. Cir. 1988). However, appellant bears the burden of proving jurisdiction. *Reynolds*, 846 F.2d at 748.

The issue here is whether Key is a contractor within the meaning of the CDA. As a general rule, the contractor is the party named on the contract with the Government. Under the CDA only that contractor can bring an action against the Government before this Board. 41 U.S.C. § 606. The CDA defines a “contractor” as “a party to a Government contract other than the Government.” *Id.* § 601(4). Waivers of sovereign immunity are strictly construed. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Thus, subcontractors are generally barred from filing a direct appeal under the CDA. *United States v. Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983). However, there have been exceptions to this rule. For example, in *D & H Distributing Co. v. United States*, 102 F.3d 542 (Fed. Cir. 1996), the court found that the third-party beneficiary could enforce the payment provision of the contract in a direct action against the Government. In another case, the court found privity between the Government and a subcontractor where the prime contractor was determined to be a mere government agent. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954). In *Kern*, the contractor was acting as a purchasing agent for the Government, the contract clearly stated the agency relationship, and the contract made the Government directly liable to the subcontractor for the purchase price. As in *Kern*, the relationship between Commerce and Key went substantially beyond that of the normal contractor/subcontractor.

Commerce sought to lease and possibly purchase computer equipment solely from vendors that held existing FSS contracts. It sent its request for a contract quotation to JRTI and other vendors. However, JRTI’s FSS contract did not permit leasing, a requirement of the solicitation. Commerce was aware that some offerors would have to enter into teaming arrangements to satisfy its requirements. Thus, the solicitation specifically stated that if an offeror’s FSS contract did not contain leasing provisions, that offeror would have to enter a “GSA FSS Contracting Teaming Arrangement” with one or more additional contractors whose FSS contracts would permit leasing to Commerce. Commerce dictated the requirements of the teaming arrangement, including identification of the company that would be considered the “prime” contractor, the “roles, responsibilities, and obligations,” of each

teaming party, the processes for orders, the warranties and liabilities between the parties, the terms that would survive a termination, and the method for handling disputes. Commerce needed to approve the teaming arrangement before award.

Commerce also notified offerors that they should visit the GSA website for additional guidance on teaming arrangements. That website informed the offerors of the distinction between teaming arrangements and prime contractor/subcontractor agreements. That website stated that under a prime contractor/subcontractor arrangement, only the prime contractor has privity of contract and can interact with the Government, while under a contractor team arrangement, each team member has privity and can interact with the Government. We find that by reference to this website, Commerce incorporated this representation into the solicitation.

With this background, Commerce placed the order (contract) to lease that is the subject of these appeals. The order identified JRTI as the “prime contractor.” However, Commerce later stated that either company could have been identified as the “prime” and that it would have awarded the contract to whichever party had been designated as prime contractor in the teaming arrangement. Finding 16. The order made specific reference to the “Teaming Arrangement between James River and Key Federal Finance.” Subsequently, Commerce recognized the assignment to issue all money due under the contract to Key. Ultimately, the contract was terminated by GSA’s reference to a clause in Key’s FSS contract.

The circumstances of this case indicate that 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 this 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.

The Board has jurisdiction over this appeal.

#### Decision

Commerce’s motion is **DENIED**.

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JAMES L. STERN  
Board Judge



We concur:

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STEPHEN M. DANIELS  
Board Judge

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CATHERINE B. HYATT  
Board Judge