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FEATURE COMMENT: Subcontractor Data Rights Challenges: A Need For Clarity

Life as a Department of Defense prime contractor is difficult, even on a good day. For DOD subcontractors it is often worse, but at least subs do not have to deal with a prime's headstrong contracting officer. Or so they think, until there is a data rights challenge. Then, to all subcontractors' dismay, they, not the primes, get the challenge directly from the CO. They, not the primes, have to slog through the iterative challenge process. They, not the primes, have to submit a certified claim, disguised as a sub's final response to the CO's challenge. And they, not the primes, get the adverse final decision directly from the CO, all as described in Defense Federal Acquisition Regulation Supplement 252.227-7037 "Validation of Restrictive Markings on Technical Data" and the similar validation provision for computer software, 252.227-7019.

Wait, what happened to privity of contract, which we learned from day one does not exist between the Government and a subcontractor?

A good question, as privity seems to have been dispensed with. Everything in -7037 is directed separately to the subcontractor as well as the prime, e.g., the CO "may request the Contractor *or subcontractor* to furnish a written explanation for any restriction asserted ...." (7037(d)(1)); "The Contractor *or subcontractor* shall submit such written data as requested ...." (id.); "the Contracting Officer shall send a written challenge notice to the Contractor *or subcontractor* ...." (7037(e)(1); "the Contracting Officer will issue a final decision to the Contractor *or subcontractor* ...." (7037(f)). (emphasis added).

In turn, this suggests that a subcontractor, not a prime, could appeal the CO's adverse final decision directly to a Board or to the Court of Federal Claims. This makes a great deal of sense, given all the other arduous direct dealings between the sub and the CO. More persuasively, the technical data validation clause indicates that if the subcontractor does not appeal, it is out of luck:

> If the Contractor *or subcontractor fails to appeal, file suit, or provide a notice of intent to file suit* to the Contracting Officer within the ninety (90)-day period, the Government may cancel or ignore the restrictive markings, and *the failure of the* Contractor or *subcontractor to take the required action constitutes agreement with such Government action.*

252.227-7037(g)(2)(ii). (emphasis added).

Yet, common sense and these words notwithstanding, the most prudent course is for the subcontractor *not* to appeal directly, but instead to pursue the typical "indirect appeal" in the prime's name (with the prime's permission) unless there is no alternative. This is because of one peculiar sentence in each validation clause that makes little sense, confuses contractors and the Government alike, and begs for revision and clarity. Here is DFARS 252.227-7037(k):

> Privity of contract. The Contractor or subcontractor agrees that the Contracting Officer may transact matters under this clause directly with subcontractors at any tier that assert restrictive markings. *However, this clause neither creates nor implies privity of contract between the Government and subcontractors.*

(emphasis added).

DFARS 252.227-7019(c) is comparable:

> The Contractor agrees that the Contracting Officer may transact matters under this clause directly with subcontractors or suppliers at any tier .... *Neither this clause, nor any action taken by the Government under*

> *this clause, creates or implies privity of contract between the Government and the Contractor's subcontractors or suppliers.*

(emphasis added).

Although starkly inconsistent with the body of the technical data validation clause, this caveat is consistent with a multitude of decisions holding that, absent privity, a subcontractor cannot pursue litigation at a Board or the COFC under the Contract Disputes Act.

The most pertinent of these cases for data rights purposes is the 2014 Armed Services Board of Contract Appeals decision in *Binghamton Simulator Co*., ASBCA 59117, 14-1 BCA ¶ 35,715; 56 GC ¶ 317, in which the Board considered the privity question in the context of the validation provisions for computer software in DFARS 252.227-7019, which are similar, though crucially not identical, to the validation provisions for technical data in -7037. The Board found there was no privity to support a direct appeal under that clause:

> "[R]are, exceptional" circumstances must exist to either create privity of contract between the subcontractor and the government or to establish some other-than-privity basis allowing the subcontractor to appeal directly to the Board. [*U.S. v. Johnson Controls, Inc.*, 713 F.2d 1541, 1556 (Fed. Cir. 1983)]; see, e.g., *Johnson Controls*, 713 F.2d at 1551-52 (privity where prime contractor acts as mere government agent), at 1552-56 (direct subcontractor appeals pursuant to terms of prime contract); *Rahil Exports*, [ASBCA 56832,] 10-1 BCA ¶ 34,355 at 169,647 (implied-in-fact contracts). However, *no such "rare, exceptional" circumstances are presented here.* BSC does not allege, and nothing in the record indicates to us, that BSC was in privity with the government *or that the terms of the contract somehow provided for BSC to be able to appeal directly to the Board.*

Id. at 174,870–71 (emphasis added).

The Board's decision *arguably* is defensible—and that is a stretch—but only as applied to the -7019 software validation clause, because that provision is different in wording, though certainly not intent, from the -7037 technical data validation clause. First, the software clause articulates all affirmative actions and obligations only in terms of "the Contractor," without the consistent and repetitive references to "the Contractor or Subcontractor" of -7037. This almost certainly is a consequence of the software clause's definition of "Contractor," which muddies things by encompassing subcontractors: "As used in this clause, unless otherwise specifically indicated, the term *Contractor* means the Contractor and its subcontractors or suppliers." 252.227-7019(a)(1). This could have led the Board to conclude that only the prime contractor, acting on behalf of "the Contractor and its subcontractors," can pursue an appeal. There is, however, no such homogenizing definition in -7037, which clearly separates primes and subs. Thus, had the Board compared the two clauses, *Binghamton* may have been decided differently, as there is no reason to credit this definitional variation with any substantive consequence.

Second, and most importantly, unlike the software provision, the technical data validation clause contains exactly what the Board was looking for but could not find (or infer) in *Binghamton* —i.e., contract terms that "somehow provided for [the subcontractor] to be able to appeal directly to the Board." The subcontractor's appeal right is expressly contemplated in -7037(h)(2):

> If the Contractor *or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit*, the Contracting Officer's decision is not sustained —
>
> (i) The Government shall continue to be bound by the restrictive marking ….

(emphasis added).

Third, the Board appears not to have been made aware of the "legislative history" of -7019, which might have influenced the decision, but which in all events reinforces the point that for technical data challenges the subcontractor is the claimant. In 2010, DOD proposed to (but did not) merge the software and technical data validation provisions, stating (at 75 Fed. Reg. 59411):

> *[I]ntellectual property rights create a direct relationship between the Government and subcontractors.* Intellectual property rights are one area in which there is *a direct legal relationship created between the Government and subcontractors, at any tier.* The Government's license rights are granted directly from the subcontractor, as the owner of the deliverable intellectual property; the Government and subcontractor are allowed to transact business directly with one another….
>
> *Note privity of contract with subcontractors, at*

> *any tier, and suppliers is mandated by 10 U.S.C. 2321 for technical data.* Further, both the current 252.227-7019 and the current 252.227-7037 clause contain a privity of contract provision for subcontractors, at any tier, and suppliers ….

(emphasis added).

DOD's reference to 10 USCA § 2321 is to subsection (h) of the statute, which contemplates direct challenges by DOD to subcontractors' technical data rights assertions, and makes those assertions a CDA claim:

> If a claim pertaining to the validity of the asserted restriction is submitted in writing to a contracting officer by a contractor or subcontractor at any tier, such claim shall be considered a claim within the meaning of chapter 71 of title 41.

The DOD statute was influenced by Congressional activity in 1984. As part of S. 2489, the proposed "Small Business Competition Enhancement Act," Congress contemplated codifying the right of a "contractor or subcontractor" to submit a claim and clarifying the privity issue. The Senate's discussion reflected Congressional perception that subcontractors had an independent right to a direct appeal, as noted in Senate Report No. 98-423:

> THIS PROVISION, AND ALL OF SECTION 7 OF S. 2489, AS REPORTED, WAS MODIFIED TO PROVIDE DIRECT GOVERNMENTAL ACCESS TO A SUBCONTRACTOR THAT HAS ASSERTED A PROPRIETARY DATA RIGHT, WHICH HAS BEEN PASSED-THROUGH BY THE PRIME CONTRACTOR TO THE GOVERNMENT. *THE COMMITTEE RECOGNIZES THAT THE PRIVITY OF CONTRACT, WHICH IS GENERALLY MAINTAINED IN THE GOVERNMENT CONTRACT ARENA, IS BEING CIRCUMVENTED,* BUT BELIEVES THAT SUCH DIRECT ACCESS ELIMINATES A BURDEN ON THE PRIME CONTRACTOR TO VERIFY THE VALIDITY OF EVERY RESTRICTION BEING PASSED-THROUGH, AND *ELIMINATES THE DEPENDENCE OF THE SUBCONTRACTOR ON HAVING THE PRIME CONTRACTOR PLEAD ITS CASE.*

S. Rep. 98-423 at 5384. (emphasis added).

These Congressional debates took place around the same time Congress passed the Department of Defense Authorization Act, 1985, adding DOD's validation statute at 10 USCA § 2321. They also led, meanderingly, through the former 41 USCA § 235d to today's civilian agency validation statute, 41 USCA § 4703, "Validation of Proprietary Data Restrictions." This civilian statute contemplates direct engagement by COs with "a contractor or subcontractor at any tier," including issuing final decisions directly to subcontractors and, like 10 USCA § 2321, providing that a subcontractor's response to the CO is a CDA claim requiring certification, and thus presumably a right to appeal from a denial of that claim. Notably, there is no denial of privity in § 4703. Equally notably, DOD's challenge steps of 252.227-7037 are patterned after § 4703 and its predecessor. Ironically, although the basic FAR data rights clause 52.227-14(e) invokes and implements 41 USCA § 4703, it does not refer separately to contractors and subcontractors.

In sum, a subcontractor should today have a right under the DOD technical data validation clause to appeal directly an adverse (aren't they all) data rights final decision, notwithstanding the mystifying no-privity clause. *Binghamton,* even if correctly decided, is entirely distinguishable. Moreover, if the Board or the COFC were to confront the software validation clause today and were armed with comprehensive briefing, there is a reasonable chance, perhaps a likelihood, that *Binghamton* would not stand in the way of a direct subcontractor appeal for software challenges. It shouldn't.

Until those days arrive, however, the most prudent course for a subcontractor is an indirect appeal in the name of the prime. This avoids the problem and the debate—avoids it unless the prime balks at sponsoring the appeal, a rare but possible event. As a practical matter, at that point one would have nothing to lose and a great deal to gain by pursuing the appeal directly.

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