

Avoiding Post-Award Agreement Violations

By D. Joseph Darr

In light of the complexity and magnitude of many federal government construction projects, a contractor may need to enter into a joint venture, partnership or other performance-vehicle agreement with another entity long after the project is awarded. Additionally, given the increasing duration of construction projects, changed circumstances may force a contractor to enter into a post-award agreement to complete the work.

When part of a federal government project, post-award contracts can run afoul of the Assignment of Contracts Act (ACA). In part, the ACA states:

The party to whom the Federal Government gives a contract or order may not transfer the contract or order, or any interest in the contract or order, to another party. A purported transfer in violation of this subsection annuls the contract or order so far as the Federal Government is concerned, except that all rights of action for breach of contract are reserved to the Federal Government.

In other words, “any attempt to transfer a government contract or an interest in a government contract annuls the contract” (*Red Hawk Constr., Inc. v. United States*).

The ACA is designed, among other reasons, “to prevent fraud and multiple claims against the government and to ensure that the government is dealing with an entity that has the legal right to perform, and against whom the United States has recourse” (*NGC Inv. & Dev., Inc. v. United States*). As such, when a contractor intends to execute a post-award contract related to the completion of a federal government project, it must structure the agreement in a way that does not trigger the ACA’s annulment provision.

Based on established case law addressing the ACA, all contractors should take several factors into account prior to executing any post-contract agreements, such as a partnership, joint venture or subcontract.

One of the most important factors to avoid triggering the ACA is whether the original contractor remains “primarily liable” for the performance of the contract. Basically, this means any agreement between the original contractor and a subsequent contractor should state, at a minimum, that the original contractor will remain at least 51 percent responsible for any issues that arise before, during and after project completion.

Similarly, the original contractor must maintain a “predominant role” in the performance of the contract. Typically, this means the contract between an original contractor and the federal government must remain exclusively in the original contractor’s name. Further, the original contractor should include in any agreement with a subsequent contractor that it will have all final decision-making authority over how the project is completed. It also should include that the original contractor’s employees, including the project manager or equivalent position, will have final authority over day-to-day decisions. Specifically delineating these requirements in any future agreement demonstrates the original contractor is not contracting away its right to perform the contract.

It also may be prudent to include in any future agreement that all money received from the contract will be paid into a bank account under the original contractor's complete control. At a minimum, contract proceeds should be deposited into an account that is at least partially controlled by the original contractor.

Finally, during construction of the project, the original contractor and the subsequent contractor must act in a manner that is consistent with the agreement's status as a mere performance vehicle. For example, the original contractor should maintain all communication with the federal government; the subsequent contractor should never directly communicate with the federal government. Additionally, it would be prudent for any written communications between the original contractor and the federal government to be on the original contractor's letterhead and not letterhead that reflects some sort of special relationship between the original contractor and the subsequent contractor.

Contractors can maximize their chances of avoiding application of the ACA by adequately addressing these factors when entering into a post-award contract with another party for the completion of a federal government project. Failure to avoid the ACA could result in the nullification of a contractor's contract with the federal government, which could prevent it from successfully asserting any claims for damages.

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