

CLIENT ALERT

Commercial License Terms May Govern Even Without Contracting Officer Knowledge

Jul.30.2018

On June 27, 2018, in *Appeal of CiyaSoft Corporation*, the Armed Services Board of Contract Appeals held that the government breached the terms of a commercial software license agreement even though the contracting officer (CO) had not even seen that license. Here CiyaSoft appealed a claim asserting that the Army had breached the terms of its license by using more copies of the software than were permitted. The Army had denied the claim, in part, because the writing between the parties contained no terms specifying how the government would secure and protect the software. However, CiyaSoft had included license terms limiting the software's use (i) inside the box containing the CDs with the software, (ii) on a piece of paper inside the software's shrinkwrap, and (iii) in clickwrap that was displayed during the software's installation process. On appeal, the Board found that although the writing between the parties did not include all of the relevant license terms and the CO never saw or discussed those license terms with CiyaSoft, the CO had a duty to inquire about those license terms and the failure to do so imputed knowledge of the licensing terms on the Army. Highlighting the longstanding policy that the government should accept commercial computer license terms that are customarily provided to other purchasers, the Board held that "the government can be bound by the terms of a commercial software license it has neither negotiated nor seen prior to the receipt of the software, so long as the terms are consistent with those customarily provided by the vendor to other purchasers and do not otherwise violate federal law."

After finding that the Army could be subject to CiyaSoft's commercial license terms, the Board then determined that the software was "commercial computer software" under FAR 2.101 because (1) it was developed without government funds, (2) it had been sold to at least one non-governmental entity, and (3) the modifications to the software prior to delivery to the Army did not affect the software's core purpose.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Nicole Owren-Wiest

Partner – Washington, D.C.

Phone: +1 202.624.2863

Email: nowrenwiest@crowell.com

John E. McCarthy Jr.

Partner – Washington, D.C.

Phone: +1 202.624.2579

Email: jmccarthy@crowell.com

Jonathan M. Baker

Partner – Washington, D.C.

Phone: +1 202.624.2641

Email: jbaker@crowell.com

Skye Mathieson

Counsel – Washington, D.C.

Phone: +1 202.624.2606

Email: smathieson@crowell.com

M. Yuan Zhou

Counsel – Washington, D.C.

Phone: +1 202.624.2666

Email: yzhou@crowell.com

Christopher D. Garcia

Associate – Washington, D.C.

Phone: +1 202.688.3450

Email: cgarcia@crowell.com