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Bid Protest Spotlight: Standing, Evaluation Criteria, Debriefing

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(May 5, 2020, 3:40 PM EDT) - This month's spotlight features noteworthy decisions from the U.S. Court of Appeals for the Federal Circuit, the U.S. Government Accountability Office and the U.S. Court of Federal Claims.

- Eskridge & Associates v. U.S.[1] addresses the hurdles associated with establishing prejudice.
- Abacus Technology Corporation[2] discusses an agency's requirement (or lack thereof) to conduct a price realism analysis.
- Sayres & Associates Corporation[3] addresses an agency's unreasonable substitution of escalation rates.
- NIKA Technologies Inc.[4] provides a helpful discussion of the debriefing rules when an agency permits questions.

Eskridge & Associates

In Eskridge & Associates v. United States, the Federal Circuit affirmed the COFC's decision to dismiss Eskridge's protest for lack of standing. The solicitation was issued in 2018 to provide nurse anesthetists for a U.S. Army hospital.

This was the Army's second attempt to procure these services; the first solicitation, issued in 2016, was canceled in connection with a corrective action. The 2018 solicitation provided that the bids would be evaluated on a lowest price technically acceptable basis, and that the Army would identify the five lowest priced proposals, and then examine them for technical acceptability.

The Army identified the five lowest priced bids, determined that three were technically acceptable and awarded the contract to Ansible Government Solutions LLC. Eskridge protested the decision at the GAO, alleging that the award was unreasonable and contrary to law, and that the evaluation was not performed according to the terms of the solicitation.

The Army ultimately took corrective action to review and document the selection process, and determine whether the awardee met solicitation requirements. The Army reviewed the 10 lowest priced bidders on technical and past performance. Of the five technically acceptable bidders, Eskridge's bid was the highest priced and the Army awarded the contract to Ansible.

Eskridge filed a post-award bid protest with the GAO, alleging a number of protest grounds. The GAO, however, determined that Eskridge was not an interested party and dismissed the protest.

Eskridge filed a complaint at the COFC requesting declaratory relief and that the court direct the award to Eskridge. Eskridge presented the same allegations brought before the GAO.

The court concluded that Eskridge did not have a substantial chance of winning the contract because of the five bidders that the Army considered, Eskridge's bid was the highest price. Eskridge therefore was not an interested party, and lacked standing. Eskridge appealed to the Federal Circuit.

The Federal Circuit affirmed the lower court ruling, finding that Eskridge lacked standing. The court reasoned that even if Ansible had not received the contract, three other, lower priced bidders were in line to receive the award.

Further, Eskridge failed to demonstrate prejudice outside of its allegations that the Army failed to conduct a meaningful price-realism analysis. Eskridge's remaining price-realism argument was based upon terms in the 2016 solicitation that were not actually incorporated into the 2018 solicitation. Eskridge could therefore not establish why rebidding would be required.

Key Takeaway

Tenacity aside, prejudice is essential. As evidenced in Eskridge, where the protester could not defend a theory that enabled it to move from fifth to first in line, a protester will not be able to establish standing unless it can show a substantial likelihood that it would have received the contract absent the agency's errors. This challenge is further amplified in a lowest price technically acceptable competition where technical acceptability is confirmed and the award hinges on price.

Abacus Technology

The U.S. Department of the Air Force issued a fair opportunity proposal request, or FOPR, for network and infrastructure support services. The FOPR contemplated that proposals would be evaluated under two evaluation factors, technical and cost/price.

The technical evaluation factor considered three subfactors: technical capability, management and technical experience. The cost/price factor provided that proposals would be evaluated for completeness, reasonableness and unbalanced pricing.

The FOPR also required the Air Force to make a responsibility determination. To assist with this

determination, offerors were asked to submit a compensation plan listing salaries and fringe benefit packages.

Offerors were also instructed to include a discussion of how their proposed compensation package reflected a sound management approach and understanding of the contract requirements, and facilitated recruitment and retention.
The Air Force awarded the task order to Micro Technologies LLC and Abacus Technology Corp. filed a protest with the GAO challenging the agency's best-value tradeoff decision.

Specifically, Abacus alleged that Micro Tech's proposal should have been rated technically unacceptable or assessed a higher risk level due to its unreasonably low price. In response, the Air Force took voluntary corrective action.

During its corrective action, the Air Force determined each proposal was technically acceptable and each was assigned a risk rating of low. The Air Force reawarded the task order to Micro Tech.

Abacus filed a second protest arguing that the Air Force failed to evaluate whether Micro Tech could perform the task order requirements at the low price it proposed. The Air Force moved to dismiss Abacus's protest on the ground that the FOPR did not require the Air Force to conduct a price realism evaluation.

Abacus argued that the language of the FOPR requiring a review of offerors' compensation plans was substantially similar to the text of federal acquisition regulation provision 52.222-46, Evaluation of Compensation for Profession Employees, which has been held to essentially contemplate a price-realism evaluation.

The GAO, however, agreed with the Air Force and found that the cost/price evaluation criteria said nothing about evaluating an offeror's compensation plan or price information for realism. The FOPR only required that the Air Force evaluate prices for completeness, reasonableness and balance.

Key Takeaway

An agency is not required to determine whether a proposed price is unreasonably low or below the cost of performance absent an explicit price realism provision in the solicitation. This case stands for the importance of understanding the price evaluation criteria to determine what exactly is required of the agency.

Sayres & Associates

Sayres & Associates Corp. successfully challenged the U.S. Navy's cost realism evaluation on the grounds that the evaluation of the protester's escalation rate was unreasonable. Sayres and RP Technologies Inc. were the sole offerors in response to a Navy request for proposals, or RFP, to holders of the Navy Seaport-e indefinite delivery, indefinite quantity, or IDIQ, contract.

The RFP contemplated a best-value tradeoff, and the evaluation criteria weighed technical and management, past performance and total evaluated cost. The RFP warned that proposals required substantiating information for any elements affecting cost realism, and that failure to provide that information could result in a cost adjustment.

Offerors were encouraged to provide realistic escalation rates to project future wage increases, but if the proposal lacked substantiating historical rates, the government reserved the right to substitute using current market data.

While evaluating proposals, the Navy noted that Sayres' escalation rate was lower than the industry forecasts for similar services, so it substituted an industry benchmark escalation rate. The Navy's cost analysis added over 5% in total to Sayre's proposed costs.

The source selection authority concluded that RP had a higher technical and past performance rating, and a lower total evaluated cost than Sayres', and awarded the contract to RP.

Sayres filed a bid protest at the GAO, challenging the Navy's cost-realism analysis on the grounds that it unreasonably rejected its proposed escalation rate. Sayres also contested the Navy's assertion that it did not provide substantiating data for its escalation rate, arguing that it provided detailed historical data of salaries and their increases over a five-year period. The Navy countered that the historical data Sayres provided was unverified.

The GAO concluded that Sayres did provide five years of data, which articulated a basis for its escalation rate. The GAO determined that the record did not show that the Navy conducted a meaningful assessment of Sayres escalation rate. Instead, the Navy determined the rates were below the IHS rate and stated in a conclusory fashion that Sayres did not provide substantiating data.

The Navy argued that Sayres nevertheless was not prejudiced, because RP still had a superior technical score. The GAO disagreed, and found that Sayres had been prejudiced by the Navy's evaluation, because absent the Navy's tinkering with the escalation rate, Sayres would have had a superior total evaluated cost, and that would have required the Navy to conduct a true tradeoff determination.

Key Takeaway

Source selection authorities cannot reject offerors' substantiating information in a conclusory fashion. If an offeror provides information to justify its pricing, an agency must conduct a meaningful and well documented review of the data. That said, to the extent that a solicitation requires substantiating information, we encourage clients to ensure the data submitted is verifiable and complete.

NIKA Technologies

NIKA Technologies Inc. filed a complaint at the COFC following refusal by the U.S. Army Corps of Engineers to authorize a competition in contracting, or CICA, stay while NIKA's post-award bid protest

was pending at the GAO. NIKA argued that its protest was timely and triggered an automatic stay pursuant to Title 31, Section 3553(d) of the U.S. Code. The Corps, on the other hand, argued that NIKA's protest was untimely and the Corps was thus not required to stay performance.

The contract at issue is a multiple-award, IDIQ contract to provide services for the Corps' Operation and Maintenance Engineering and Enhancement Program. On Feb. 27, the Corps informed NIKA that its corporate experience was unacceptable and it would not be selected for award. The next day, NIKA requested a debriefing.

The Corps acknowledged the request, and NIKA responded with a list of questions on March 3. The Corps sent NIKA a written debriefing letter on March 4, allowing NIKA to submit additional questions within two days of receipt of the debriefing.

The letter explained that the debriefing would be considered closed if questions were not received within two days, but if questions were received, the government would respond within five days, and the debriefing would close upon delivery of the written responses to the additional questions.

NIKA sent the Corps a letter on March 5 stating that it planned to follow up the next day, but on March 7, NIKA informed the Corps that it had no additional questions.

NIKA filed a bid protest at the GAO on March 10, and sought an automatic CICA stay. The Corps, however, argued NIKA's protest was untimely and refused to implement the CICA stay. NIKA filed a complaint at the COFC challenging the Corp's refusal to stay performance pending a determination on its GAO protest.

The court reasoned that NIKA would be entitled to an automatic stay if its protest was filed within the later of either 10 days after the date of contract award, or five days after a requested debriefing date that when requested, is required. The parties' sole disagreement was which debriefing date is the true debriefing date.

NIKA argued that its decision not to submit additional questions by March 6 meant the debriefing closed on that date. Therefore, its protest filed on March 10 fell within the five-day period. The government argued the debriefing date was March 4, the date the Corps provided the debriefing letter to NIKA.

The court looked to Section 181 of the 2018 National Defense Authorization Act,[5] which implements enhanced debriefings. This legislation modified debriefings under CICA, providing a two-day period in which offerors could submit questions.

The court noted that Title 10, Section 2305(b)(5)(B)(vii) of the U.S. Code provides that a debriefing shall include "an opportunity for a disappointed offeror to submit, within two business days after receiving a post-award debriefing, additional questions related to the debriefing." The court concluded that if no questions were submitted within the two-day period, the debriefing closed at the end of that period.

Further, the court observed that the agency's own letter indicated that the government would consider the debriefing closed if questions were not received within two business days. Therefore, the end of the debriefing period would be March 6, the date by which the debriefing would close if questions were not submitted.

Accordingly, the court determined that NIKA's protest was timely and thus entitled to an automatic stay under CICA.

Key Takeaway

It is well understood that the deadline for filing a protest is within 10 days of award or five days after the close of a requested — and required — debriefing. This opinion defines the boundaries of the enhanced debriefing requirements and addresses the gray areas that arise when questions are being submitted, and answered, by an agency.

There is, however, an adage in the military that (slightly paraphrased) states, "you can either choose to probably be right or certainly be right." In essence, this saying counsels a conservative approach to deadlines: if you have a five-day filing deadline, you know you are safe if you file in four days. While this ruling helps define the boundaries of the filing deadlines, getting the job done early is probably the best approach.

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[1] Eskridge & Associates v. United States, No. 2019-1862, 2020 WL 1870530, at *1 (Fed. Cir. Apr. 15, 2020)

[2] Abacus Technology Corporation, GAO B-417749.2 B-417749.3, Mar. 9, 2020

[3] Sayres & Associates Corporation[3], B-418374, Mar. 30, 2020, 2020 WL 1819896

[4] NIKA Technologies, Inc. v. United States, No. 20-299C, 2020 WL 1922381, at *1 (Fed. Cl. Apr. 16, 2020)

[5] (Pub. L. 115-91, 131 Stat. 1283 (2017))