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Bid Protest Spotlight: Limitations, Timeliness, Cost-Realism

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While the global pandemic may still have still have much of the country on hold, this month's installment of our bid protest roundup makes clear that the federal courts are business as usual, with one decision from the U.S. Court of Federal Claims and two decisions from the U.S. Court of Appeals for the Federal Circuit.

The first decision, Utech Products v. U.S.,[1] reaffirms the limitations surrounding sole-source awards and stands for the proposition that sole-source awards cannot be used as a work-around to replace unsatisfactory incumbents. In order to satisfy the Competition in Contracting Act, agencies must consider all potential vendors, including the incumbent, regardless of the quality of the incumbent's performance.

The second and third decisions deal with last of the protests stemming from the U.S. Department of Defense's $17.5 billion 2018 Encore III awards. Inserso Corp. v. U.S.[2] expands the bounds of the long-standing Blue & Gold Fleet protest timeliness rule. While Blue & Gold Fleet LP v. U.S. originally held that protesters must raise challenges related to patent errors in the solicitation prior to the close of bidding, Inserso expands that rule to apply to challenges beyond the language of the solicitation, including organizational conflicts of interest.

Finally, Agile Defense Inc. v. U.S.[3] is a reminder of the wide latitude agencies have in conducting cost-realism evaluations, even where the solicitation sets forth a specific evaluation methodology the agency intends to use, so long as the solicitation is not written in a manner than limits the agency to that specific methodology.

Utech Products

In 2016, the U.S. Department of Veterans Affairs contracted with Four Points Technology LLC to provide gastrointestinal electronic- medical-records, or GI EMR, software for the VA's Virginia and North Carolina region. In turn, Four Points subcontracted the actual GI EMR software, EndoSoft, from Utech Products, d/b/a EndoSoft.

However, shortly after implementation of the EndoSoft GI EMR system, users began experiencing significant technical issues, including the unexplained deletion of patient records.

Following several reports of software glitches, the VA decided not to continue with EndoSoft and opted not to exercise additional option years on the Four Points contract.

In an effort to find a viable replacement for EndoSoft, the VA conducted market research and determined that there was only one other suitable GI EMR vendor. The VA's conclusion was based largely on concerns regarding potential vendors' ability to extract data from the legacy EndoWorks system.

The VA found that of 179 potential GI EMR vendors, only two were authorized to use the proprietary data export tool necessary to extract patient data from the legacy system. Of those two vendors, the VA found that one was more focused on clinical settings, as opposed to the VA's nonclinical needs, leaving only one viable vendor, ProVation Medical Inc.

In August 2019, the VA issued a justification and approval for the sole-source award to ProVation, citing its data mitigation concerns and issues with EndoSoft's performance on the incumbent contract. In response, EndoSoft sent the VA an email questioning the justification and approval on the grounds that it also had a suitable data migration tool.

Nevertheless, the VA proceeded with the sole-source award, and EndoSoft brought this protest to the Court of Federal Claims alleging that the VA's justification and approval for its sole-source award to ProVation was arbitrary and capricious, and in violation of the Competition in Contracting Act.

After briefing and a hearing on the merits, the court agreed with EndoSoft, holding that the VA's justification and approval was arbitrary. Specifically, the court found that the animating force driving the VA's sole-source award was not a finding of only one viable source, but instead the VA's preference for ProVation over EndoSoft.

The court pointed to the fact that the VA's market research report was premised on EndoSoft's poor performance and consisted almost entirely of a comparison between ProVation and EndoSoft. The court concluded:

The determination that a new contractor could perform better the same functions an incumbent contractor currently performs is insufficient, even if true, to justify a sole-source award.

The court also found that the VA's stated basis for the justification and approval — that only ProVation could use the required data extraction tool — was also flawed because, as EndoSoft pointed out in its email to the VA, EndoSoft was already migrating this data as the incumbent, undermining the VA's claim that only ProVation could migrate the data.

Not only did the court take issue with the VA's failure to examine whether it would be difficult for other vendors to obtain a license to use the required data extraction tool, but it also pointed out that even with the data migration tool, ProVation had no means to actually incorporate the legacy EndoSoft data into its own software, creating a gap in patient records that would require manual data entry.

Finally, in a classic twist worthy of a black-and-white courtroom drama, after briefing, the government revealed that it had learned a third company had access to the data extraction tool.

During a hearing on the merits, the contracting officer argued that because the third company did not have a stand-alone medical records system, it would not be a prospective offeror. The court disagreed, however, because access to the tool, not capability to field a stand-alone system, was the minimum

agency need.

Takeaway

Utech serves as a reminder to all that preference for a specific vendor, even where that preference is justified, is not an adequate basis on which to forego competitive procurement procedures. While EndoSoft's performance on the incumbent contract surely would have eliminated it from a competitive follow-on procurement, agencies cannot use the Competition in Contract Act's sole-source exception[4] to avoid having to actually conduct that follow-on competition.

Further, although not relevant to the merits of the case, EndoSoft originally filed its protest at the U.S. Government Accountability Office, but its protest was dismissed because EndoSoft failed to file its comments on the agency report by the due date, rendering its protest grounds abandoned.

This serves as a useful reminder to all protesters at the GAO that due dates are strictly observed. Although the GAO may alter its filing deadlines if a party provides adequate notice and shows good cause, it will not hesitate to dismiss a protest if the protester fails to file its comment on time. Litigants at the GAO should scrupulously track and observe deadlines for all filings.

Inserso

In March 2016, the Defense Information System Agency, or DISA, issued the Encore III solicitation to award several indefinite delivery, indefinite quantity contracts under which offerors would provide information technology service through fixed-price or cost-reimbursable task orders.

The solicitation divided the competition into two tiers: one for full and open competition, and the other set aside for small businesses. DISA planned to award 20 contracts in each tier.

The solicitation provided that small businesses could compete in both competitions, and participate in joint ventures or partnerships, but could ultimately receive only one award. Although Inserso competed only in the small business tier, other small businesses competed in both tiers.

Initial proposals in both tiers were due in October 2016. However, the timing of the two competitions diverged significantly shortly thereafter.

In the full and open tier, DISA notified successful and unsuccessful bidders in early November 2016 and completed the debriefing process less than a week later. In the small business tier, DISA conducted extensive discussions and did not request final proposal revisions until April 2018.

Bidders were notified of awards in September 2018, and debriefings followed.

After evaluation, Inserso was ranked 23rd and thus did not receive one of the 20 set aside awards. In its debriefing, Inserso received the total evaluated price for the 20 successful offerors, as well as previously undisclosed information regarding how DISA evaluated proposal costs. Inserso noted that several awardees in the small business tier had competed previously in the full and open competition.

Inserso asked DISA whether those entities received debriefings with similar detail following the full and open competition in November 2016. DISA acknowledged that all unsuccessful bidders in both competitions received similarly detailed cost information in their debriefings.

Based on this information, Inserso filed a protest at the Court of Federal Claims, alleging that the debriefing given to small businesses in the full and open tier provided those entities with an unfair competitive advantage denied to small businesses that only competed in the set aside tier. Inserso argued that this created an organizational conflict of interest, or OCI, and violated regulations prohibiting disparate treatment of bidders.

The court ultimately denied Inserso's protest, finding that Inserso was not prejudiced by the release of information. Inserso then appealed to the Federal Circuit.

Instead of reviewing the Court of Federal Claims' ruling on lack of prejudice, the Federal Circuit found alternative grounds on which to deny Inserso's protest. The majority held that pursuant to the Blue & Gold Fleet rule, Inserso's claim was time barred.

Blue & Gold Fleet established that where a party has the opportunity to object to any patent error in the solicitation and fails to do so prior to the close of bidding, it waives its ability to raise that objection in a subsequent protest.

Here, the majority argued that it was apparent from the solicitation that this type of information would be released in debriefings for each tier, and, as such, Inserso waived its right to protest. As Inserso had the opportunity to raise its concerns about the impact of the full and open competition debriefings from November 2016 prior to the close of bids for the set aside competition in April 2018, it was required to do so then and waived its right to raise the issue post-award.

According to the majority, Inserso should have known that unsuccessful offerors in the full and open tier would have received debriefing information, including the total evaluated prices, because this information is required by Federal Acquisition Regulation 15.503. The court ruled that such knowledge should have been known, because "a defect is patent if it could have been discovered by reasonable and customary care," and offerors in a government solicitation are charged with knowledge of the law.

While the FAR did not require disclosure of the evaluation methodology, the Federal Circuit found that Inserso should have known that the disclosure would likely be included in the debriefing, because a summary of the rationale for award, among other factors, is required by FAR 15.506.

The majority was unpersuaded by Inserso's argument that it should not be charged with knowledge of the full and open debriefings because the GAO publicly dismissed a post-award protest of that competition in February of 2018, prior to the April 2018 closing of bids in the set-aside tier.

This case is also unique for its dissent, which offers a fascinating critique of the Blue & Gold Fleet rule itself, as well as its application in Inserso. The dissent points out the very naming of the Blue & Gold Fleet rule as a "wavier" is incorrect, as a waiver is an equitable defense, which requires that a defendant show that a plaintiff intentionally relinquished a right.

The dissent goes on to point out that, as a judicially created doctrine, the Blue and Gold Fleet rule operates as a time bar to claims that would otherwise be timely according to statute, specifically Title 28 of the U.S. Code, Section 2501. That statute provides a six-year statute of limitations for every claim for which the Court of Federal Claims has jurisdiction.

As such, the rule creates additional limitations on when disputes may be brought despite clear

legislative intent. Citing the recent U.S. Supreme Court case of SCA Hygiene Products AB v. First Quality Baby Products LLC,[5] the dissent argues that the "courts are not at liberty to jettison Congress' judgment on the timeliness of suit;" and doing so narrows the statute of limitations in a way the legislature did not contemplate.

Further, the dissent argues that the Blue & Gold Fleet time bar applies to patent errors, but Inserso's claim could not have been a patent error because it arose from government conduct that occurred well after the release of the solicitations. There was nothing on the face of the solicitation indicating that the timelines of the two competitions would diverge so drastically.

The dissent also asserts that small businesses could face burdens by being charged with actively investigating and preemptively challenging conflicts of interest.

Takeaways

The Inserso case is consistent with prior decisions at the Court of Federal Claims and GAO decisions that have similarly barred untimely OCI claims that were known to protesters prior to award.[6] With the Federal Circuit's ratification of this rule, protesters of any size must be vigilant about addressing OCI concerns pre-award.

Under Inserso, this includes understanding the terms of the solicitation, procurement law and seemingly any relevant public information that might provide the basis of any potential protest grounds, such as the status of related bid protests or other public announcements.

Agile Defense

DISA's Encore III procurement made a second appearance this month at the Federal Circuit in Agile Defense, which addressed DISA's cost realism analysis.

The Encore III solicitation required bidders to provide supporting cost information for their labor rates, from which DISA would perform a cost realism analysis in accordance with FAR 15.404-1(d). The solicitation provided that to facilitate the cost realism analysis, DISA would calculate an average for each labor rate using the rates provided by all offerors in each tier.

When DISA reviewed individual proposals, if an offeror's labor rate was more than one standard deviation below the calculated average rate, it would review supporting documentation for the rate. If the documentation did not provide justification for that rate or the justification was inadequate, the rate would be adjusted to equal the calculated average rate, but if the documentation supported the realism of that rate, it would not be adjusted.

While reviewing Agile's proposal, DISA determined that many of its proposed labor rates were more than one standard deviation below the calculated average rate, and that those rates included workers that did not meet minimum education and experience requirements in the solicitation.

Due to concerns that Agile's overall pricing methodology might be defective, DISA expanded its review to Agile's labor rates that were within one standard deviation. DISA sent an evaluation notice of these findings to Agile, and Agile provided a revised proposal with increased labor rates. However, despite Agile's revisions, its final evaluated price was too high relative to other offerors, and it was not selected for award.

Agile protested at the Court of Federal Claims, arguing that based on the terms of the solicitation, DISA should not have analyzed any of its rates that were not one standard deviation below the calculated average rate. The court found that while the solicitation required DISA to evaluate rates that fell below the one standard deviation bar, it did not restrict DISA from looking at rates within one standard deviation of the average.

Agile then appealed to the Federal Circuit, arguing that DISA's evaluation of rates within one standard deviation violated the solicitation's terms because the solicitation required analysis only of below-deviation rates.

The court rejected Agile's reasoning, pointing out that the solicitation required DISA to determine whether the labor rates were complete, reasonable and realistic "using one or more techniques defined in FAR 15.404."

The court found that nothing in the solicitation prohibited DISA from evaluating labor rates that were within one standard deviation of the calculated average; in other words, a requirement to review below-deviation rates did not operate as a prohibition to reviewing within-deviation rates. Such a reading, the court held, would unduly restrict contracting officers' discretion and hinder agencies from determining whether cost elements were realistic.

Takeaways

Offerors should carefully review the cost-realism terms in a solicitation to ensure their proposal is compliant with any evaluation methodology set forth in the solicitation. However, Agile confirms that agencies have significant discretion in conducting realism reviews.

While a proposal must be evaluated according any cost-realism methodologies set forth in the solicitation, it may not follow, as was the case in Agile, that an agency cannot utilize additional methodologies to further scrutinize cost realism, especially where the solicitation language does not limit the evaluation.

Offerors should pay attention to solicitations that include sweeping statements about conducting cost-realism evaluations "using one or more techniques defined in the FAR," even if a specific evaluation methodology is also provided.

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[1] Utech Products v. U.S., No. 20-315C, 2020 WL 3046110 (Fed. Cl. May 28, 2020).

[2] Inserso Corp. v. U.S., No. 2019-1933, 2020 WL 3163623 (Fed. Cir. June 15, 2020).

[3] Agile Defense Inc. v. U.S., 959 F.3d 1379 (Fed. Cir. 2020).

[4] 41 U.S.C. § 3304(a)(1)

[5] SCA Hygiene Products AB v. First Quality Baby Products LLC, 137 S. Ct. 954 (2017)

[6] See, e.g., Honeywell Tech. Solutions Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49.