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Bid Protest Spotlight: Recertification, Conflicts, Assumptions

By **Locke Bell and Markus Speidel** (February 9, 2021, 6:14 PM EST)

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This month's bid protest spotlight examines three recent protest decisions, each offering a cautionary tale to offerors in the stages prior to contract award.

HWI Gear Inc. v. U.S. emphasizes the requirement for small businesses undergoing an acquisition to recertify their size status on their pending proposals.[1]

In Perspecta Enterprise Solutions LLC v. U.S., the U.S. Court of Federal Claims warns offerors of the dangers in sitting on allegations that a competitor has an organizational conflict of interest until after award, at which point a protest might be dismissed as untimely.[2]

The U.S. Government Accountability Office's decision in Matter of Innovative Management & Technology Approaches Inc. reminds offerors not to make assumptions in a proposal that might conflict with material solicitation requirements.[3]

HWI Gear

As a general matter, a contractor's small business-size status is determined as of the date it submitted its offer for a given contract. However, if that contractor is acquired by, sold to or merges with another concern, the U.S. Small Business Administration's size regulations, at Title 13 of the Code of Federal Regulations, Section 121.404(g)(2), require it to recertify its size status, either within 30 days or, for any pending proposals, prior to award.

In either event, generally, if the contractor is no longer small as a result of its new affiliates, it nevertheless may continue to perform its existing small business contracts or receive an award on its outstanding small business proposals, although a recent rule change limited the latter to proposals submitted more than 180 days prior to the merger, sale or acquisition.[4]

The Federal Acquisition Regulation contains a similar recertification requirement, but is silent with regard to pending proposals. Specifically, FAR 52.219-28, regarding post-award small business program representation, mandates that if the contractor represented that it was a small business prior to award of the contract, the contractor shall rerepresent its size and socioeconomic status within 30 days after a merger or acquisition.

In HWI Gear, the Court of Federal Claims held that, although this recertification requirement does not expressly apply to pending proposals on its own, or even if merely incorporated by reference, it may apply if its specific text is written into a solicitation.

At issue in HWI Gear was a small business set-aside solicitation issued by the Defense Logistics Agency for U.S. Army capacitive combat gloves. The awardee qualified as a small business when it submitted its initial offer, but possibly not after a significant portion of its interests were acquired by a private equity firm while its proposal was pending.

In connection with the transaction, the awardee converted from a corporation to a limited liability company, and in two separate letters, it notified the procuring agency of the conversion and resulting name change — from "incorporated" to "limited liability company."

Neither letter explained, however, that the conversion and name change were in connection with an acquisition — one noted that "[a]ll other terms and conditions of the [awardee's] offer remain unchanged" — nor did the contracting officer inquire.

According to the court, these letters put the agency on notice of a change in the awardee's corporate structure, and the agency had a duty to inquire whether the awardee remained small notwithstanding that change. And had it inquired, according to the court, the agency likely would have discovered that, in fact, the awardee was not small anymore.

The court acknowledged the general rule that a company's size is determined at the time of its initial offer, and that size determination continues for the life of the contract. The court also acknowledged the FAR itself does not require recertification, and even added that incorporation by reference alone would not require recertification.

But because the agency "specifically chose to include the language from FAR 52.219-28 directly in the solicitation," the court held the agency had imbued the solicitation with the recertification requirement. The agency did not need to include the clause in the solicitation, but once included, the agency had to enforce it.

This was true, according to the court, notwithstanding the text being incorporated in a section of the solicitation titled "Contract Clauses," or FAR 52.219-28 being, by title, a post-award recertification requirement.[5]

The court also pointed to the awardee's size certification in its initial proposal as evidence the size representation requirements applied to offerors, and the awardee's letter claiming those terms and conditions remained unchanged as a material misrepresentation.[6]

The court adamantly stated it was not making any determination about the awardee's size, a matter squarely in the SBA's jurisdiction and, at least at the time of the court's decision, subject to ongoing size protest proceedings at the SBA's Office of Hearings and Appeals.

But because the agency had been put on notice of the structural change, which the court found put the agency on notice of a potential change in size status, the court held the agency was required to enforce at least the recertification requirement incorporated into its solicitation. Because it failed to do so, the protest was sustained.

Takeaways

If you are a small business, and you enter into transaction — whether as seller or buyer — you should be sure to recertify your size status on your pending proposals promptly in accordance with SBA regulations.

Although the court's holding in HWI Gear may not survive appeal and is narrowly limited to rare cases where a procuring agency expressly incorporates a recertification requirement by text into a solicitation, failure to recertify under SBA regulations could nevertheless be deemed a material misrepresentation, may give rise to a size protest or otherwise could cause the agency to reject a pending proposal.

Recent changes to the SBA's regulations, requiring rejection of any offeror that is unable to recertify as small after a merger, sale or acquisition occurring within 180 days of submitting its proposal, only increase these risks. They also add complexity that any small business considering a transaction will need to navigate.

Perspecta

The Court of Claim's dismissal (in relevant part) of the bid protest in Perspecta highlights the need for a protester to act quickly — or at least before initial proposal submission — if it has reason to believe one of its competitors should be ineligible for award based on an organizational conflict of interest.[7]

There are various flavors of organizational conflicts of interest. Specifically at issue in Perspecta was an alleged unequal access to information conflict, where a contractor, by way of its other relationships, has access to nonpublic information that may provide it an unfair competitive information.

In Perspecta, the protester alleged that the awardee had created such a conflict by hiring a former U.S. Navy official who had access to such information, and argued that the agency had failed to meaningfully consider whether that perceived conflict, left unmitigated, should have precluded the awardee from the competition.

Without getting into whether the former official's employment actually created any potential organizational conflict of interest, the court held that the protester, knowing about his employment before submitting its proposal but failing to raise its objections until after award, had waived the argument under the Federal Circuit's long-standing Blue and Gold waiver rule.

That rule, as recently extended by the U.S. Court of Appeals for the Federal Circuit in Inserso Corp. v. U.S., bars post-award organizational conflict of interest challenges where the protester "exercising reasonable and customary care would have been on notice of the now-alleged defect in the solicitation long before awards were made."[8]

Because the protester knew or should have known, more than a year before submitting its initial proposal, of the awardee's hiring the former official — after all, the court noted, he had attended the agency's engineering day alongside representatives from the protester and industry news articles had identified him specifically as a member of the awardee's capture team — the court held any related conflict challenge was required to be a preaward protest.

Because his involvement specifically in the procurement at issue was clearly a matter of public record,

the protester waived its conflict of interest challenges by waiting until after award.

Takeaways

At the GAO, protests challenging a competitor's organizational conflict of interest typically can be raised only after award, with some limited exceptions. The court, however, as shown in prior cases and reiterated in Perspecta, takes a harder line, requiring protesters to file preaward even if a potentially conflicted competitor simply shows interest in the procurement.

As a practical matter, this rule can be difficult to manage and may create a more litigious environment than intended. But, in all events, offerors must be vigilant in identifying potential conflicts and raising them to legal counsel early, to avoid inadvertently waiving their rights to protest later.

Innovative Management & Technology Approaches

In the last highlighted protest for this month, Innovative Management, the GAO sustained a protest, and even suggested award be made to the protester, where the procuring agency identified in the awardee's proposal an assumption and exception to a material solicitation requirement and, rather than rejecting it, engaged in unequal discussions with the awardee alone to allow revision.

The award at issue was a blanket purchase agreement plus two initial call orders for service desk operations support at the U.S. Patent and Trademark Office, awarded through the General Service Administration's Federal Supply Schedules.

In relevant part, the solicitation required the successful contractor to "handle all incoming internal and external contacts directly received or transferred to" the service desk and included service level agreements the contractor was required to meet or exceed. To assist offerors in estimating their required staffing and costs, the solicitation provided historical call volume data, although it warned actual contact volumes could fluctuate greatly.

In its proposal, the awardee included a technical assumption stating its "staffing proposal is based upon the average historical volumes as provided" and adding that any "increase of 10% or greater in call/email volume from the agreed staffing plan will trigger a request for a contract modification to fund surge staffing."

If such additional funding was not provided, the proposal disclaimed responsibility for missing any service level agreements.

Recognizing that this assumption appeared to conflict with the mandatory requirements in the solicitation, the agency asked the awardee to revise its proposal to remove it. But it did so after selecting the protester as the best-value offeror, as a preaward communication with the apparent awardee, without opening discussions with any other offerors, including the protester.

Upon receiving the agency's request to "update its quote to remove the noted assumption," the awardee dutifully did so, and five days later, the agency notified the protester of the award.

As a rule at GAO, a proposal or quotation that takes exception to a solicitation's material terms and conditions — those affecting, for example, price, quantity, quality, or delivery of the goods or services being provided — is unacceptable and may not form the basis for an award.

Furthermore, an agency may not accept an offeror's promise in one section of its proposal to meet a material solicitation requirement, in the face of conflicting statements elsewhere in the proposal.

Because the awardee had taken exception to the mandatory service level agreement requirements for those cases where it did not receive additional surge funding — which the solicitation did not provide for — the GAO found its proposal, as written, was unacceptable and should have been rejected.

And even during the procurement, the agency seems to have acknowledged the same by seeking removal of the conflicting assumption. It was this request by the agency, thereby opening up discussions and soliciting proposal revisions from just one offeror alone, that led the GAO to sustain the protest.

The agency argued that its outreach to the apparent awardee did not rise to the level of discussions, but was merely a request for clarification and an attempt to make "the best value quote from the apparent awardee even better." The GAO, however, found these communications to be "a textbook case of discussions" because the offeror was allowed to revise its proposal to remove the offending language.

According to the GAO, solicitation language reserving the right to communicate with any or all contractors submitting a quote could not save the agency from the GAO's long line of decisions prohibiting such unequal discussions. Accordingly, the GAO sustained the protest.

Takeaways

When drafting proposals, offerors must take care not to make assumptions that could conflict with material solicitation requirements. If you think an assumption is warranted, the best practice, if feasible, is to raise that assumption prior to proposal submission, either at an industry day, or in agency questions and answers to the solicitation.

Correction: An earlier version of this article omitted one of the authors. The error has been corrected.

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[1] HWI Gear Inc. v. U.S., No. 20-930, 2020 WL 7706975 (Fed. Cl. Dec. 29, 2020).

[2] Perspecta Enterprise Solutions LLC v. U.S., No. 20-814, 2020 WL 8182111 (Fed. Cl. Jan. 15, 2021).

[3] Innovative Management & Technology Approaches Inc., B-418823.3; B-418823.3 (Jan. 8, 2021).

[4] https://govcon.mofo.com/small-business/sba-issues-wide-ranging-final-rule-addressing-government-contracting-programs/.

[5] To be clear, FAR 52.219-28 is prescribed in the FAR as a contract clause, not a solicitation clause; it imposes duties on "the Contractor" during performance of "this contract"; and it is often shrouded in other contract clauses that no reasonable person could understand or intend to take effect prior to

award. We are not aware of any other decision that reaches a similar conclusion, and the case is currently on appeal at the Federal Circuit.

[6] The Court did not address the text of 13 C.F.R. § 121.404(g)(2)(i) in effect at the time of award, which suggested if, after recertification, an offeror was no longer small, it remained eligible for award, even if the agency could not count options or task orders under the awarded contract towards its small business goals. As mentioned, that provision has since been revised to provide expressly that a recertifying firm is still eligible for award, so long as the merger, sale, or acquisition causing its change in size status occurred more than 180 days after initial proposal submission.

[7] In addition to dismissing the protester's OCI arguments, the Court denied a potpourri of other common protest grounds, including material misrepresentation of personnel availability, flawed price and cost realism, failure to engage in meaningful discussions, and a flawed technical and managerial factor analysis. For brevity's sake, we will not discuss those other grounds in detail here.

[8] Inserso Corp. v. U.S., 961 F.3d 1343, 1352 (Fed. Cir. 2020)