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Bid Protest Spotlight: Proper Scope, Tardiness And Weakness

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(March 4, 2020, 5:30 PM EST) -- This month's roundup features three noteworthy decisions from the U.S. Government Accountability Office released in February.

Steel Point Solutions LLC addresses the proper scope of reprocurement contracts.

Vizocom provides a cautionary tale for contractors regarding late proposal submissions.

Education Development Center Inc. addresses the difficulties of challenging an agency's determination that a particular weakness was not significant, and therefore need not be raised during discussions.

Steel Point Solutions

In February 2019, the U.S. Defense Information Systems Agency awarded a task order to Akira Technologies Inc. under a federal supply schedule services contract. Several months later, DISA terminated the task order with Akira for default and determined reprocurement from the original competition and quotations was warranted.

DISA subsequently awarded a replacement task order to Creative IT solutions, the second-lowest bidder. The replacement task order had a period of performance that exceeded the remaining performance period under the task order awarded to Akira.

Steel Point Solutions, a disappointed offeror from the original task order competition, protested.[1] Steel Point Solutions alleged, among other things, that DISA was required to compete the replacement task order because its performance period exceeded that of the task order it was replacing.

The GAO agreed. Although the GAO recognized that agencies have considerable discretion to repurchase goods and services for a substitute contract, it explained that agencies do not have the authority to repurchase goods or services in quantities that exceed the undelivered quantity remaining on the original contract.

To illustrate the reasoning behind this rule, the GAO referred to Federal Acquisition Regulation 12.403(c)(2), which states that the "[g]overnment's rights after a termination for cause shall include all the remedies available to any buyer in the marketplace."

Noting that one remedy available in the commercial marketplace is "cover" — which the Uniform Commercial Code defines as authorizing a buyer "to purchase goods in substitution for those due from the seller," and then recover the price differential — the GAO concluded that reprocurements are limited to repurchasing goods or services to substitute for those ordered from the original awardee.

In reaching this decision, the GAO expressly rejected DISA's argument that it was not required to recompete the replacement task order because DISA had not received value from Akira prior to the default termination. Noting that DISA had paid Akira, and that AKIRA provided "at least some of the contract deliverables," the GAO concluded that DISA could not pretend as if the task order award to Akira had never happened.

Takeaways

Reprocurement contracts cannot exceed the scope of work remaining under the originally awarded contract, even where an agency believes the original awardee did not materially perform the contract. Instead, where an agency intends to award a reprocurement contract that goes beyond the scope of the originally awarded contract, it must treat the reprocurement as a new acquisition subject to the standard rules for full and open competition.

Vizocom

Vizocom, a San Diego company, was a potential offeror for a solicitation released by the U.S. Department of the Army. The solicitation had explicit instructions for delivery, including an express directive that offerors obtain military installation access prior to proposal submission if they intended to hand-deliver their proposal.

Vizocom intended to hand-deliver its proposal and hired a courier 30 minutes prior to the proposal submission deadline to make the delivery. Vizocom also sent an email to the Army contract specialist to advise that Vizocom had dispatched a courier to deliver its proposal.

The courier, however, encountered delays attempting to deliver the proposal because she required a sponsor to enter the military installation. Then, upon gaining access to the installation, the courier mistakenly went to the incorrect location for proposal delivery. Ultimately, the Army did not receive Vizocom's proposal until 20 minutes after the time specified in the solicitation, and the contracting officer rejected Vizocom's proposal as late.

Vizocom protested at the GAO, arguing that the solicitation's addresses for proposal delivery were ambiguous and that the proposal was only late because of improper government action.[2] The GAO, however, disagreed, finding that Vizocom's late delivery was the result of its own lack of planning, rather than any improper government action.

Takeaways

The GAO's rules for late proposals are strict and unforgiving (although the U.S. Court of Federal Claims is more forgiving). Offerors therefore should account for the worst-case scenario when determining when exactly to make a proposal submission. Simply put: it is better safe than sorry, especially at the GAO.

Education Development Center

The U.S. Agency for International Development issued a solicitation for educational services in Somalia. After receiving initial proposals, the USAID entered into discussions with the offerors, and, as required

by the Federal Acquisition Regulation, discussed significant weaknesses and deficiencies. The USAID ultimately awarded the contract to Creative Associates International.

Education Development Center protested the award, alleging, among other things, that the USAID did not hold meaningful discussions.[3] Specifically, EDC alleged that USAID failed to identify three weaknesses in it's initial proposal during discussions that EDC claimed were actually significant weaknesses which proved dispositive in the award decision.

The GAO denied the protest. Although the GAO acknowledged that an agency's characterization of a weakness as significant is not controlling, the GAO found that the context of the evaluation showed that the assessed weaknesses were not, in fact, significant.

As evidence, the GAO pointed to the fact that none of the weaknesses assessed appreciably increased the risk of unsuccessful contract performance. The GAO also noted that, notwithstanding the weaknesses, EDC received a rating of "very good," which indicated "EDC's proposal demonstrated a strong grasp of the requirements, presented a low overall degree of risk of unsuccessful contract performance, and the proposal's strengths outweighed its weaknesses."

In denying the protest, the GAO rejected EDC's argument that the source selection authority's consideration of the weaknesses in the source selection decision necessarily meant that the weaknesses were significant and outcome determinative. The GAO explained that, even where a weakness is determinative of award, it is not necessarily significant.

Takeaways

This decision underscores the inherent difficulty in claiming an assessed weakness is actually a significant weakness that the agency was required to raise during discussions. It also exposes an area where a protester may have better chances of success at the Court of Federal Claims.

Unlike the GAO, the Court of Federal Claims "looks to whether the potential deficiency, significant weakness, or adverse past performance information would materially affect the offeror's chance of receiving the award."[4] Thus, under the court's precedent, "the agency must discuss weaknesses or deficiencies that 'could have a competitive impact.'"[5] EDC may have had better luck in its protest under this standard.

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[1] Steel Point Solutions, LLC, B-418224; B-418224.2, January 31, 2020.

[2] Vizocom, B-418246.2, February 14, 2020.

[3] Education Development Center Inc., B-418217; B-418217.2, January 27, 2020.

[4] Precision Asset Mgmt. Corp. v. United States, 135 Fed. Cl. 342, 352 (2017).

[5] Id.