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Bid Protest Spotlight: Jurisdiction, Specificity, Fees And Costs

By **Alissandra Young and David Allman** (December 8, 2020, 5:19 PM EST)

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This month's bid protest spotlight examines three recent protest decisions from the U.S. Government Accountability Office, the U.S. Court of Appeals for the Federal Circuit, and the U.S. Court of Federal Claims.

In MayaTech Corp., the GAO addressed its jurisdiction to hear bid protests of task orders valued at less than $10 million in limited circumstances.[1]

In LAX Electronics Inc. dba Automatic Connector v. U.S., the Federal Circuit also addressed a jurisdictional question when it interpreted the meaning of the requirement that a bid protest must be "in connection with a procurement or proposed procurement" to invoke the Court of Federal Claims' bid protest jurisdiction.[2]

Finally, in Utech Products dba Endosoft LLC, the Court of Federal Claims provided a reminder of the rigorous standards protesters must meet to demonstrate entitlement to reimbursement for proposal costs and attorney fees.[3]

MayaTech

The U.S. Federal Acquisition and Streamlining Act establishes a $10 million jurisdictional threshold for the GAO to hear protests of task orders issued under multiple-award contracts that are awarded by civilian agencies. The GAO does, however, have jurisdiction to hear protests of task orders valued at less than $10 million where the protester asserts that the task order increases the scope, period or maximum value of the contract under which the order is issued.

MayaTech — attempting to invoke an exception to the jurisdictional threshold — protested the award of a task order valued at less than $10 million to the GAO under the theory that the task order solicitation changed the scope of the underlying indefinite delivery, indefinite quantity contract.

Specifically, MayaTech claimed that the U.S. Department of Health and Human Services changed the scope of the underlying indefinite delivery, indefinite quantity contract by allegedly failing to follow the evaluation scheme laid out in the task order solicitation, thereby "materially chang[ing] the scope" of the base contract's ordering clause.

MayaTech interpreted this ordering clause, which states that the issuance of any task order would be in accordance with Section 16.505(b) of the Federal Acquisition Regulation, to mean that awards of task orders must be in accordance with the evaluation scheme outlined in the task order solicitation. MayaTech argued that the DHHS deviated from this requirement, citing to the fact that it should have won the task order award if the DHHS had followed the stated evaluation scheme.

The GAO disagreed with MayaTech's interpretation, finding it to be a futile attempt at expanding the definition of "scope."

The GAO explained that the analysis of whether a task order is outside the scope of an indefinite delivery, indefinite quantity contract is whether there is a material difference between the task order and the contract. In determining whether there is a material difference, the GAO will look at various changes between the contract and task order, including changes in the type of work, performance period and costs.

Ultimately, the overall inquiry is whether the task order is of a nature that potential offerors would reasonably have anticipated. However, the GAO noted that MayaTech made no attempt to argue that there had been a change in the type of work, the performance period or the costs of the indefinite delivery, indefinite quantity contract. Rather, MayaTech simply argued that it could not anticipate that DHHS would not follow the stated evaluation schemes for task order awards.

The GAO found MayaTech's attempt at expanding the definition of scope amounted to nothing more than mere disagreement with DHHS' evaluation. In short, MayaTech's expansion of the definition would swallow the exception to the $10 million threshold rule. According to the GAO, if MayaTech had its way then any "departure from the task order solicitation... would result in a task order that exceeds the scope ... and all protests related to task orders would fit within the 'increases the scope' exception."

Takeaways

The GAO's decision in MayaTech provides a helpful reminder of both the jurisdictional threshold for task order protests, as well as possible exceptions to that threshold. While MayaTech's attempt at fitting within one of those exceptions ultimately failed, unsuccessful offerors for task orders below $10 million — or $25 million for U.S. Department of Defense agencies — should not immediately give up all hope at protesting the award decision.

Instead, offerors should carefully review whether the task order increases the scope, period or maximum value of the contract under which the order is issued. However, in doing so, offerors should be wary of potential timeliness issues, and should raise any such arguments before proposals are due if they are known at that time.

LAX Electronics

LAX Electronics, doing business as Automatic Connector, is a longtime supplier of electronic connectors to the U.S. government and government contractors. Automatic Connector has numerous connectors listed on the Defense Logistics Agency, or DLA, qualified parts list, which designates government-approved sources of supply.

As such, Automatic Connector has historically been able to supply the government and government

contractors with its connectors in procurements that require qualified-parts-list listings.

After an audit of Automatic Connector manufacturing facility found several violations of certain DLA standards, the DLA informed Automatic Connector that it had 30 days to provide corrective action plans, which required DLA approval, to remedy DLA's identified technical deficiencies. In the meantime, DLA ordered Automatic Connector to cease shipment and production of the connectors.

Although Automatic Connector timely sent DLA its proposed corrective actions, DLA never responded. Instead, DLA removed two of Automatic Connector's electronic connectors from its qualified parts list. As a result of this removal, Automatic Connector is barred from bidding on subsequent DOD procurements for those parts.

DLA continued to solicit numerous bids for the electronic connectors, which Automatic Connector could no longer supply after its removal. Automatic Connector identified at least five solicitations for which it would no longer be able to compete.

Automatic challenged its removal from the qualified parts list at the Court of Federal Claims, claiming the DLA violated DOD Manual 4120.24 and FAR Section 9.205(a) by not allowing it an opportunity to correct any deficiencies, or enough time to arrange for qualification before award.[4]

For both protest grounds, Automatic Connector relied on the court's bid protest jurisdiction "to render judgment on an action by an interested party objecting to ... any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."[5]

The DLA moved to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Regarding Automatic Connector's first protest ground, i.e., that the DLA violated DOD Manual 4120.24 when it removed Automatic Connector from the qualified parts list, the DLA contended that Automatic Connector was not an interested party and that its dispute did not relate to an identified procurement or a proposed procurement.

The court agreed, finding that Automatic Connector's claim was not made in connection with a particular procurement because the company's removal from the qualified parts list related to the DLA's actions in connection with an audit, not a procurement. Therefore, the court found it did not have jurisdiction to hear the claim and transferred it to the U.S. District Court for the Eastern District of New York.

As to Automatic Connector's second claim that the DLA violated FAR Section 9.205, which requires agencies to allow offerors sufficient time to meet certain qualifications it deems necessary before award, the court held that it had bid protest jurisdiction because the claim was in connection with the five solicitations Automatic Connector identified.

Nevertheless, the court dismissed the second protest ground for failure to state a claim, finding that FAR Section 9.205(a) only requires agencies to allow potential offerors sufficient time to meet new qualifications — not qualifications a previously qualified contractor no longer meets.[6]

Automatic Connector subsequently appealed the Court of Federal Claims' decision to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit vacated the lower court's jurisdictional dismissal of the first claim, and upheld dismissal of the second claim, but on other grounds.

Regarding Automatic Connector's first claim, the Federal Circuit disagreed with the Federal Claims Court's reliance on an unpublished opinion, Geiler/Schrudde & Zimmerman v. U.S., when it found that Automatic's claim was not in connection with a procurement.

In Geiler/Schrudde & Zimmerman, the protester attempted to invoke the Federal Claims Court's bid protest jurisdiction in a challenge to an agency decision to remove the protester's service-disabled veteran-owned small business status.[7] In that decision, the Federal Circuit held that the challenge was not "in connection with a procurement or a proposed procurement," because the protester did not allege that removal of service-disabled veteran-owned small business status affected its ability to compete for a specific procurement.[8]

In LAX Electronics, however, the Federal Circuit explained that a more recent case, Acetris Health LLC v. U.S., was more applicable to the case at hand. In Acetris, the Federal Circuit explained that the "in connection" standard is broad and can be met where a contractor can "identify any future procurements on which the protestor intended to bid."[9]

Here, the Federal Circuit reasoned, Automatic Connector's first claim met this standard because the DLA continuously solicited bids for Automatic Connector's electronic connectors after it removed the company from the qualified parts list, yet the removal precluded Automatic Connector from competing for those opportunities.

Therefore, "the violation alleged to have infected the removal from the [qualified parts list] was 'in connection with' those likely procurements."[10] Thus, the Federal Circuit found the Federal Claims Court had bid protest jurisdiction to hear Automatic's first claim, and remanded the case for further proceedings.

As to Automatic Connector's second claim that the DLA violated FAR Section 9.205(a), the Federal Circuit affirmed the lower court's dismissal, but did not uphold its determination that FAR Section 9.205(a) applies only to a new qualification.

Instead, the Federal Circuit concluded that Automatic Connector failed to state a claim because it did not argue that the DLA failed to provide it with sufficient time to qualify for the solicitations, as required by the FAR. Rather, it claimed that the DLA denied it an opportunity to qualify for the solicitations by failing to provide feedback on Automatic Connector's proposed corrective actions after the audits.

Takeaways

The Federal Circuit's decision is helpful precedent for understanding the breadth of the Court of Federal Claims' bid protest jurisdiction. Contractors who are required to meet specific agency-imposed qualifications are reminded that a bid protest is a potential avenue for challenging an agency's decision to deny or remove such qualifications from them.

However, it is important to bear in mind that to properly invoke the court's jurisdiction in such cases, the contractor must be able to point to instances where the removal of the qualification precludes the contractor from bidding on specific solicitations. As in many bid protest cases, specificity is key.

Utech Products

Earlier this year at the Court of Federal Claims, Utech Products, doing business as EndoSoft, successfully

challenged a sole-source contract award by the U.S. Department of Veterans Affairs to ProVation Medical Inc. for a gastrointestinal electronic-medical-record software system.[11] Based on that challenge, the Court of Federal Claims enjoined the VA from implementing the contract and ordered the award to be set aside.

Three months later, however, the VA again issued a solicitation for the same subject matter as the prior contract, stating that ProVation's system was to be used. Predictably, EndoSoft filed another preaward protest, while it began preparing to submit a proposal, after the VA indicated it would not cancel the solicitation.

However, two hours after EndoSoft filed its protest with the Court of Federal Claims, the VA reversed course and canceled its solicitation. Subsequently, EndoSoft sought bid preparation and proposal costs pursuant to the Tucker Act, and attorney fees pursuant to the Equal Access to Justice Act.

Although the test to determine whether a protester is entitled to such costs and fees requires slightly different analyses under each of the two statutes, a decision on the merits is a prerequisite for entitlement in both tests.

In the context of bid preparation and proposal costs under the Tucker Act, the court has held that there can be no decision on the merits of a contract award where the government cancels the solicitation before the court has a chance to reach the merits of the case, thereby rendering the protest moot. Therefore, the court found that because the VA canceled the solicitation after EndoSoft filed its complaint, EndoSoft was not entitled to bid preparation and proposal costs.

The court similarly found EndoSoft was not entitled to attorney fees under the Equal Access to Justice Act, reasoning that its lack of authority to award bid preparation and proposal costs "determines its [in]ability to award attorneys' fees to EndoSoft." Under the act, a claimant must be a prevailing party, which requires the claimant to have been granted relief on the merits of its claim. Although EndoSoft sought cancellation of the solicitation in its protest, which ultimately occurred, the VA did not cancel the solicitation due to any action by the court on the merits of the protest — i.e., there was no judicial imprimatur.

Takeaways

Without knowing the requirements to establish entitlement to bid preparation costs and attorney fees, one would presume that the VA's actions at issue here would surely render a finding that EndoSoft was entitled to some relief from what appears to have been unnecessarily incurred bid preparation costs and attorney fees.

However — as jarring as it seems that the VA informed EndoSoft it would not cancel the solicitation, forcing EndoSoft to file its protest, and then canceled the solicitation anyway a mere two hours after EndoSoft filed its complaint — at the end of the day, the VA's actions were not enough to establish entitlement. What mattered was that the court never reached the merits of EndoSoft's protest.

This case is another example showing that just because the plaintiff achieves the result it sought when filing its protest at the Federal Claims Court, it does not always mean that it can recover its related fees. It is worth noting, however, that entitlement to such costs at the GAO follows different standards.

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[1] The MayaTech Corp., B-419313, Nov. 9, 2020, 2020 WL 6625963.

[2] LAX Elecs., Inc. v. U.S., No. 2020-1498, 2020 WL 6437779 (Fed. Cir. Nov. 3, 2020).

[3] Utech Prods. v. U.S., No. 20-1082C, 2020 WL 6687480 (Fed. Cl. Nov. 6, 2020).

[4] LAX Elecs., Inc. v. U.S., 2020 WL 6437779 at *5 (Fed. Cir. Nov. 3, 2020).

[5] Id. (emphasis added).

[6] The Court also noted that FAR § 9.202(e) conflicts with Automatic's argument, as it provides that "a contracting officer need not delay a proposed award in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification."

[7] Geiler/Schrudde & Zimmerman v. U.S., 743 F. App'x 974 (Fed. Cir. 2018).

[8] Id.

[9] Acetris Health LLC v. U.S., 949 F.3d 719, 727-28 (Fed. Cir. 2020).

[10] LAX Elecs. Inc. v. U.S., 2020 WL 6437779 at *10 (Fed. Cir. Nov. 3, 2020).

[11] EndoSoft unsuccessfully protested this sole source contract award at both the VA and GAO before it finally was successful at COFC. This serves as a subtle reminder that if at first you do not succeed, try, try again (in a different bid protest forum).