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Bid Protest Spotlight: Jurisdiction, Standing, Selection Criteria

By **Locke Bell and Markus Speidel**

Locke Bell

Markus Speidel

(February 7, 2020, 4:37 PM EST) -- This installment of the bid protest spotlight examines three protest decisions released in January. First, Colonna's Shipyard Inc. addresses challenges to contractor performance assessment reports, or CPARs.

Second, Noble Supply & Logistics Inc. addresses whether agencies can use a highest-technically rated reasonably priced selection methodology when procuring through the General Services Administration's Federal Supply Schedules, or FSS.

Third, W&G Machine Co. considers whether an incumbent small-business supplier has standing to challenge of the bundling of contracts by the Defense Logistics Agency, or DLA, after it sat idle through multiple bid solicitations.

Colonna's Shipyard

In Colonna's Shipyard,[1] Colonna's Shipyard challenged the Navy's reliance on a CPAR evaluation, which allegedly was neither factual nor correct, filing a four-count protest. The challenged award concerned a contract for dry-dock phased maintenance of the United States Naval Ship Prevail.

The government sought dismissal for lack of subject matter jurisdiction on the grounds that a CPAR challenge is only viable as a claim under the Contract Disputes Act, not under the U.S. Court of Federal Claims' bid protest jurisdiction. The court dismissed three of the four counts, but determined that Colonna's allegation that the government had breached its covenant of good faith and fair dealing should survive.

Analysis

As noted, the court dismissed three of Colonna's four counts. First, Colonna argued that the court had protest jurisdiction to correct the CPAR evaluation on the grounds that the erroneous evaluation caused Colonna to lose the Prevail contract, and would likely continue to cause Colonna to lose future contracts.

The court disagreed. Following the U.S. Court of Appeals for the Federal Circuit's decision in Bannum Inc. v. United States,[2] the court confirmed that such performance evaluations are not subject to challenge as bid protests. Because Colonna failed to distinguish the facts of its case from those of Bannum, the court held the binding precedent applied and dismissed this portion of Colonna's complaint.

Second, Colonna alleged a breach of contract, arguing that the government had a "duty to perform the CPAR evaluation ... in accordance with the Federal Acquisition Regulation." The court again disagreed, adopting the defendant's argument that by raising issues of contract administration, the complaint fell outside the court's bid protest jurisdiction, and therefore also dismissed this portion of Colonna's complaint.

Third, Colonna raised a de facto debarment and deprivation of constitutional rights argument, which the court again summarily dismissed. Because Colonna targeted the contents of its evaluation, the court determined its claim, in any form, should properly be brought under the Contract Disputes Act, not as a bid protest, even under the trappings of debarment and constitutional rights.

However, the court refused to dismiss Colonna's remaining claim alleging that Navy personnel acted in bad faith when they published "incorrect, misleading and inaccurate" statements in the CPAR evaluation to "preserve the reputation of Navy personnel" while "shift[ing] the blame for all contract problems onto the contractor."

Colonna also alleged sufficient details regarding a potential conflict of interest affecting the CPAR. Thus, the court held that so long as "the focus is on bad faith actions which allegedly compromise the award" of a contract, then such allegations fall properly within the court's protest jurisdiction.

Takeaways

Contractors often take issue with their performance reviews — and, in many cases, are justified for doing so. Yet they are left, more or less, without a remedy: Bid protest challenges are, as Colonna shows, all but foreclosed and the court's ability to order any real relief under the Contract Disputes Act is unclear.

The court's opinion in Colonna offers at least some hope, albeit slim, that contractors may be able to seek relief through a bid protest where they can show evidence of the government's bad faith — a tall task, for which the court historically requires "well-nigh irrefragable proof," but a glimmer of hope nonetheless.

Noble Supply & Logistics

In Noble Supply & Logistics[3], the protester successfully challenged the terms of a request for quotations issued by the GSA, seeking to establish four separate single-award blanket purchase agreements.

The protestor, a small-business entity, alleged the solicitation for hardware store supplies and ancillary services, by seeking the highest-technically rated, reasonably priced proposal, violated the terms of the Competition in Contracting Act[4] because it failed to result in the lowest overall cost alternative meeting the government's needs. The protestor also alleged that the terms of the solicitation did not match the requirements of the contract.

The Government Accountability Office sustained both arguments.

Analysis

To the first point, the GAO noted that when procuring through the GSA's federal supply schedule contracts, there is a statutory and regulatory imperative for agencies to consider the lowest-cost alternative. The use of the FSS, with its streamlined process for obtaining commonly used goods and

services, in lieu of full and open competition, is premised on establishing the lowest overall cost to the government by following the procedures of Federal Acquisition Regulation Subpart 8.4.

While agencies do not need to use a lowest-price, technically acceptable model in a FSS procurement, agencies do need to weigh "the value and benefits associated with a vendor's approach against its associated cost" when establishing a blanket purchase agreement.

The solicitation at issue failed to directly compare price with any of the technical features and benefits, and therefore it failed to determine the best value to the government. The solicitation established five technical evaluation factors, three of which were to be evaluated on a pass/fail or satisfactory/unsatisfactory basis. The other two technical factors, technical approach and corporate experience, were to be assessed qualitatively and rated adjectivally.

Price, in contrast, was to be evaluated for fairness and reasonableness. The solicitation specified that neither a lowest-price, technically acceptable nor a best-value tradeoff methodology would be used. Instead, the agency would award the blanket purchase agreements to the highest technically rated quotations with fair and reasonable prices.

While the GAO had previously approved a similar evaluation methodology in Sevatec Inc.,[5] the GAO distinguished the facts of the case at hand, because unlike in Sevatec, in which the agency shifted price competition to the task order level, the agency here intended to establish single-award blanket purchase agreements, which entailed no further competition.

To the second point, the GAO found that the solicitation diverged from the underlying contract in terms of pricing the ancillary services. In addition to allowing orders for hardware goods, the solicitation also required offerors to provide such "commercially available, ancillary services typically performed in, and in the spirit and concept of, a hardware store."

The solicitation, however, was silent on instructions for pricing the required services. When asked to clarify the matter during a question and answer session, the agency stated that service prices were to be included in the product prices.

The GAO found this patently unacceptable. Because ancillary services would be paid for under separate special item numbers from those for goods, the GAO held that the two needed to be priced separately in the proposals as well, and therefore the solicitation as written conflicted with the demands of the underlying contract.

Takeaways

The takeaways from Noble Supply are relatively straightforward. Most notably, federal agencies are now on notice that the highest-technically rated, reasonably priced proposal evaluation methodology is not available when establishing blanket purchase agreements through the GSA schedules.

Secondarily, the decision is a good reminder to procuring agencies and bidders alike that awards made against the GSA schedules ultimately must fall within the scope of, and therefore be consistent with, the terms of the overarching schedule contract.

W&G Machine Co.

In W&G Machine Co.[6], a small-business incumbent parts supplier, W&G Machine Company, challenged two decisions by the Defense Logistics Agency to bundle requirements, both to no avail. Specifically, the

DLA decided to (1) bundle the requirements for spare parts for the Chinook and Apache helicopters into a sole source award, and (2) bundle over 220,000 national stock numbers into a single solicitation.

Rather than responding to DLA's notices on FedBizOpps.gov about the consolidation, or submitting its own proposal under the solicitation, W&G waited until the anticipated award date to file its protest. The Court of Federal Claims found W&G's silence unacceptable and thus dismissed W&G's protest for lack of standing.

Analysis

On the merits of its protest, W&G sought to establish that in bundling the helicopter parts, DLA unlawfully favored original equipment manufacturers at the expense of small businesses, and that by bundling the national stock numbers, the DLA marginalized W&G and "fundamentally alter[ed] and diminish[ed] the agency's competitive procurement landscape."

However, before a court may consider the merits of a case, it must determine if jurisdiction exists. Here, the government and the intervenor moved to dismiss for lack of jurisdiction or, in the alternative, for failure to state a claim. Finding the plaintiff failed both prongs of the interested party test, the court dismissed the complaint for lack of subject matter jurisdiction.

To challenge a contract award at the Court of Federal Claims, the protestor must be an interested party. To qualify as such, a protestor must show two things: (1) that they are an actual or prospective bidder; and (2) that they have a direct economic interest that the challenged contract award would affect.

A prospective bidder is one who expects to submit an offer prior to the closing date of the solicitation. To prove a direct economic interest, a party must demonstrate it had a substantial chance of winning the contract.

On the first prong, the court held that W&G lost its standing as an actual or prospective bidder after failing to respond to the agency's several notices posted on FedBizOpps. Beginning in 2017, the DLA posted first a potential sources sought notice, then a presolicitation notice, and finally a notice of intent to bundle requirements, to all of which W&G failed to respond.

Furthermorthe DLA sent W&G a letter explaining its intent to transition away from long-term contracts and/or purchase orders. Despite such extensive notice and warning, W&G waited two years to protest the terms of the solicitation, a nap the court found inexcusable.

Although failure on the first prong would have sufficed for dismissal, the court continued to consider the second prong and determined that W&G failed there as well. To show it had a direct economic interest in the award after sleeping through its opportunity to object to the bundling, W&G needed to show it could meet the new requirements.

Although W&G had previously provided helicopter parts to DLA, the plaintiff acknowledged it lacked the capacity to perform either solicitation as bundled. The court, therefore, determined that W&G lacked a direct economic interest and, therefore, was not an interested party, and as a result it lacked the standing to sue.

Takeaways

The bid protest process is fraught with deadlines and rules that require vigilance to safeguard one's rights to fight for one's interests. The court's decision in W&G Machine Co. is a good reminder to

contractors to monitor procurement developments early in the acquisition cycle, take advantage of opportunities to respond to sources-sought notices or requests for information, and take the steps necessary to secure one's standing to protest if needed.

The rule to keep in mind, for situations like that in W&G Machine Co., is this: If you disagree with an agency's decision not to conduct a competitive procurement — for example, by bundling requirements in a way that prevents you from competing — you must advise the agency of that disagreement, either by responding to the public notices about the procurement or by submitting a proposal of your own.

Locke Bell is an associate and Markus Speidel a law clerk at Morrison & Foerster LLP.

[1] Colonna's Shipyard Inc., v. United States, No. 1901373C (Fed. Cl., Jan. 21, 2020).

[2] See Bannum Inc., v United States, 404 F.3d 1346, 1353 (Fed. Cir. 2005) (holding that "a bid protest is not the proper forum" to litigate performance assessments).

[3] Noble Supply & Logistics Inc., B-418141, Jan. 16, 2020.

[4] 41 U.S.C. § 152(3)(B) (stating that the federal supply schedule satisfies the requirement for full and open competition when participation in the program has been open to all responsible sources, and orders and contracts under the FSS procedure "result in the lowest overall cost alternative to meet the needs of the Federal Government.").

[5] See Sevatec Inc.; et al., B-413559.3 et al., Jan. 11, 2017, 2017 CPD ¶ 3.

[6] W&G Machine Co. v. United States, No. 19-1696C (Fed. Cl., Jan. 10, 2020).