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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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COFC Finds Agency Went Too Far With Corrective Action

*By Sandeep N. Nandivada**

The author of this article explains a recent U.S. Court of Federal Claims decision that reflects an important check on agency discretion in deciding the appropriate corrective action in response to a protest.

The U.S. Court of Federal Claims (“COFC”) recently reiterated an important check on agencies’ ability to direct corrective action, holding that despite the discretion afforded contracting officers (“CO”), agency corrective action must be supported by the administrative record to be found reasonable.¹ The court’s decision is a reminder to government contractors that agency discretion is not without its limits and that contractors should not take for granted that proposed corrective action is appropriate under the circumstances.

FACTS

The United States Special Operations Command (“SOCOM” or “Agency”) issued a solicitation for the award of multiple indefinite delivery, indefinite quantity (“IDIQ”) contracts for global support services totaling approximately \$900 million dollars. Because of concerns over potential organizational conflicts of interest (“OCIs”), SOCOM conducted the acquisition in three groups, with task orders presenting significant risks of OCIs being set aside for service-disabled, veteran-owned small businesses.

On July 28, 2015, SOCOM awarded IDIQ contracts to four offerors. The awards were predicated in large part on SOCOM’s evaluation of proposals for three task orders (Task Orders 1, 2, and 3) that were to be initially awarded. Following the IDIQ and task order awards, several contractors filed protests at the Government Accountability Office (“GAO”), alleging, among other things, that SOCOM failed to consider potential OCIs concerning one awardee with respect to Task Order 1 that would have rendered it ineligible for the IDIQ contract award. According to one of the protesters at GAO, the awardee had an unequal access to information OCI and an impaired objectivity OCI, neither of which could be mitigated.

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¹ *MacAulay-Brown, Inc. v. United States*, No. 15-1041C (Fed. Cl. Feb. 18, 2016).

In response to the protests, the CO notified GAO that SOCOM would be taking corrective action. The CO conceded that the Agency did not properly consider whether the awardee had potential or actual OCIs because the Agency only evaluated whether offerors' OCI plans would avoid or mitigate OCIs for future task order competitions, and not the three task orders to be initially awarded. The CO further asserted that the requirements for Task Order 1 no longer reflected the agency's needs, and that requirements in Task Orders 2 and 3 also required changes. Accordingly, the CO proposed to amend the solicitation to:

- (1) remove Task Order 1 and add a new task order in its place;
- (2) update the requirements for Task Orders 2 and 3;
- (3) establish a new date for the submission of proposals; and
- (4) make new award decisions.

In light of SOCOM's proposed corrective action, GAO dismissed the protests of the IDIQ and task order awards.

On September 11, 2015, the IDIQ contract awardees challenged the Agency's proposed corrective action by seeking injunctive relief at the Court of Federal Claims. SOCOM voluntarily stayed its corrective action pending the result of the protest at the Court. The parties subsequently filed cross-motions for judgment on the administrative record.

HOLDING

The Court of Federal Claims granted the plaintiffs' motion for judgment on the administrative record, finding that the CO's proposed correction action was not supported by the record.² The court's decision was predicated on three findings:

- The court found that the administrative record did not evidence a failure by the Agency to consider OCIs when awarding Task Order 1. On the contrary, the record indicated that each offeror submitted an OCI plan and that the Agency considered each plan and rated each as acceptable.
- The court found that the CO's belief that any OCI could not be

² The court also rejected the Agency's contention that the proposed corrective action was necessary to make needed changes to the requirements for the three awarded task orders. The court noted that the Agency had identified potential changes to Task Order 1 before it awarded that task order, and that, in any event, the Agency could make each of the desired changes to the task orders through in-scope modifications.

mitigated lacked support in the record. Given that the Agency had not yet conducted any OCI analysis, the court found that the CO could not have reasonably concluded that any potential or actual OCI was beyond mitigation.

- The court found that the Agency partitioned the procurement specifically to address task orders at risk for OCIs, and rejected suggestions from contractors to move potentially risky tasks from non-risk groups to the at-risk group. Accordingly, the court held that “[h]aving gone through this process to create three groups and consider appropriate tasks for each, the government, without more facts and analysis, is not free to change course and terminate the awards.”

Thus, the court held that because the Agency could not point to evidence in the record to support its determination that resolicitation was required to address the alleged issues with the procurement, the Agency’s proposed corrective action was unreasonable under the circumstances. Finding that the protesters’ claims were meritorious, the Court, after considering the remaining three factors for injunctive relief,³ granted the plaintiffs’ motion for judgment on the administrative record and vacated the Agency’s corrective action determination. The court remanded the matter to the Agency to determine by May 10, 2016 whether OCI concerns actually required corrective action.

SIGNIFICANCE

The court’s decision is significant for government contractors because it reflects an important check on agency discretion in deciding the appropriate corrective action in response to a protest. That is, although a CO has considerable discretion in deciding whether, and in what manner, to take corrective action, that determination must be supported and justified by the administrative record. Here, the court found that SOCOM’s proposed resolicitation was a drastic remedy given the entirely speculative nature of the OCI concerns at hand. Contractors will want to carefully review proposed corrective actions to similarly determine whether the proposed remedy is justifiable.

³ In determining whether injunctive relief is warranted, courts consider: (1) whether the plaintiff has succeeded on the merits; (2) whether the plaintiff will suffer irreparable harm if the court denies injunctive relief; (3) whether the balance of hardships favors injunctive relief; and (4) whether the public interest favors injunctive relief.