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Corrective Action

Court Stops Competition That Seemed to Play Favorites

BY DANIEL SEIDEN

The U.S. Court of Federal Claims stopped the Federal Highway Administration (FHA) from proceeding with a competition because a change in qualifications appeared to favor one contractor over another, a judge found (*Prof'l. Serv. Indus. Inc. v. United States*, Fed. Cl., No. 16-1038C, 11/15/16).

Judge Elaine D. Kaplan threw out the amendment, but also allowed the agency to decide if the original solicitation meets its needs or if changed circumstances demand submission of modified proposals.

"This is a very surprising decision because successful protests of corrective action are rare," Damien C. Specht, a Washington-area partner in Morrison & Foerster LLP's Government Contracts & Public Procurement practice, told Bloomberg BNA.

The agency failed to document its reasons for the amendment, but the more important point the court made here was "there were only two offerors and the solicitation amendments conformed very closely to one of those offerors' proposals," Specht said. "The court does not find bad faith, but it does imply some level of intent to drive the award to the preferred offeror."

Due to these "somewhat unique facts," he added, "contractors should not get too excited about bringing challenges to corrective action.

"That hill will remain quite steep," Specht said. "However, this case does prove that such challenges are not impossible."

Program Manager Qualifications. The original solicitation specified that the awardee must provide among its staff a program manager responsible for the oversight of all work under the contract.

The program manager was required to have master's degree and specific demonstrated knowledge and experience, according to the solicitation.

Professional Service Industries Inc. protested the award to Genex Systems LLC because it said Genex's proposed manager lacked requisite experience.

The Government Accountability Office (GAO) agreed and recommended that the agency re-evaluate propos-

als. It further recommended that the FHA amend its solicitation if it didn't accurately reflect its needs.

Weeks later, the FHA took corrective action by amending personnel requirements and sought revised proposals from Professional Service Industries and Genex.

Professional Service Industries shortly thereafter protested the amendment with the court.

Unexplained Amendment. The Court of Federal Claims ruled that the agency didn't document its decision as to whether the original solicitation's program manager requirements met its needs before issuing the amendment.

Therefore, the court said, altering the original requirements was unreasonable.

The court also said it was concerned that the amendment's "watering down" of program manager qualifications appeared to better conform to the background of Genex's proposed manager.

As a result, the court said it refused to "rubber-stamp" the unexplained amendment under these circumstances.

Nicholas Solosky, a partner at Fox Rothschild LLP in Washington, said the protester's victory is noteworthy given how "agencies are generally given a wide berth when it comes to conducting corrective action.

"It is not uncommon to see a protester that wins a protest, but is then disappointed by how the agency decides to implement the required corrective action," he said, adding that the decision doesn't provide finality because it "prohibits moving forward with the specific solicitation amendment being challenged — but does not close the door on future amendments or resoliciting revised proposals."

Favorable Venue. The Court of Federal Claims is a more favorable venue than the GAO for a protester to challenge a corrective action, Specht said.

The court has historically applied a "somewhat more stringent standard to agency corrective action" than the GAO, he said.

Oles Morrison Rinker & Baker LLP represented Professional Service Industries Inc. Wiley Rein LLP represented Genex.

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