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Bid Protest Spotlight: Rule Of 2, IT Bids, Evaluation Errors

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Our monthly bid protest spotlight will discuss a handful of interesting bid protests from the preceding month, highlighting the most noteworthy aspects of the decisions for companies competing for contracts and agencies seeking procurement.

April's bid protest roundup includes decisions from the U.S. Court of Federal Claims, the Government Accountability Office and the U.S. Federal Aviation Administration's Office of Dispute Resolution for Acquisition. These cases cover the implementation of the "rule of two" following the U.S. Supreme Court's Kingdomware Technologies v. U.S. decision, the current trend against lowest-price technically acceptable, or LPTA, and evaluation mistakes that agencies can make that often lead to sustained protests.

Land Shark v. United States

Land Shark Shredding LLC v. United States[1] involved a post-award protest to the COFC in which a service-disabled veteran-owned small business, or SDVOSB, objected to losing a U.S. Department of Veteran Affairs contract to a small business that was not an SDVOSB. As many may recall, the Kingdomware series of cases took the fight about VA set-asides and the rule of two all the way to the U.S. Supreme Court. In Kingdomware, the Supreme Court decided that the rule of two, imposed by the Veteran Affairs Act of 2006, was mandatory, even with federal supply schedule orders. The rule of two requires that a VA contracting officer must restrict a competition to concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more veteran-owned small business concerns will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

In the Land Shark case, the VA attempted to meet its requirements under Kingdomware by using a tiered system to get to contract award in one evaluation cycle. The first tier was SDVOSBs, followed by veteran-owned small businesses, all other small businesses and then all other businesses (large). Each tier would be given a preference over the next, moving down the tiers if an award could not be made at the tier above. Only three offerors responded to the solicitation: Land Shark (the protester), SafeGuard and an unnamed third offeror. Land Shark was an SDVOSB, SafeGuard was a small business and the other contractor was large. Land Shark's proposal was more than five times the price of Safeguard's

proposal, as well as the independent government cost estimate, or IGCE. Due to this huge price discrepancy, the VA determined that Land Shark's price was unreasonable and awarded to SafeGuard as the most advantageous to the government.

Land Shark made three central arguments against the award decision: (1) the agency should not have subjected its proposal to a price reasonableness test, and comparing price to the IGCE for reasonableness was irrational, (2) Land Shark's SDVOSB status was not given proper priority by the VA, in violation of Kingdomware and (3) SafeGuard did not comply with the limitation on subcontracting provision. In deciding the motion for a temporary restraining order, the court addressed each argument and found them unavailing; thus, it denied the motion stating that the Protester had not "shown likelihood of success on the merits of its protest."

First, the court concluded that, although an agency is not required to consider reasonableness of federal supply schedule, or FSS, prices, an agency is not forbidden from doing so. Further, the IGCE was reasonable in light of published prices and the fact that two of the three offerors submitted prices in line with it. Second, the VA's treatment of protester's SDVOSB status was reasonable and not a violation of Kingdomware. Kingdomware did not address price comparisons or the specific question of how the VA should determine an SDVOSB's prices fair and reasonable. The court found no violation of the Kingdomware rule of two in the agency's cascading system of preferences with SDVOSBs in the first tier. Third, the protester failed to explain how Safe Guard would violate the limitation on subcontracting beyond vague conclusory assertions.

Takeaways

Following the Kingdomware decision, SDVOSBs and VOSBs may have felt on top of the world, but the VA is finding ways to fit its procurements within the Kingdomware parameters while still getting the competition it was aiming for previously. Although the VA must give a preference to veteran-owned businesses, it does not need to do so at the expense of everything else, such as by accepting prices it deems unreasonable. The fact that the SDVOSB protester's price here was more than five times the price of the small business awardee lead the VA to declare the SDVOSB's price unreasonable and remove it from the competition.

Additionally, the tier system the VA used in this procurement is novel. Now that it has been blessed by COFC, however, it may become more common going forward. The VA does not want to have to run several procurements when it discovers no reasonable offers from each tier of small business, so it makes sense to include them all into one procurement. Notably, in Land Shark, there was only one SDVOSB in the tier. Still to come is to see how a similar case would be decided if there were two SDVOSBs and yet the VA awarded to a non-veteran-owned small business.

Finally, the COFC clarified that agencies may, in fact, consider price reasonableness under FSS contracts even if the agency is not required to do so. And agencies may do so even if the RFP does not specifically call for a price reasonableness evaluation, which further distinguishes price reasonableness from price realism.

Inserso

The matter of Inserso Corp.[2] shows a protester successfully persuading an agency to alter course through a pre-award bid protest. Inserso challenged the U.S. Department of the Air Force's decision to use a lowest-price, technically acceptable, or LPTA, approach in a solicitation for IT and cybersecurity

services, arguing that the National Defense Authorization Acts of fiscal years 2017 — Section 813(c) — and 2018 — Section 813(b) — provided that the U.S. Department of Defense should avoid using LPTA for IT or cybersecurity services.

Although the agency attempted to argue that Section 813(b) of the FY 2018 NDAA was not yet implemented into the DFARS, Inserso pointed out that the remaining subparagraphs became effective upon signing and the agency, at a minimum, must meaningfully consider how to avoid the use of LPTA to the maximum extent practicable. The agency opted to take corrective action on March 28, 2019, two weeks after the protest was filed. The agency announced it would withdraw the original request for quotations, or RFQ, and instead compete the requirement utilizing trade-off evaluation criteria. The GAO dismissed the protest as academic on April 2, 2019.

Takeaways

Often protesters attempt to make arguments like this one after they have already lost the award. Inserso did not wait to lose: It recognized that the RFQ put it at a potential disadvantage and protested to remedy the wrong. Contractors should read solicitations carefully to ensure there are no surprises later on. If there is an opportunity for questions and answers, consider asking even what may appear to be obvious questions to have a written record of the agency's interpretation of the solicitation.

Secondly, the FY 2017 and 2018 NDAAs suggest a move away from LPTA and toward best-value. Generally, the preference between the two swings like a pendulum. LPTA offers less flexibility in value but better price, and best-value could see the government paying a high premium for something only slightly better. With IT and cybersecurity, at least, the pendulum swings to best-value. Contractors and vendors with expensive, high-value products should take note.

Protest of Aquila Fitness

The FAA Office of Dispute Resolution for Acquisition is a unique forum that decides protests of FAA awards, because the FAA is not subject to the FAR. The ODRA follows its own protest rules, separate from the Government Accountability Office or Court of Federal Claims. At the ODRA, the protester bears the burden of proving, by substantial evidence, that the award decision lacked a rational bases, was arbitrary, capricious or an abuse of discretion, or otherwise failed in a prejudicial manner to comply with the acquisition management system, or AMS.[3] This analysis, of course, parallels the standard used by the U.S. Court of Federal Claims under the Administrative Procedures Act.

Aquila Fitness Consulting Systems Ltd. filed a protest with the ODRA after the FAA announced that Strive Well-Being Inc. had been awarded a contract for "fitness training services" and fitness center management. Mediation attempts — common in the ODRA — failed. The protester argued that the agency unreasonably evaluated its proposal and treated offerors unfairly.

The ODRA sustained the protest in part because the agency lacked a rational basis for assigning certain weaknesses to the protester. On several occasions, the agency accorded the protester weaknesses for items missing from the proposal, which were, in fact, in its proposal. Moreover, in some instances, the agency failed to accord weaknesses to Strive for similar proposal language to Aquila's.

Although the ODRA declined to sustain other protest grounds raised by Aquila, the ODRA concluded that Aquila may have been prejudiced by the unreasonable weaknesses assigned to its technical proposal. Specifically, the ODRA noted that Aquila was lower priced; thus, an increased technical score may have

changed the best-value trade-off. The ODRA recommended the agency re-evaluate proposals and make a new award decision within 60 days.

Takeaways

The ODRA may seem unique to those comfortable with the ways of the GAO, but it is a long-standing forum that bases its decision making on the APA — similar to the COFC. The ODRA publishes its decisions on its website and includes detailed findings and recommendations to explain its final decision. The most unique aspect of the ODRA's practice is its strong emphasis on mediation as part of the bid protest process.

As this case demonstrates, however, where mediation does not resolve a matter, the ODRA's decisions are likely to parallel the same types of decisions in the GAO. One cannot imagine that the GAO would decide this case any differently. The same principles apply to both types of protests: Agencies generally should adhere to the solicitation and not treat offerors unequally. To do otherwise is to act arbitrarily and capriciously.

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[1] COFC No. 18-1568C, Land Shark Shredding LLC v. United States, March 21, 2019

[2] GAO B-417392.1, Inserso Corporation, April 2, 2019

[3] FAA ODRA 18-ODRA-00844, Protest of Aquila Fitness Consulting Systems Ltd., February 13, 2019