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Bid Protest Spotlight: Arbitrary Action, Timeline, Task Order

By **James Tucker** (March 9, 2021, 6:08 PM EST)

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This month's bid protest roundup considers three important decisions.

In Superior Optical Labs Inc. v. U.S., in the U.S. Court of Federal Claims, a company successfully challenged an agency's decision to take corrective action by reopening a competition the company had already won.[1]

In NIKA Technologies Inc. v. U.S., the U.S. Court of Appeals for the Federal Circuit issued a decision clarifying the protest timelines applicable for triggering a stay of contract performance.[2]

In DynCorp International LLC v. U.S., the Court of Federal Claims reaffirmed the general prohibition on bringing task order protests to that court.[3]

Superior Optical Labs — Unnecessary Corrective Action

Agencies frequently take corrective action in the face of a potentially meritorious protest, and that is a good thing. But what if you are the awardee and the agency's corrective action is both unnecessary and likely to result in a different award decision? That is what faced the awardee in Superior Optical Labs.

Solicitation, Protest and Corrective Action

The U.S. Department of Veterans Affairs sought an eyeglass supplier. The solicitation required offerors to provide bid samples with their price proposals.

The bid samples were to consist of two sets of each of the frames each offeror proposed — "two (2) sample sets (labeled as Set 1 and Set 2) of the eyeglass frames offeror[s] propose[] to provide under the contract."

Although not explained in the solicitation, the two-set requirement was to permit the VA's technical evaluators to review the offered frames without having to be physically in the same location due to the coronavirus pandemic. The solicitation provided the VA would select the awardee on a lowest price, technically acceptable basis.

The two lowest-price offerors failed to submit two complete sample sets with their proposals, and the

VA eliminated their offers as technically unacceptable.

Under the solicitation's lowest price, technically acceptable source-selection procedures, the VA awarded the contract to Superior, which had the third-lowest price and complied with the solicitation's instructions for submitting two sample sets of its offered frames. The VA provided the unsuccessful offerors with the required notice of award, which included Superior's winning price.

The offeror with the second-lowest price protested to the U.S. Government Accountability Office, arguing that the solicitation did not actually require both sample sets of its frames to be complete. In the alternative, it argued the solicitation was latently ambiguous as to what it meant by two sample sets.

Prior to the date for submitting its agency report to the GAO, the VA announced it would take corrective action. The corrective action notice stated that, because the solicitation used the plural phrase "two (2) sample sets" in one place, but later used the singular words "sample" and "frame mix," the solicitation was latently ambiguous — i.e., the protester may have had insufficient notice the VA intended each offeror to provide two complete sets of its offered frames.

The VA stated it would terminate the award to Superior, amend the solicitation, permit proposal revisions and make a new award decision. In a lowest price, technically acceptable procurement, this seriously jeopardized Superior's award, as its price was now public and two offerors had lower prices than it did under the first evaluation.

Protest of the Corrective Action

After unsuccessfully objecting to the corrective action before the GAO, Superior filed suit at the Court of Federal Claims. The awardee-turned-protester argued the VA's proposed corrective action was arbitrary and capricious because there was no procurement error to correct: The solicitation was not ambiguous, Superior won the competition fair and square and the proposed termination of its contract was therefore irrational.

The court analyzed the text of the solicitation and found it required each offeror to make a submittal consisting of "two sample sets, independently labeled as such, containing 'the eyeglass frames offeror proposes to provide under the contract..'"

The court found "[t]here is no reasonable interpretation of this language other than that the VA required two complete sets of frames within a single submittal."

The court considered the VA's argument that the use of the singular noun "sample" and the word "mix" elsewhere in the solicitation introduced an ambiguity. The court found these terms did not modify the earlier requirement to submit "two (2) sample sets," and the singular nouns were best read in harmony with that prior requirement.

The court also observed that the original protester's own proposal belied the argument that the solicitation was ambiguous: That offeror in multiple instances did include two samples for some of its frames — it simply failed to provide two complete sets of all its frames. The court found this to be evidence not of confusion or ambiguity, but of careless proposal preparation.

Having found no ambiguity in the solicitation, the court concluded there was no rational basis for

terminating Superior's contract or taking corrective action. The court cited Federal Circuit precedent for the proposition "that a new competition after the contract had been awarded and price disclosed was, absent some independent justification, arbitrary and prejudicial."

Finding success on the merits and that the usual injunctive factors weighed in Superior's favor, the court enjoined the corrective action and ordered the VA to reinstate the award to Superior.

Takeaway

Agencies enjoy broad discretion in crafting corrective action, including the scope of the corrective action they take. When, however, an agency's basis for taking corrective action is demonstrably wrong and without a rational basis, an awardee may be able to convince the Court of Federal Claims to enjoin it.

NIKA Technologies: Enhanced Debriefing Timelines

In NIKA Technologies, the U.S. Court of Appeals for the Federal Circuit clarified the deadlines applicable to protests filed with the GAO for purposes of triggering a stay of contract performance.

The Federal Circuit held that, when an offeror receives a debriefing subject to the U.S. Department of Defense enhanced debriefing program, but submits no written questions following the debriefing, the offeror has five days from the date it received its debriefing in which to file a protest with the GAO if it wants to receive a stay of contract performance.[4]

This precedential decision reverses the judgment of the Court of Federal Claims, which held last year that the five-day clock does not begin to tick until two business days after the fifth day.

DOD Enhanced Debriefing Program

For a few years now, many DOD procurements have been subject to a statutory enhanced debriefing process. After a DOD agency provides an offeror a required post-award debriefing in a covered procurement, the offeror has two business days in which to submit written questions about the debriefing.

The agency then must provide written responses to the questions, generally within five business days. By statute, the offeror's protest clock does not begin to tick until the offeror receives the written responses to its timely debriefing questions.

But what happens if the debriefed offeror submits no questions? When does the protest clock begin to tick then?

NIKA's GAO Protest

On March 4, 2020, NIKA received a required debriefing in a procurement subject to the DOD enhanced debriefing rules. NIKA thus had two business days in which to submit any written debriefing questions — i.e., by March 6, 2020.

NIKA chose not to submit any post-debriefing questions, but it did decide to protest. On March 10, 2020, it filed a protest with the GAO — on the fourth day after its deadline to submit questions, but the sixth day after the date on which it received its debriefing.

Although the GAO had jurisdiction over the protest because it clearly met the separate 10-day deadline for jurisdictional purposes, the agency declined to implement the statutory stay of performance of the awarded contracts. In the agency's opinion, the protester's sixth-day protest missed the five-day deadline for triggering the performance stay.

NIKA's Court of Federal Claims Suit

The GAO lacks authority to require agencies to implement, or not to override, stays of performance. So, while NIKA continued to litigate the merits of its protest before the GAO, it filed a parallel suit at the Court of Federal Claims to compel the agency to stay contract performance.

NIKA argued that the two business days it had in which to submit post-debriefing questions were themselves an automatic extension of the debriefing. Under this theory, the five-day protest clock for triggering a performance stay did not begin to run until the question period ended — regardless of whether the offeror ultimately decided to submit any questions at all.

To the surprise of many protest lawyers, the Court of Federal Claims agreed with NIKA and ordered the agency to stay contract performance.

Appeal to the Federal Circuit

NIKA's victory was short-lived, though, as it eventually lost its GAO bid protest, and the stay it fought so hard to win thus came to its natural end. Although the controversy was no longer live, the government nevertheless appealed the Court of Federal Claims decision to the Federal Circuit.

Because this issue was "capable of repetition but evading review," the court accepted the appeal under a narrow exception to the ordinary rule that courts will not adjudicate moot controversies. NIKA, which stood to gain nothing regardless of the outcome of the appeal, did not file an appearance.

In this appeal with only an appellant, the court sided with the appellant. The Federal Circuit looked to the plain language of the underlying enhanced debriefing statute and found it contemplated that the debriefing date was the single date on which the debriefing actually was provided, and not a period of time extending from that date:

> The plain meaning of [31 U.S.C.] § 3553(d)(4)(A)(ii) is that the clock starts on the day that the bidder receives debriefing. The statute refers to "the debriefing date," using the singular form of the noun. § 3553(d)(4)(A)(ii). If Congress thought otherwise, it could have said "the end of the debriefing period," but instead it said "the debriefing date." This indicates that the proper interpretation is that the timer starts on the day that a bidder receives its debriefing, not two days afterward. It would be at odds with the plain meaning to interpret the statute to define "the debriefing date" as a day on which no actual debriefing occurred.

Focusing on the word "after" in the statute, the court rejected the lower court's holding that the two-day question period was part of the debriefing itself:

> While the statute mandates a two-day opportunity to ask questions, it mandates it "after … debriefing," which means that the two-day period for questions occurs within the five-day window for filing a protest. 10 U.S.C. § 2305(b)(5)(B)(vii).

As a result, the court held that a protester's five-day clock for filing a protest begins to run on the day of the debriefing itself, even in a DOD extended debriefing, but stops if the protester submits timely written questions to the agency within two business days. In that case, the protester's five-day clock resets itself and begins to tick again once the agency provides the written responses to the protester's timely questions.

Takeaway

Note that the court's holding in NIKA applies only to DOD procurements covered by the enhanced debriefing statute. There is no automatic right to reset protest clocks by asking questions under other procurements. Even in non-DOD procurements, however, agencies may voluntarily extend a debriefing beyond a single day, and occasionally grant specific requests to keep a debriefing open until an offeror has had a chance to receive answers to its relevant questions.

In procurements not covered by the DOD enhanced debriefing rules — which are automatic — the best practice is for an offeror to get written confirmation from the agency that a debriefing remains open for a question period, and for the agency to provide written notice when a debriefing closes. Absent such confirmation in a non-DOD procurement, an offeror generally should assume the five-day clock begins to run on debriefing day and will not be extended or reset.

DynCorp International: Changes of Name and Task Order Protest Bar

DynCorp International is interesting for two reasons.

First, it emphasizes that the exceptions under which the Court of Federal Claims may entertain protests of task orders are quite narrow, and creative pleading is insufficient to overcome the ordinary rule that the claims court lacks jurisdiction over task-order protests.

Second, it comes to a commonsense conclusion that administrative red tape in processing a legal entity's change of name does not create doubt about the entity's existence or its ability to receive task orders under an indefinite delivery, indefinite quantity contract it holds under a different name.

CACI's Conversion and Change of Name

On Dec. 31, 2017, CACI Technologies Inc. filed the necessary paperwork in the Commonwealth of Virginia to convert from a corporation to a limited liability company and became CACI Technologies LLC.

CACI then worked with the Defense Contract Management Agency to effect a change of name in accordance with Federal Acquisition Regulation 42.1205 for all of CACI's numerous government contracts, including the indefinite delivery, indefinite quantity contract at issue here. The government did not finalize CACI's change-of-name agreement until April 2020. Through it all, CACI kept 8D014 as its CAGE code.

As it waited for approval of its change-of-name application, CACI submitted a task order proposal to the U.S. Army under its indefinite delivery, indefinite quantity contract. Consistent with the fact that the government had not yet recognized the change of name, CACI submitted the proposal using its prior name, CACI Technologies Inc., and identified itself using the same CAGE code on its indefinite delivery, indefinite quantity contract — 8D014.

In May 2019, the Army awarded the task order to CACI Technologies Inc. — CAGE code 8D014. Following two protests by DynCorp and corrective action, the Army reawarded the task order to CACI Technologies Inc. — still under CAGE code 8D014.

By that time, the government had approved CACI's change of name and CACI had updated its System for Award Management profile to reflect its new name under the same CAGE code.

DynCorp then filed its third protest against the task order award at the GAO, arguing that CACI Technologies Inc. was ineligible for award because it did not hold the underlying indefinite delivery, indefinite quantity contract and no longer existed as a company, the agency was uncertain as to what company was the offering entity, and CACI's information in the System for Award Management was not accurate and current when CACI submitted its proposal.

When the GAO denied DynCorp's protest on the merits, the disappointed offeror took the unusual step of filing a task order protest at the Court of Federal Claims.

Dismissal for Lack of Jurisdiction Over Task Order Protests

On motions to dismiss, the Court of Federal Claims addressed the threshold question of whether it had jurisdiction over DynCorp's protest. The Federal Acquisition Streamlining Act, or FASA, broadly bars the claims court from adjudicating protests "in connection with the issuance or proposed issuance of a task or delivery order."[5]

FASA contains a narrow exception permitting the court to entertain a protest alleging a task order increases the "scope, period, or maximum value of the contract under which the order is issued."[6]

DynCorp first argued that its protest of the issuance of a task order to CACI was not in connection with the issuance of a task order. DynCorp argued it was really protesting the fact that CACI LLC allegedly did not have an indefinite delivery, indefinite quantity contract at all.

The court rejected this argument, noting that Federal Circuit precedent required the claims court to apply the FASA bar broadly to any action that was in connection with a task order or proposed task order. The court observed that DynCorp's action was plainly in connection with the task order issued to CACI, as issuance of the task order to CACI was precisely what precipitated the protest.

The court also noted that the relief sought was also in connection with the task order, as DynCorp sought an injunction of the task order.

DynCorp argued in the alternative that it was protesting a task order that exceeded the scope of the underlying indefinite delivery, indefinite quantity contract, and thus fell into one of the narrow exceptions to the FASA bar. The court rejected this argument, too.

The court observed that, under the standard rules of interpretation, exceptions to a policy ordinarily must be read narrowly. The court also noted that a parallel provision of FASA uses the phrase "statement of work or specifications" in place of "scope," which the court found to be evidence that the exception for scope increases refers specifically to a task order that goes beyond the statement of work or specifications of the underlying indefinite delivery, indefinite quantity contract.

This is a narrow exception to a broad prohibition, and not wide enough to permit the court to entertain an argument that a task order awardee is ineligible or nonexistent.

The Court's Resolution of the Change-of-Name Question

After determining it had no jurisdiction over the protest, the court nevertheless turned to the merits and held that DynCorp would have lost its protest even if the court did have jurisdiction.

DynCorp argued that, when CACI Inc. converted to CACI LLC, the old legal entity ceased to exist and the new legal entity started afresh under Virginia law. Thus, according to the protester, CACI Inc.'s indefinite delivery, indefinite quantity contract no longer had a contractor, and a nonentity submitted the task order proposal and was issued the task order.

The court rejected this argument, holding that the FAR contemplates a change-of-name procedure in connection with corporate conversions and considers the pre-name-change and post-name-change company to be the same entity. The court agreed with the GAO's decision that, in the context of a delayed change-of-name process, CACI and the awarding agency acted appropriately by using the preconversion name for task order purposes. To have done otherwise would have created needless administrative complications.

The court also rejected DynCorp's contention that Virginia law treats a conversion as extinguishing the preconversion corporation: The court found that, under Virginia law, the same entity simply carries on under a new name and new form.

Again echoing the GAO, the court looked to the single CAGE code that appeared on the indefinite delivery, indefinite quantity contract, the task order proposal and the task order award as confirmation that the same entity was the contractor, the offeror and the awardee. Thus, there was no confusion as to who CACI was.

Takeaways

Second-bite protests at the court rarely succeed when the GAO, as here, has issued a thorough denial on the merits. That is especially true in the case of task order protests. Although the court has jurisdiction over three exceptional kinds of task order protests, the court views those exceptions as quite narrow.

Corporate transactions and internal restructuring continue to generate business for protest lawyers. Where, however, the awarding agency is aware of the corporate event, or nothing material has changed in the entity that undergoes the restructuring, a protest is unlikely to succeed.

The GAO's and the court's decisions in the DynCorp protests likely will provide comfort to companies undergoing simple conversions or changes of name. If they follow the rules in the FAR and keep their CAGE codes straight, the change is unlikely to pose a material risk of a sustained protest.

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[1] Superior Optical Labs Inc. v. United States, No. 20-1497C.

[2] Nika Technologies Inc. v. United States, No. 20-1924.

[3] DynCorp International LLC v. United States, No. 20-cv-1293C.

[4] A protester may also trigger an automatic stay of performance by filing a protest with the GAO within 10 days after the date of contract award. This alternative protest clock was not at issue in this decision.

[5] 10 U.S.C. § 2304c(e).

[6] 10 U.S.C. § 2304c(e)(1)(A).