

Contract Formation and Source Selection

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Sole-Source Justifications

- No startling developments in the past year
- While it's legal to make sole-source awards, Comptroller General and the U.S. Court of Federal Claims continue to look very carefully at such awards.
- Kudos to the agencies that are taking advantage of the different types of market research available, including requests for information and draft requests for proposal.
 - This can result in a very competitive solicitation that benefits both the agency and the taxpayer.

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Sole-Source Justifications

- In the last year, there were at least three instances in which agencies were found to have justified their use of a sole-source approach.
 - *Ridgeline Industries, Inc.*, B-402105, Jan. 7, 2010, 2010 CPD ¶ 22
 - *Sikorsky Aircraft Corp.*, B-403471, et al., Nov. 5, 2010, 2010 CPD ¶ 271
 - *Emergent BioSolutions, Inc.*, B-402576, June 8, 2010, 2010 CPD ¶ 136

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Sole-Source Justifications

- To fully appreciate these cases, it is important to understand that agency technical personnel—the customers—will often have a favorite contractor in mind and will do what they can, including withhold information from their contracting people, to make sure things work out as they wish.

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Meaningful Discussions

- “Meaningful discussions” is the product of a long line of GAO decisions holding that whenever an agency engages in discussions with offerors, those discussions must be “meaningful.”
 - *AINS, Inc.*, B-400760.4, *et al.*, Jan. 19, 2010, 2010 CPD ¶ 32
 - *AMEC Earth & Environmental, Inc.*, B-401961, *et al.*, Dec. 22, 2009, 2010 CPD ¶ 151

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Past Performance

- Although agencies are given broad discretion in their handling of past performance information, that discretion is not unlimited.
 - *Shaw-Parsons Infrastructure-Recovery Consultants, LLC; Vanguard Recovery Assistance, Joint Venture*, B-401679.4, *et al.*, March 10, 2010, 2010 CPD ¶ 77
 - *CRAssociates, Inc. v. United States*, 95 Fed. Cl. 357 (2010)
 - *BLR Group of America v. United States*, 94 Fed. Cl. 354 (2010)

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Past Performance

Litigation should be undertaken only if all other efforts have failed.

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Organizational Conflicts of Interest

- OCIs – Perhaps the most difficult challenge facing agencies and contractors alike in a pre-award context
- This issue has increased in importance and in frequency on bid protest dockets.
- The trend does not appear to be ebbing.

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Organizational Conflicts of Interest

- Federal Acquisition Regulation (FAR)
 - April 26, 2011 – The Department of Defense (DoD), NASA and GSA issued a proposed rule to amend the FAR coverage.
 - Comments on the proposed rule are due by June 27, 2011.
 - December, 29, 2010 – The DoD issued a new rule addressing OCIs on major defense programs.
 - Too early to tell precisely what impact these new rules will have; the GAO and the courts continue to deal with this challenging issue.

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Organizational Conflicts of Interest

- *McCarthy/Hunt, JV*, B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68
- *Turner Construction Company v. United States*, 94 Fed. Cl. 561 (2010), *appeals pending*, Dkt. No. 2010-5158, Federal Circuit
- *Valdez International Corp.*, B-402256.3, Dec. 29, 2010, 2011 CPD ¶ 13
- *Serco, Inc.*, B-404033 *et al.*, Dec. 27, 2010, 2010 CPD ¶ 302

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Choice of Protest Forum

- Pre-award protests may be filed at the procuring agency, with the GAO, or with the U.S. Court of Federal Claims; however, the GAO handles far more claims than the Court.
- GAO Statistics
 - FY 2010 – 16 percent increase in the number of protests it received as compared to a 20 percent increase the year before.
 - FY 2010 – 441 decisions issued on the merits; 82 sustained, for a “sustain rate” of 19 percent – a rise of one percent from the prior year, but still far below FY 2006 when the sustain rate was 29 percent.

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Choice of Protest Forum

- GAO Statistics
 - Used Alternative Dispute Resolution procedures in 159 protests, ten more than the year before.
 - 2010 – **42 percent effectiveness rate** (“Effectiveness rate” is the total of its sustained decisions, and the number of protests where the GAO recommended that the agency take corrective action in order to avoid an adverse decision.
- 2010 – [IS THIS ALSO FISCAL YEAR? ALSO, THIS SHOULD BE MOVED UP IN YOUR PRESENTATION – EARLIER IN THE PARAGRAPH. AGREE?] U.S. Court of Federal Claims was chosen for 88 bid protest cases, 19 of them pre-award and 69 post-award.

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Choice of Protest Forum

- U.S. Court of Federal Claims treats protests as a *de novo* matter, *i.e.*, the GAO's decision is not given any deference.
- As a result, it is theoretically possible for a company to lose at the agency level, then lose in a protest at the GAO, and finally prevail at the U.S. Court of Federal Claims.
 - *Geo-Seis Helicopters, Inc.*, B-299175 *et seq.*, March 5, 2007, 2007 CPD ¶ 135
 - *Geo-Seis Helicopters, Inc. v. United States*, 77 Fed. Cl. 633 (Fed. Cl. 2007)

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