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Update on Procurement-Related Cases
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While there were no significant surprises in the decisions of the courts, boards of contract appeals or the Government Accountability Office ("GAO") with respect to protest or contract administration issues, there have been some cases of interest that provide further guidance or develop the jurisprudence of certain areas of procurement law. In June 2011, the GAO's decision in *Technatomy Corp.*, B-405130, June 14, 2011, 2011 CPD ¶ 107, caused quite a stir when the GAO held that it had jurisdiction over a protest concerning a task order competition by a civilian agency because Congress had not extended the May 27, 2011, sunset provision at 41 U.S.C. § 4106(f) that had prohibited protests involving ID/IQ task order competitions unless their value exceeded $10 million and gave GAO exclusive jurisdiction over such competitions. In September 2011, the U.S. Court of Federal Claims ("COFC") agreed with the GAO's interpretation of the statute's sunset provision and took jurisdiction over a protest against a Department of Labor task order award. *MED Trends, Inc. v. United States*, 101 Fed.Cl. 638 (2011). Curiously, Congress had extended the sunset provision in the companion statute applicable to defense agencies and NASA, 10 U.S.C. § 2304c(e)(3), to September 30, 2016.

After seven months during which protests against civilian agency task order competitions were not restricted, Congress finally fixed the problem with the passage of the National Defense Authorization Act for FY 2012 on December 31, 2011. What this means is that the statutory prohibition against task order protests – unless the task order value exceeds $10 million or the task order is alleged to exceed the scope of the underlying ID/IQ contract – is in place until September 30, 2016 with respect to all agency task order competitions, and that the GAO has exclusive jurisdiction over task order awards that can be protested.

A. Organizational Conflicts of Interest ("OCI")

We reported at last year's program that OCI protests were on the rise, and that trend has continued through 2011. In *Turner Construction Co., Inc. v. United States,* 645 F.3d 1377 (Fed. Cir. 2011), the U.S. Court of Appeals for the Federal Circuit affirmed the COFC's decision holding that the Army's decision to follow a GAO recommendation to terminate a contract awarded to Turner and to exclude Turner from consideration of the new award because of an OCI was unreasonable. The Federal Circuit agreed with the COFC that the GAO decision, which rejected the contracting officer's analysis and findings that no OCI existed, lacked a rational basis. Based on the fact-specific circumstances in the procurement at issue, the court held that

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the GAO's determination was not based on "hard facts" but rather was premised on inferences based on mere suspicion and innuendo. In other words, the GAO decision cited no "hard facts" demonstrating that Turner's design partner—through merger talks with a member of a joint venture that had been contracted to prepare the design requirements for the hospital to be constructed under the contested procurement—actually or potentially had access to special knowledge or competitively useful information giving rise to a "biased ground rules" and/or an "unequal access" OCI.

There have been numerous protests involving OCI issues since the *Turner* decision was issued demonstrating that OCIs have increasingly become a thorny problem for procurement officials. In *NETSTAR-1 Government Consulting, Inc. v. United States,* 101 Fed.Cl. 511 (2011), the COFC sustained a protest against a DHS award of a blanket purchase agreement to Alon, Inc. because the contracting officer improperly delayed the identification of the potential OCI contrary to FAR requirements, the "hard facts" showed that Alon had a significant "unequal access" OCI, and the OCI was not sufficiently mitigated with post-award declarations from certain Alon employees (but not those employees who had had access to the competitively valuable information). Interestingly, the GAO had denied NETSTAR's earlier protest, having completely deferred to the agency's determination that any potential OCI had been adequately mitigated.

Finally, two post-*Turner* GAO decisions warrant mentioning, both of which involved an offeror's hiring of a former government employee. In *VSE Corporation,* B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268, VSE successfully protested the Army's termination of a contract awarded to VSE because the CO determined there was an appearance of impropriety created by VSE's hiring of a former deputy project manager with the Army's Rapid Equipping Force ("REF") as a consultant. After considering the "hard facts" regarding the deputy project manager's activities while with the REF based on declaration and hearing testimony, the GAO determined that the CO had relied on assumptions, rather than the "hard facts," and an incorrect understanding of the statutes and regulations applicable to post-government employment activities (*i.e.*, what was meant by allowable "behind-the-scenes" activities by former government employees).

In the other case, *TeleCommunication Systems, Inc.*, B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229, the GAO denied a similar protest challenging the agency's termination of the protester's contract on the basis that the protester's hiring of a former high-level agency employee created an appearance of impropriety that may have caused an unfair competitive advantage. In contrast to the situation in the *VSE* protest, the GAO found that the agency had conducted a thorough and

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well-documented investigation in which it was found that the former employee had access to non-public source selection information while employed by the government and appeared to have had input in the preparation of the protester's revised proposal once he became a company employee.

Because of the growing scrutiny on conflict situations, contractors should educate themselves about the OCI rules, and they should be increasingly vigilant in recognizing actual or potential conflicts and seeking ways to mitigate OCI risks at the earliest possible time.

B. Federal Supply Schedule ("FSS") Procurements

While there have been no significant changes with respect to FSS procurements, two GAO decisions are worth mentioning as reminders of what can and cannot be done in a FSS competition. The GAO sustained a protest against the award of a FSS order where the solicitation limited competition to vendors holding FSS contracts for required items and the selected vendor's FSS contract did not include all required items. As the GAO reiterated in *Rapiscan Systems, Inc.*, B-401773.2, B-401773.3, March 15, 2010, 2010 CPD ¶ 60, the sole exception to the requirement that all required items in a solicitation must be included in a vendor's FSS contract is for items that do not exceed the micro-purchase threshold of $3,000.

The decision in *Brooks Range Contract Services, Inc.*, B-405327, Oct. 12, 2011, 2011 CPD ¶ 216, involved a FSS competition where the selected awardee was a team of two companies, each holding the required FSS contract, that had submitted its proposal pursuant to a contractor team arrangement ("CTA"), as authorized and addressed at the GSA's CTA website. The protester argued that the award was improper because the awardee was a joint venture entity that did not have its own FSS contract. The GAO disagreed, finding that the awardee team followed the guidance provided by the GSA in an answer to a vendor question that two schedule holders could form a CTA per GSA's CTA website and had included a copy of the CTA with their quotation, and that each team member had a FSS contract.

The protester fared no better when it raised the same arguments before the COFC. In *Brooks Range Contract Services, Inc. v. United States*, 101 Fed.Cl. 699 (2011), the court held that the challenged CTA complied with the mandatory requirements at GSA's CTA website and with the applicable solicitation. To avoid a similar challenge, the court advised drafters of future CTAs to include a provision specifically disclaiming status as a joint venture, partnership or other formal business organization. This case also provides cautionary guidance for

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protesters: They must articulate in their opening briefs that the alleged procurement errors prejudiced their chances for award. In *Brooks Range*, the court held that the plaintiff lacked standing because it waived the requisite prejudice argument by failing to raise it until the plaintiff responded to the government's initial motion for judgment on the administrative record.

C. Contracting With Service-Disabled, Veteran-Owned Small Business Concerns

Procurements restricting the competition to service-disabled, veteran-owned small business ("SDVOSB") concerns have increased steadily over the past few years. Recent GAO decisions remind us that, before using the FSS, the Department of Veterans Affairs ("VA") is statutorily required to conduct market research to determine if the procurement should be restricted for SDVOSB concerns, and it must set aside the procurement for SDVOSBs if the prerequisites (*i.e.*, there is a reasonable expectation that two or more SDVOSB or VOSB concerns can meet the requirement at a reasonable price) are met. *Aldevra*, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183, and A*ldevra*, B-406205, March 14, 2012, 2012 CPD ¶ 112. In a rare move, the VA advised the GAO that it was not going to follow GAO's recommendation in the first *Aldevra* decision to conduct the requisite market research and cancel the FSS procurement if the statutory requirements were met. In the second *Aldevra* decision, involving the same issue but a different FSS procurement, the GAO reached the same conclusion and rejected all of the VA's arguments to the contrary. On March 19, the VA again informed GAO that it would not follow GAO's recommendation. Since the VA and the GAO clearly disagree on the correct interpretation of the statute, a resolution of the issue will have to come either from the COFC or through a legislative fix.

The GAO also confirmed that only SDVOSB concerns listed in the VA VetBiz Vendor Information Pages database are eligible for award of a VA contract (*A1 Procurement, JVG,*, B-404618.3, July 26, 2011, 2011 CPD ¶ 140) and that this requirement applies as well to joint ventures even if one or both joint venture members are listed in the database (*Pro South-Emcon, a Joint Venture,* B-405267, B-405268, Aug. 18, 2011, 2011 CPD ¶ 162).

With respect to joint ventures consisting of one or more SDVOSB concerns, the SBA's Office of Hearings and Appeals ("OHA") issued a decision last year, *Construction Engineering Services, LLC*, SBA No. VET-213 (2011), in which OHA reversed its 2007 and 2009 decisions, which had held that a SDVO joint venture structured as a separate legal entity, such as a limited liability company, could not qualify as a SDVOSB concern because of the regulatory requirement, 13

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CFR § 125.9, that a SDVOSB concern must be directly owned and controlled by a service-disabled veteran. OHA reversed its previous position on several grounds: (a) 13 CFR § 125.15(b), which appears in Subpart C of the SDVOSB regulations that governs contracting, specifically provides that a SDVOSB concern may joint venture with another small business for the purpose of performing a SDVOSB set-aside contract and does not differentiate between informal joint venture arrangements and joint ventures formed as separate legal entities; (b) since § 125.9 is in Subpart B of the regulations that govern eligibility, it is more reasonable to conclude that § 125.15(b) serves to exempt a SDVO joint venture from the eligibility requirements in Subpart B; (c) the SBA's 8(a) regulations at Part 124 allow joint ventures between 8(a) concerns and other small business concerns that can be eligible for 8(a) contract awards and there is no reason to interpret and apply the SDVOSB regulations differently in this regard; and (d) requiring a SDVO joint venture to meet the SDVO program eligibility requirements if it is structured as a separate legal entity would discourage SDVOSB concerns from taking practical measures to protect themselves when joint venturing with other firms (such as limiting their exposure to liability by forming a LLC).

Two other recent OHA decisions confirmed that a SDVOSB joint venture agreement must name the SDVOSB concern as the managing venturer and clarified that the agreement must actually provide the name of the SDVOSB employee who will serve as the project manager. *Hane-JV,* SBA No. VET-227 (2012) (affirming Area Office rejection of joint venture agreement because it gave both parties equal control and it failed to name the SDVOSB concern's employee serving as the project manager). *Rush-Link One Joint Venture,* SBA No. VET-228 (2012) (interpreting the regulation's project manager requirement to mean that the joint venture agreement must identify a specific individual employed by the SDVOSB concern as the project manager).

D. Postscript Regarding Joint Venture Agreements

At last year's program, we addressed many of the changes to the SBA regulations that became effective on March 14, 2011. One change to the rules governing the SBA's Mentor-Protégé Program at § 124.520 was that to receive the benefit of the "non-affiliation" rule, which is an exception from the general rule that joint venture members are deemed affiliates for size purposes, a joint venture must meet the requirements of § 124.513 for both 8(a) and non-8(a) procurements. A very recent decision by a SBA Area Office demonstrates the significance of this rule. In that case, an 8(a) concern had a SBA-approved mentor-protégé agreement with a large concern, and the two companies joint ventured together in submitting a proposal in response to a small business set-

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aside procurement. Since the procurement was not an 8(a) set-aside, the JV team did not have to obtain approval of the joint venture agreement from the protégé's SBA District Office as required by § 124.513(e). When the JV was selected for award, several competitors submitted timely size protests, which were forwarded to the applicable SBA Area Office. In response to the size protest, the JV provided the Area Office with the requested documentation, including a copy of the joint venture agreement, and argued that the "non-affiliation" rule should apply because the joint venture was between the parties to an approved mentor-protégé agreement. The Area Office rejected that argument and upheld the size protest because the joint venture agreement did not comply with all of the content requirements set forth at § 124.513(c). Because the JV team did not carefully draft their joint venture agreement to satisfy the regulatory requirements, it lost what could have been a lucrative construction contract.

Kym Nucci counsels clients on issues related to bid protests, performance requirements and disputes, and claims by and against the government. She also advises clients on labor-related issues uniquely applicable to government contractors, such as Service Contract Act compliance, and has considerable experience with small business issues.

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