THOMPSON COBURN LLP

GOVERNMENT CONTRACTS *update*

Bid Protest Highlights

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Timing for Filing a Protest

Solicitation terms

- For protests filed at GAO, GAO's rule at 4 C.F.R. § 21.2(a)(1) requires that they be filed before proposals are due. This rule is strictly applied by GAO.
- For protests filed at the COFC, a similar requirement was established in *Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308 (Fed. Cir. 2007), in which the Federal Circuit held that in situations where the protester had the chance to challenge solicitation terms before award and failed to do so, the protest is deemed to have been waived and will be dismissed as untimely.
- The *Blue & Gold* waiver rule was applied in a post-award challenge of a solicitation amendment that was issued after proposal submission and the agency did not request revised proposals based on the amendment. In *Comint Systems Corp. v. U.S.*, 700 F.3d 1377 (Fed. Cir. 2012), the Federal Circuit held that the challenged terms in the amendment were patent and the protester had time to file its protest before award.

Timing for Filing a Protest

Solicitation terms *(cont.)*

- With respect to non-offerors protesting solicitation terms, the particular circumstances will dictate whether the *Blue & Gold* waiver rule is applied. *Compare Red River Communications, Inc. v. U.S.*, ___ Fed.Cl. ___, 2013 WL 628320 (2013) (competition restricted to NETCENTS contract holders and protester, the incumbent, did not have a NETCENTS contract; held protester's challenge was not waived under *Blue & Gold*), and *Shamrock Foods Co. v. U.S.*, 92 Fed.Cl. 339 (2010) (despite being invited to submit a proposal showing how it could meet solicitation requirements, protester did not protest the solicitation until after award; held protester's challenge was waived).

Unsuccessful Offeror

- When your proposal is excluded from the competitive range, the timing for filing a protest depends on when you knew or should have known the basis of your protest. If you don't ask for a debriefing, any protest must be filed within 10 days of the date you receive the exclusion letter.
- Regardless of what the exclusion letter says, always request a pre-award debriefing within three days of notice of your exclusion.
- Whether you receive a pre-award debrief or the agency, at its discretion, postpones the debrief until post-award, your protest cannot be filed before the debriefing date. *See Pentec Environmental, Inc*., B-276874.2, June 2, 1997, 97-1 CPD ¶ 199.
- When you receive notice that award was made to someone else, request a post-award debriefing within three days of receipt of the notice.
- Even if you know the basis for your protest, you must wait until the debrief before the protest can be filed. *See* 4 C.F.R. § 21.2(a)(2) (debriefing exception language)

Unsuccessful Offeror

- Once the debrief is concluded, GAO protests must be filed within five calendar days of the debrief if you want to trigger the automatic stay of contract performance, or within 10 days of the debrief in order to be timely.
- When a debrief is considered "concluded" is critical. Compare *Harris IT Services Corporation*, B-406067, Jan. 27, 2012, 2012 CPD ¶ 57 (held protest was timely where agency affirmatively indicated that the debriefing process was continuing after a written debriefing was provided to the protester because protest was filed within 10 days of subsequent telephonic debriefing) and *SI, LLC*, B-295209, Nov. 22, 2004, 2005 CPD ¶ 71 (held protest was untimely where there was no affirmative indication from the agency that the debriefing would remain open after the scheduled session).

Eligibility to Protest

- For a GAO protest, you must be an actual or prospective offeror whose direct economic interest would be affected by a contract award or the failure to make a contract award. 4 C.F.R. § 21.0(a)(1).
- The standing requirement is essentially the same at the COFC. *HP Enterprise Services, LLC v. U.S.*, 104 Fed.Cl. 230 (2012).
- According to the COFC, standing arises from prejudice to the protester. To establish prejudice in a pre-award protest, you must show that you were an actual or prospective offeror that has suffered or will suffer a non-trivial competitive injury which can be addressed by judicial relief. *Bayfirst Solutions, LLC v. U.S.*, 104 Fed.Cl. 493 (2012).
- In a post-award protest, you must show that you were an actual or prospective offeror and that, but for the agency's errors, you would have had a substantial chance of receiving the contract award. *Three S Consulting v. U.S.*, 104 Fed.Cl. 510 (2012).

Common or Recent Protest Grounds

Organizational conflicts of interest (OCI)

- As addressed at FAR Subpart 9.5, OCIs fall into three groups: biased ground rules, unequal access to non-public information, and impaired objectivity.
- To establish that an OCI prevents an offeror from receiving an award or from protesting the award to another contractor, an agency must make an OCI determination based on hard facts showing that the OCI exists. *See NikSoft Systems Corp.*, B-406179, Feb. 29, 2012, 2012 CPD ¶ 104 (agency request to dismiss protest because protester had an OCI was rejected by GAO because agency failed to show that its OCI determination was based on hard facts, rather than speculation or unsubstantiated conclusions, demonstrating that the protester had unequal access to competitively-useful information).

Common or Recent Protest Grounds

- Contractors can take steps to mitigate their OCIs, however, the GAO has held that an impaired objectivity OCI cannot be mitigated by a proposed firewall. *Cognosante, LLC*, B-405868, Jan. 5, 2012, 2012 CPD ¶ 87 (held that protester was properly excluded from the competition because protester's dual role as both a state and federal audit contractor with respect to the Medicaid program created an impaired objectivity OCI, and that a proposed firewall was irrelevant to an OCI involving impaired objectivity because the conflict pertains to the organization and not to the individual employees).

Common or Recent Protest Grounds

Clarifications vs. discussions

- FAR 15.306 describes the kinds of exchanges that agencies may have with offerors.
- Clarifications are limited exchanges for the purpose of eliminating minor uncertainties or irregularities.
- On the other hand, discussions occur when the communication's purpose is to obtain information essential to determine the acceptability of a proposal or allows an offeror to revise its proposal.

Common or Recent Protest Grounds

Clarifications vs. discussions *(cont.)*

- If discussions are held (regardless of whether the agency characterizes them as clarifications), they must be held with all offerors in the competitive range. *ERIE Strayer Company*, B-406131, Feb. 21, 2012, 2012 CPD ¶ 101 (protest sustained where the agency's communications with the awardee constituted discussions because, prior to the exchange, the proposal was rated as unacceptable and after the exchange it was found to be acceptable, and the agency failed to conduct discussions with the protester).

Common or Recent Protest Grounds

- Where an agency conducts discussions, or its communications with offerors are found to constitute discussions, those discussions must be meaningful. *Tipton Textile Rental, Inc.,* B-406372, May 9, 2012, 2012 CPD ¶ 156 (protest sustained on the bases that the agency's communications with the protester constituted discussions, and the discussions were not meaningful because the agency did not base its evaluation on the protester's responses to questions asked by agency officials during telephone calls and during a site visit).

Common or Recent Protest Grounds

Price analysis (for reasonableness and/or realism) and cost realism analysis

- Protesters challenging agency price/cost evaluations often confuse these concepts.
- For fixed-price contracts, agencies need only evaluate the offered prices for reasonableness. They can evaluate prices for realism only if the solicitation calls for such a price realism analysis.
- Price reasonableness is an assessment of whether a price is unreasonably high, and price realism is an assessment of whether the price is too low. *Lifecycle Construction Services, LLC*, B-406907, Sept. 27, 2012, 2012 CPD ¶ 269 (protest sustained because agency's rejection of protester's proposal as unreasonably low priced, based on a comparison of protester's price to a median price calculated by the agency by including prices of otherwise unacceptable offerors, was improper); *Digital Technologies, Inc*., B-406085.2, Feb. 6, 2012, 2012 CPD ¶ 94 (protest sustained where agency's determination that protester's price was unrealistically low and posed a performance risk was unreasonable because the agency did not compare protester's price to the prices of all seven offerors, and its conclusions were not supported by the record).

Common or Recent Protest Grounds

- Where a cost reimbursement contract is to be awarded, agencies must conduct a cost realism analysis of the offerors' proposals.
  - This does not mean that agencies must verify each and every variable reflected in cost proposals; rather, they must reasonably consider the extent to which the costs reflected in the technical approach reflect what the contract should cost, assuming reasonable economy and efficiency. *KPMG LLP*, B-406409 *et al*., May 21, 2012, 2012 CPD ¶ 175 (protest sustained where agency's inadequate cost realism analysis failed to consider the reasonableness of the awardee's reduced costs in the out years based on its plan to replace higher-paid personnel, whose resumes were evaluated as part of the awardee's technical approach, with less experienced, lower-paid personnel).

Common or Recent Protest Grounds

Electronically-submitted proposals and the late proposal rules

- In this age of electronic commerce, the FAR late proposal rules are woefully outdated.
- Fortunately, the COFC – unlike the GAO – has reasonably and fairly applied the FAR in situations where a proposal clearly was received by the government's e-mail server and, therefore, was under the government's control, but was not received in the designated recipient's mailbox due to glitches in the government e-mail system until after the proposal deadline. *Insight Systems Corp. v. U.S.*, ___ Fed.Cl. ___ (May 6, 2013) (rejecting government's rigid application of the "late is late" rule where agency's e-mail system delayed transmission of the offerors' timely electronic quotes from the receiving server to the contracting officer's mailbox, and holding that the Government Control exception in the FAR applied); *Watterson Constr. v. U.S.,* 98 Fed.Cl. 84 (2011) (same).

Common or Recent Protest Grounds

Procurement vs. grant or cooperative agreement

- As defined in the Federal Grant and Cooperative Agreement Act, agencies must use procurement contracts when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the government.
- Cooperative agreements or grants shall be used when the principal purpose of the relationship is to transfer a thing of value to carry out a public purpose in support or stimulation authorized by law.
- In two recent cases, the COFC reached different conclusions in response to plaintiffs' challenges to agency conduct of a competition for the award of a cooperative agreement.

Common or Recent Protest Grounds

- In *360Training.com, Inc. v. U.S.,* 104 Fed. Cl. 575 (2012), the COFC held that notwithstanding OSHA's use of a cooperative agreement for online OSHA outreach training program courses, the court had jurisdiction over plaintiff's protest because OSHA was engaging in a procurement process to acquire from a third party services that were statutorily required to be provided by OSHA.

Common or Recent Protest Grounds

- In *CMS Contract Management Services et al. v. U.S.*, ___ Fed.Cl. ___, 2013 WL 1727186 (2013), the COFC upheld HUD's use of a Notice of Funding Availability (NOFA) contemplating the award of cooperative agreements for services to administer the Section 8 project-based housing program throughout the U.S. and its territories.
- Based on a thorough analysis of the numerous and complex changes to the Housing Act since its enactment in 1937, the court determined that the principal purpose of the relationship between HUD and state public housing agencies, the ultimate awardees, was to transfer Section 8 funding to the states to carry out their public purpose to provide safe and affordable housing to low and middle income families, and that the Housing Act did not mandate HUD's performance of the Section 8 administration services.

Common or Recent Protest Grounds

- In August 2012, the GAO had reached the opposite conclusion, holding that HUD was conducting a procurement and could not acquire the services through the NOFA process. *Assisted Housing Services Corp. et al.,* B-406738 et al., Aug. 15, 2012, 2012 CPD ¶ 236. This hotly-contested issue is likely heading to the Federal Circuit.

Thank You

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