

Roundup

An Update on Government Contracts Issues for Clients & Friends

GAO's Latest Word on OCIs

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Contractors who believe that a competing bidder on a government contract may have an organizational conflict of interest ("OCI") may find it more difficult to obtain relief in the wake of two recent GAO decisions, both of which denied OCI-based protests. In *Overlook Systems Technologies*, B-298099.4 & B-298099.5, 2006 U.S. Comp. Gen. LEXIS 199 (November 28, 2006), the GAO held that an agency's communications with an offeror do not constitute improper "discussions" when their purpose is to determine whether the offeror is barred from performance by an organizational conflict of interest. Less than two weeks later, in *Leader Communications Inc.*, B-298734 & B-298734.2, 2006 U.S. Comp. Gen. LEXIS 200 (December 7, 2006), the GAO reaffirmed that an agency may allow an incumbent contractor to compete on related contracts, absent evidence that the contractor's performance of the incumbent contract enabled it to obtain an unfair advantage in the procurement.

The *Overlook Systems* case arose from an Air Force procurement for support services for the Global Positional System ("GPS") Operations Center at Schriever Air Force Base in Colorado. Overlook Technologies, Inc. ("Overlook") protested the award of the contract to LinQuest Corporation ("LinQuest"), alleging that one of LinQuest's proposed subcontractors had an OCI that prevented its objective performance of the contract. LinQuest proposed to use General Dynamics Advanced Integration Systems ("GDAIS") in performance of the contract. Overlook argued that the contract required the winning bidder to analyze and evaluate GPS systems manufactured by General Dynamics and certain competitors of General Dynamics, and that GDAIS could not perform such evaluations objectively.

After the protest was filed, the Air Force requested that LinQuest address in writing any actual or potential conflicts in its performance and advise what steps it would take to mitigate or eliminate them. In response, LinQuest provided the Air Force with a written mitigation plan. After reviewing the plan, the Air Force concluded that the risk of a conflict was minimal, and renewed its decision to award the contract to LinQuest. Overlook renewed its protest, and added a second, supplemental protest ground: it argued that the Air Force's communications with LinQuest regarding the mitigation plan constituted improper discussions.

The GAO denied Overlook's protest on both grounds. Turning first to the alleged conflict of

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interest itself, the GAO held that the Air Force had conducted a meaningful review of the potential OCI. When an agency is found to have conducted a meaningful review of an alleged conflict, a bid protest will only be upheld if the agency's determination is unreasonable or unsupported by the record. The GAO found that the record supported the Air Force's conclusion that LinQuest's proposed performance created a minimal risk of a conflict of interest.

Next, the GAO addressed Overlook's novel argument that the Air Force's communications with LinQuest requesting the mitigation plan constituted improper discussions. Where an agency engages in discussions with one offeror, it must afford all offerors in the competitive range an opportunity to engage in meaningful discussions. FAR § 15.306(d)(1). An agency is generally deemed to have held discussions with an offeror when the purpose of the agency's communication is to obtain information essential to the proposal's acceptability or to allow the offeror to materially revise or modify its proposal. However, not all communications between the government and an offeror constitute discussions.

Here, the GAO held that the Air Force's communications with LinQuest did not constitute discussions. The Air Force's intent in communicating with LinQuest was to ascertain whether LinQuest could properly be classified as a "responsible" bidder. The communications did not seek additional information about LinQuest's technical proposal or pricing, nor was LinQuest offered the opportunity to revise its bid in any material respect as a result of the communications. Accordingly, the communications were not "discussions," and therefore were proper.

The GAO considered a second OCI issue in the *Leader Communications* case. That case arose from an RFP for business resources and support services for the Air Force Research Laboratory ("AFRL") at the Kirtland Air Force Base in New Mexico. The Air Force awarded the contract to CC&G Company, a joint venture comprised of Corporate Allocation Services, Inc. ("CAS") and two other entities. LCI, the incumbent contractor, filed a protest, alleging that CAS should have been barred from competition because it was currently performing a separate acquisition closeout support services contract for the AFRL at the Kirtland Air Force Base. LCI noted that its incumbent contract contained a specific OCI clause prohibiting it from competing on any other AFRL contracts during the course of its performance. Although the CAS acquisition closeout contract did not contain such a clause, LCI nevertheless argued that "fundamental fairness" required that CAS, like LCI, be prohibited from competing for additional AFRL contracts. LCI alleged that CAS may have acquired information in the performance of its incumbent contract that gave it an unfair advantage in the current procurement.

The GAO denied LCI's protest. It found that the nature and scope of the incumbent AFRL contracts performed by LCI and CAS were sufficiently different so as to justify the Air Force's inclusion of a broader OCI clause in LCI's contract. The GAO found that the Air Force reasonably included a narrower OCI clause in CAS's contract, which contained certain prohibitions on the use of confidential information, but did not prevent CAS from competing for additional AFRL contracts. Moreover, LCI failed to allege that CAS had in fact obtained any proprietary or confidential information during the performance of its AFRL contract that would have given it a competitive advantage in the bidding process. LCI's unsupported suspicions that CAS acquired such information were insufficient to sustain its protest.

Together, *Overlook Systems* and *Leader Communications* demonstrate some of the hurdles a contractor faces when alleging that a competitor has an organizational conflict of interest. As seen in *Overlook Systems*, a competitor may engage in unilateral communications with the Government regarding potential OCIs and may submit a mitigation plan to address any potential conflicts. And as demonstrated in *Leader Communications*, a contractor's unsupported allegations that a competitor's incumbent contract enabled it to obtain an unfair advantage in a procurement will not be sufficient to sustain an OCI-based protest.

Has COFC Opened the Door to Task Order Protests Tied to FSS Contracts?

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The Court's decision in *IDEA International, Inc. v. United States*, Nos. 06-652C & 06-717C, 2006 U.S. Claims LEXIS 376 (Dec. 1, 2006), is the most recent in a line of cases addressing whether the Court may properly exercise subject matter jurisdiction over task order protests tied to Federal Supply Schedule ("FSS") contracts. In *IDEA*, Judge Wheeler departs from some of his colleagues' earlier decisions by expressly holding that the Court has jurisdiction under the Tucker Act to hear such protests. In so holding, Judge Wheeler made clear his belief that the Federal Acquisition Streamlining Act of 1994 ("FASA") statutory prohibition on bid protests in connection with the issuance of task or delivery orders was not intended to apply to FSS orders.

As we have chronicled in earlier editions of the *Roundup*, the controversy over the Court's jurisdiction stems from language in FASA which states that awards of individual task orders under multiple award Indefinite Delivery-Indefinite Quantity ("IDIQ") contracts are not subject to bid protests "except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued." 10 U.S.C. § 2304c(d). In the past, other judges on the Court have interpreted this language to prohibit task order protests. In *Group Seven Associates, LLC v. United States*, 68 Fed. Cl. 28, 32 (2005), Judge Bruggink addressed the suggestion that FASA was not intended to apply to task order protests tied to FSS contracts and decided that an interpretation favoring jurisdiction was "less than compelling." See *Roundup*, November 2005. Judge Bruggink noted in *Group Seven* that "[t]he statutory language . . . does not suggest any exceptions" to the applicability of the FASA prohibition on task order protests. Based on that interpretation of FASA, Judge Bruggink stated that jurisdiction was "doubtful." Despite his concerns, however, the judge assumed jurisdiction and decided the task order protest on the merits.

After *Group Seven*, the Court seemed to take a step backwards on jurisdiction in *A&D Fire Protection, Inc. v. United States*, 72 Fed. Cl. 126 (2006). In that case, Judge Bush decided that the Court did not have jurisdiction over a bid protest regarding an individual task order issued pursuant to an IDIQ contract that was issued under a GSA Schedule contract. Judge Bush concluded that the Court's hands were tied—the language and intent of FASA prohibited it from hearing A&D's bid protest and none of the statutory exceptions applied. At the same time, Judge Bush was troubled that the ban might allow for abuses of the competitive process. Unlike Judge Bruggink in *Group Seven*, Judge Bush dismissed the protest for lack of jurisdiction. See *Roundup*, September 2006, Vol. II, No. 9.

Judge Wheeler took a different approach in *IDEA*. In this protest, the Department of Defense proposed to enter a fixed price contract by delivery order against offerors' Schedule 69 FSS contract. The DOD used the GSA's E-Buy system to conduct a best value competition among schedule holders. Following the agency's award to ICATT, IDEA filed a post-award protest containing three allegations:

- (1) ICATT's subcontractor did not hold the required schedule contract;
- (2) the agency improperly evaluated the technical advantages of IDEA's proposal; and
- (3) the agency and the awardee improperly modified the payment provisions shortly after award.

In response to the Government's claim that jurisdiction was lacking, Judge Wheeler relied on the express language of FASA to justify exercising jurisdiction over the task order protest. Specifically, he noted that the FASA prohibition on bid protests is limited to task and delivery order contracts pursuant to 10 U.S.C. §§ 2304a and 2304b—neither of which applied to the contract at issue. Further, he noted that the FASA prohibition does not expressly mention orders under schedule contracts—an omission which he viewed as intentional and determinative of Congressional intent. As such, Judge Wheeler held that the FASA prohibition does not apply to task order protests tied to FSS schedule, and he proceeded to address the merits of the protest.

Although all three cases suggest that the judges want to exercise jurisdiction over task order protests tied to FSS contracts, there now appears to be a split in the Court regarding the propriety and origin of this jurisdiction. Given the different approaches in *IDEA*, *M&A*, and *Group Seven*, questions remain regarding the proper interpretation of FASA's prohibition on task order protests, particularly because the jurisdictional issue

has never been addressed by the Federal Circuit. Whether the Court takes jurisdiction over such protests may rest on the luck of the draw, that is, which judge is assigned the case. After *IDEA*, the door seems to have been reopened for task order protests. But, will it remain so?

New Civilian Board of Contract Appeals Starts Work

As part of the Defense Authorization Act of 2006, Pub. L. No. 109-163 (H.R. 1815), § 847, the boards of contract appeal hearing Contract Disputes Act cases will be consolidated into two main boards, a Civilian Board of Contract Appeals and the Armed Services Board of Contract Appeals. The new Civilian Board is scheduled to start work on January 8, 2007. All appeals on contract decisions involving the Departments of Defense, Army, Navy, and Air Force as well as NASA will continue to be heard at the ASBCA. All other contract disputes from other non-defense federal agencies will be heard at the Civilian Board. Cases pending at the non-defense boards will be transferred to the new Civilian Board. The Postal Service, Tennessee Valley Authority, GPO, and the District of Columbia will continue to operate their own boards. Also on January 8, the new Civilian Board of Contract Appeals intends to issue interim rules for use by parties in litigation and for comment by the public. Based on drafts of those rules, the new Civilian Board's procedures will be similar to the rules used by the GSBCA.

DOD Issues Guidance on New Berry Amendment Provisions

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As we noted in earlier editions of the *Roundup*, in the Defense Authorization Act for FY 2007, the House and Senate recently agreed to changes in the Berry Amendment "specialty metal" restrictions for defense contracts. Based on Section 842 of the Act, the specialty metals restrictions will now be addressed in 10 U.S.C. § 2533b and will change the compliance scheme in many respects. On December 6, 2006, the DOD issued a class deviation to deal with the new statute. On December 8, 2006, DCMA issued internal guidance to implement the new statute. While these directives provide some interpretation to the new statute, there are still questions to be addressed for contractors. Below is a short synopsis of DOD's recent guidance.

Class Deviation Issued by DPAP

In its December 6 guidance, DOD views the new statute as confirming many of the restrictions that were already established by the DFARs. In sum, DOD reads the statute as requiring contractors to flow down the specialty metal restrictions to all subcontractors and suppliers when DOD is purchasing an end item or component for aircraft, missile and space systems, ships, tank and automotive items, weapon systems, or ammunition. DOD has made an exception depending on the tier component that it will buy. It takes the position, however, that unlike older contracts, DOD can no longer continue the practice of accepting non-compliant items with a "withhold" on new contracts entered after November 16, 2006. Basically, the contractor must ensure full compliance with the restriction unless it is selling a third-tier component directly to DOD.

DOD will also grant a one-time waiver for products in which non-compliant specialty metal was incorporated into items produced, manufactured, or incorporated into items prior to November 16, 2006, but delivery was made to the Government after that date.

DOD also seems to be willing to expand the one-time waiver rule adopted by Congress to "past violations." Although it is not clear, this seems to refer to goods delivered to the Government before November 16, 2006. DOD states that the new law allows "for a period" during which suppliers can become compliant with the new law. As for past violations, it orders Contracting Officers, "in order to be consistent with the approach of the new law," to determine whether the non-compliance was "of the inadvertent type recognized by the Congress." DOD notes that most commercial item purchase non-compliances were probably inadvertent and that the CO can rely on the contractor's representations that it was so. However,

DOD still directs the CO to obtain consideration for the noncompliance and to ensure that the contractor puts in place a Corrective Action Plan (CAP) to ensure compliance in the future.

DOD has also interpreted the "de minimis" exception for "commercially available electronic components." "De minimis" shall mean that the value of the specialty metal in the component does not exceed 10% of the value of the lowest level electronic component produced by the contractor or by the subcontractor from which the component was acquired. In an example, DOD suggests that if a prime was purchasing radio communication equipment from a subcontractor for an aircraft, the radio equipment would be the component against which the 10% de minimis value would be measured. The individual electronic parts in the radio equipment are not the components against which the value would be judged because they are not produced by the subcontractor. As long as the specialty metal does not make up more than 10% of the value of the radio equipment, then there is no violation. DOD notes that the CO can "reasonably estimate" the value of the specialty metal in the component.

Finally, DOD addressed the revisions to the non-availability exceptions. The new statute notes that the prohibition does not apply when "compliant specialty metal of satisfactory quality and sufficient quantity, and in the required form, cannot be procured as and when needed." Sect. 841(b). Accordingly, DOD notes that whether the price of compliant material is fair and reasonable would be a factor in a Domestic Non-Availability Determination (DNAD).

DCMA Guidance on Corrective Action Plans

DCMA's December 8 memorandum addresses the review of Corrective Action Plans (CAPs) that will be required of contractors both for past violations and before the One-Time Waiver can be granted. DCMA notes that CAPs must include, among other aspects, the price of the lowest auditable part with non-compliant material (including burden); the date by which the part will be compliant; and the price and location of a compliant part, if it can be found. If compliance cannot be achieved, contractors should include a request for a DNAD in the plan.

There are still many questions for contractors in dealing with specialty metal compliance. In the near future, DOD should publish a rule for notice and comment by industry. Moreover, the Defense Procurement and Acquisition Policy office is expected to issue FAQs for specialty metal compliance on its website (see <http://www.acq.osd.mil/dpap/paic/berryamendment.htm>) in the near future. More guidance would be welcome from DOD to ensure that contractors can comply with the old and new requirements.

Upcoming Events

Criminal Enforcement in Government Contracting Pitfalls, Roadblocks & Land Mines Encountered When Allegations Arise

Government Contracts Briefing
Wednesday, January 24, 2007
Tampa, FL

Plan to join us for this complimentary program on one of the hot topics in government contracting. This program will educate general counsel on how to properly respond to the challenges that arise during federal investigations, parallel proceedings, or when criminal allegations are discovered independently. For more information, please contact Maurisa Turner-Potts at maurisa.turner@akerman.com.

Doing Business with the Feds – Getting the Work and Staying Out of Trouble as a Prime, Sub, or Grantee

Government Contracts Briefing
February 2007 (Exact date and time TBD)
Jacksonville, FL

Learn more about entering the government contracts industry or making the most of your existing federal contracts. This program will provide valuable information to all types of businesses wishing to perform federal work. For more information, please contact Maurisa Turner-Potts at maurisa.turner@akerman.com.

Hot Issues in Government Contracting: Ethics, Data Rights, Fraud, and Other Issues That Can Ruin Your Day as a Contractor

Government Contracts Briefing
March 2007 (Exact date and time TBD)
Orlando, FL

As we note in the *Roundup*, some issues seem to have a higher profile and pose greater risks than others in today's world of federal contracting. Companies struggle on a day-to-day basis with the various business ethics rules, protecting their intellectual property and trade secrets, and avoiding situations that could put the company at risk. In this advanced program, the Government Contracts Group will provide an update to in-house counsel and corporate executives on the latest developments in federal contracting's hottest issues.

About Our Government Contracts Group

The Government Contracts Group at Akerman Senterfitt Wickwire Gavin assists large and small businesses with all types of federal government contracts issues. To do business with the federal government, contractors must deal with a unique and complicated series of statutes, regulations and procedures. We help clients work with this system to maximize contracting opportunities with federal government agencies. We provide counseling and representation to clients in the areas of contract compliance issues, bid protests, Small and Disadvantaged Business matters, contractor and subcontractor claims administration, construction contracts, information technology contracts, and international contracts. In addition, we are uniquely qualified to advise and assist contractors who provide goods or services to the U.S. Postal Service.

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Information contained in this newsletter is for the general education of our readers. It is not designed to be and should not be the sole source of information when analyzing and resolving a legal problem. It does not create an attorney-client relationship. If you have specific questions regarding a particular issue or if you have questions or comments relating to the *Roundup* or other Government Contract matters, please consult with competent legal counsel.

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