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Welcome to Jenner & Block's Government Contracts Legal Round-Up, a biweekly update on important government contracts developments. This update offers brief summaries of key developments for government contracts legal, compliance, contracting, and business executives. Please contact any of the professionals at the bottom of the update for further information on any of these topics.

Protest Cases

1. *VERSA Integrated Solutions, Inc.*, B-420530 (April 13, 2022)

- GAO denied a protest challenging the Food and Drug Administration's (FDA) decision not to consider a proposal that was not timely received by the agency in a manner consistent with the solicitation.
- While the proposal was received in the government's electronic server before the submission deadline, the proposal submission email was quarantined by the server and did not reach the contracting officials before the deadline.
- In presenting its case, VERSA emphasized that it submitted its proposal prior to the deadline and maintained that the government was in control of its proposal following that submission. The protester relied on standard FAR provisions that allow the government to consider a late proposal where there is no risk of delay to the procurement and the proposal is under government control before the proposal submission deadline.
- But GAO strictly interprets the FAR's "government control" exception, routinely holding that it does not apply to proposal submitted electronically. VERSA specifically asked GAO to reconsider this line of decisions—*i.e.*, declining to apply the exception in circumstances similar to those here.
- GAO declined the invitation to revisit is interpretation of the government control exception and denied the protest.

As always, offerors should leave plenty of time to submit proposals well in advance of the deadline and anticipate that electronic submissions may encounter challenges that delay submission. In the event an agency does reject an electronic proposal submission as late, recognize that GAO and the Court of Federal Claims (COFC) analyze these issues differently, and COFC may provide the more favorable forum for protest. Specifically, several COFC judges have found that an electronic proposal submission that reaches a government server before the proposal submission deadline does qualify for the "government control" exceptions stated in FAR 52.212-1 and 52.215-1.

2. *Rice Solutions, LLC*, B-420475 (April 25, 2022)

- GAO sustained a protest because the agency unfairly engaged in discussions with only the awardee.
- The Department of Health and Human Services, Indian Health Service (IHS), received three proposals in response to IHS's solicitation for certified registered nurse anesthetist (CRNA) services in South Dakota. Protester Rice's proposal was rated as unacceptable.
- Despite not establishing any competitive range, IHS thereafter engaged in discussions with the awardee—the only offeror initially rated as acceptable.
- GAO faulted the agency for not conducting discussions with Rice. In doing so, GAO rejected the agency's position that an initial rating of technically unacceptable automatically excluded Rice from the competitive range, had one been established by the agency.
- GAO also rejected the agency's contention that it established "a *de facto* competitive range of one" because nothing in the record supported this contention.
- Thus, GAO ruled that because no competitive range had been established, the agency was required to conduct discussions with all offerors. Indeed, GAO emphasized that such discussions could have resulted in Rice submitting a revised final proposal that was found to be technically acceptable.

Although an agency has broad discretion in establishing a competitive range and is not required to memorialize its competitive range determination expressly in a formal document, the agency is required to provide sufficient information to adequately support its rationale. GAO will sustain a protest where the record is devoid of any documentation or support for the agency's contention that a competitive range had been established before entering into discussions with only one offeror. Moreover, once an agency chooses to conduct discussions, it must do so with all offerors in the competitive range. FAR 15.306(d)(1).

3. *NOVA Dine, LLC*, B-420454, B-420454.2 (April 15, 2022)

- GAO rejected a protester's contention that it was misled during discussions to raise its proposed labor rates.

- Over multiple rounds of discussions, the Defense Information Systems Agency (DISA) advised NOVA that 73 proposed labor rates appeared to be "unrealistically low," and DISA asked NOVA to "review and provide revised rates, or provide rationale for the proposed rates."

- In the end, NOVA increased its rates, resulting in an increase of nearly $50 million to the offeror's total cost/price.

- NOVA argued that it was misled during discussions because the company's total cost/price was higher than other offerors and because DISA compared rates to salary data taken from a more expensive geographic location (even though the contract would be performed around the world).

- GAO denied this ground of protest, finding that DISA did not coerce NOVA into raising its direct labor rates; rather, NOVA made an independent business judgment about how to respond to the agency's discussion concerns.

- GAO also rejected the protester's challenges to DISA's evaluation under the past performance and management approach evaluation factors.

GAO generally will not find an agency's discussions objectionable when an agency advises an offeror that certain rates appear low and provides the offeror the option of either raising the rates or justifying the rates. An offeror's decision to raise rates—rather than justify—is typically viewed by GAO as a business judgment of the offeror. As GAO concluded here, "Ultimately, it was the offeror's responsibility to recognize where it disagreed with the agency's cost realism conclusions and explain why its own salary calculations were correct."

Claims Cases

1. *GSC Construction, Inc. v. Secretary Of The Army*, Fed. Cir. 21-1803 (May 2, 2022)

- The United States Court of Appeals for the Federal Circuit (CAFC) affirmed the Armed Services Board of Contract Appeals (ASBCA or Board) decision holding that the United States Army Corps of Engineers (the Army) properly had terminated the contractor's construction contract for default.

- GSC Construction, Inc. (GSC) contracted with the Army to build two warehouses, but then fell behind after disputing responsibility to remove soil for foundation work and failing to meet design requirements. Interestingly, the latter issue related to DOD's Unified Facilities Criteria (UFC) Minimum Antiterrorism Standards. The contract required compliance only with an earlier, less stringent version but GSC mistakenly submitted its design under the more recent, more stringent version, with which it then failed to comply. The Army itself didn't identify the error and evaluated the design under the wrong standard.

- Ultimately the Army terminated for default, and GSC filed an appeal with the ASBCA—arguing that the disputes concerning the soil and the design standard provided ground for an excusable delay, and seeking both damages and that the termination be converted to one for convenience.

- The Board denied the appeal and the Federal Circuit affirmed the ASBCA's decision, agreeing that the contract assigned site preparation and design responsibility to GSC. The Army's failure to identify GSC's design standard mistake did not shift risk related to design to the government.

- In addition, the Federal Circuit rejected the argument that the Army had forfeited its right to enforce the contract by providing GSC with an extensiPublishon: "Given the Army's repeated reservation of its rights during construction, we fail to see how the Board erred in holding that there was no forfeiture [and] GSC's argument is thus unpersuasive."

Termination for default is a serious threat in government contracting. Working with experienced counsel when encountering project delays or design disapproval can help avoid more costly litigation in the future, including by developing effective recovery plans and fully protecting rights under the contract.

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