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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.

Investigations and Enforcement

There are a number of noteworthy developments in the investigations and enforcement space:

- Precision Metals Corp. won injunctive relief preventing DLA from maintaining the company's debarment. DLA, which is aggressive and takes a more expansive view of suspension and debarment practice than most other federal agencies, is alleged to have denied five requests for in person meetings to address the facts underlying the company's exclusion and focused on past data rather than current operations.

- An individual pled to bid rigging and set aside fraud relating to more than $17 million in military contracts as part of a Procurement Collusion Strike Force related matter. Read more here.

- Numet Machining Techniques, LLC, and affiliated entities paid more than $5 million to resolve allegations of set-aside fraud relating to government contracts won after M&A activity rendered the business other than small. Numet disclosed the misconduct and "received credit" for the disclosure as part of the resolution. This is a notable resolution because, while follow on enforcement action after this type of disclosure is possible, it is comparatively rare. Read more here.

- And in a lower dollar settlement for procurement related misconduct, McLain and Company paid $137,500 to resolve allegations of falsified inspection documentation relating to inspection vehicles customized for work on bridges. Read more here.

Claims Cases

1. *Microtechnologies LLC v. United States Attorney General*, No. 2021-2169 (Fed. Cir. July 28, 2022) (nonprecedential)

- The government contracted with MicroTech to provide commercially available software licenses and maintenance for one base year and two option years. On the first day of the base year, MicroTech purchased the software licenses and maintenance for all three years of potential performance. After accidentally executing the first option year, the government terminated the first option year for convenience on the first day of performance.
- There was no dispute as to MicroTech's entitlement for the completed base year of performance. MicroTech, however, sought termination costs for the option year equal to the price that MicroTech paid for a full year of the relevant software license and maintenance, even though the agency never used the software or maintenance during the first option period. MicroTech argued that the commercial software is only sold in one-year increments and cannot be refunded once purchased; therefore, according to MicroTech, once the government executed the first option year, MicroTech was obligated to incur the full year's worth of licensing and support costs, even if never used.
- The Civilian Board of Contract Appeals granted the government's cross-motion for summary judgment, and the Federal Circuit affirmed in a non-precedential opinion: "The Board correctly held that the cost of software maintenance for option year one was not a 'reasonable charge' that 'resulted from the termination,' as required for recovery under FAR 52.212-4(l)," which governs convenience terminations for commercial item contracts. The panel explained that "MicroTech acknowledges that the cost was not required under any contract when it was incurred," and therefore "even assuming that the software maintenance could only be purchased in one-year increments and that MicroTech's purchase was nonrefundable, MicroTech cannot show that the cost of software maintenance for the first option year 'resulted from' the government's termination [of the option year]."

This is the latest in a growing line of important claims decisions relating to software licensing disputes. Contractors providing government customers with access to commercial software licenses must keep in mind the risk that comes with the inherent disconnect between (i) standard FAR clauses (e.g., termination for convenience) and (ii) the terms and conditions that typically apply to commercial software licenses. Software aside, while buying in bulk at the beginning of a base year may allow for cost savings and increased profit, there is always the risk that an agency will not exercise option periods.

Protest Cases

1. *KOAM Engineering Systems, Inc.*, B-420157.2, July 6, 2022 (Publicly issued July 18, 2022)

- GAO denied a protest alleging that the awardee gained an unfair competitive advantage because one of the awardee's proposed key persons is married to a Navy contracting officer's representative (COR) on the protester's incumbent contract.
- The protester argued that given the marriage and the fact that both worked in close proximity at home and share a common financial interest, there should be an "irrefutable presumption of impropriety."
- The Navy investigated the matter, including by reviewing declarations provided by the husband and wife. Based on this investigation, the Navy found no evidence that the COR participated in the instant procurement, or that the COR disclosed competitively useful information. The Navy also concluded that the specific information for which the COR had access, i.e., historical pricing information from KOAM's incumbent contract, would not have provided a material competitive advantage to the awardee in light of this RFP's specific terms.
- GAO concluded that the agency's investigation sufficiently rebutted the protester's allegation of the appearance of impropriety, and sufficiently demonstrated that KOAM's proprietary or otherwise competitively useful information was not disclosed.

Contracting agencies are to avoid even the appearance of impropriety in government procurements. Where a protester alleges a conflict of interest, including one based on a marital or familial relationship, GAO will not sustain the protest if the contracting agency reasonably investigates the allegations and finds no impropriety. A marital or familial relationship, without more, does not establish that an awardee gained an unfair competitive advantage.

2. *Apprio, Inc.*, B-420627, June 30, 2022 (Publicly issued July 18, 2022)

- GAO sustained a protest challenging a Federal Emergency Management Agency (FEMA) task order for training services to be performed at the Center for Domestic Preparedness (CDP).
- GAO first found unreasonable FEMA's cost realism analysis of awardee Leidos, Inc.'s proposed costs because the contemporaneous evaluation record did not demonstrate any evaluation of the awardee's direct labor rates and lack of escalation. Moreover, while GAO will take into account credible, post-protest explanations that provide a detailed rationale for contemporaneous conclusions and fill in previously unrecorded details, here FEMA neglected to sufficiently explain how the agency evaluated Leidos's labor rates or how the specific conclusions of those evaluations were made.
- For example, while Leidos proposed to staff the task order with its incumbent personnel, the awardee proposed rates for many of these personnel based on the wage determination (WD) rates and not necessarily actual labor costs on the predecessor efforts. GAO sustained the protest because the agency's cost realism evaluation did not assess whether the WD rates proposed to be paid to the majority of the incumbent workforce would be sufficient to retain those employees.

- GAO also found objectionable the agency's use of a standard deviation methodology as a tool to determine realism because the solicitation here contemplated unique technical approaches by offerors, and those unique approaches were not considered when FEMA relied on a common standard deviation to assess realism.

- And GAO sustained the protest because a weakness assigned to the protester's proposal under the corporate experience factor was directly contradicted by the contents of Apprio's proposal.

Where an agency intends to award a contract containing cost-reimbursable line items, an offeror's proposed costs of performing the cost-reimbursable CLINs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Consequently, the procuring agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed, and this analysis must provide a reasonable measure of confidence that the costs proposed are realistic based on information reasonably available to the agency at the time of its evaluation. GAO will sustain a protest where an agency's cost realism evaluation is not reasonably based.

3. *Cellebrite, Inc.*, B-420371.2, April 28, 2022 (Publicly issued July 18, 2022)

- GAO found unobjectionable an agency's decision to not permit revised pricing as part of corrective action.

- In response to a prior protest, the United States Secret Service (USSS) took corrective action by amending the solicitation to clarify language contained in the corporate experience factor and the management and staffing approach factor. The amendment also revised the curriculum demonstration factor to permit subcontractor instructors to present during the curriculum demonstration presentation, provided they were previously included in the previous key personnel proposal submission.

- USSS denied the protester's request that the agency allow it to amend its price because its investment and growth in the interceding 5 months, as a newly listed public company, resulted in increased efficiencies and reduced operating costs.

- In response to the protest, the agency emphasized that Cellebrite's request to revise its price was not based on any changes made to its proposal in response to the solicitation amendment.

- GAO found no basis to object to the agency's corrective action because the record established that the corrective action was narrowly tailored to clarify the procurement improprieties that the agency sought to resolve during corrective action.

Contracting officers in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition, and the details of corrective action are within the sound discretion and judgment of the

contracting agency. An agency may reasonably limit the scope of proposal revisions permitted during corrective action, provided such limitation is appropriate to remedy the procurement impropriety. GAO generally will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action.

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Government Contractor Litigation and Compliance

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