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3 Recent Bid Protest Decisions You Should Know About

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Three recent bid protest decisions from the U.S. Court of Federal Claims and the U.S. Government Accountability Office may affect how government contractors approach the proposal and protest process. First, the COFC held that a protest may be time-barred if it is based on information revealed in an earlier protest of the same award, further cementing the importance of intervening in protests where possible. Second, the GAO confirmed that an agency may use a contractor's cybersecurity approach as a technical evaluation factor and give extra credit to offerors who exceed the minimum requirements set by regulation or the solicitation. Third, the COFC issued an opinion finding that a potential offeror that did not have a record of relevant past performance lacked standing to protest a sole-source solicitation, which seems inconsistent with an important Federal Acquisition Regulation requirement for evaluating past performance.

Sonoran

In Sonoran Technology and Professional Services LLC v. United States, the Court of Federal Claims considered the knowledge that an awardee would have gained from intervening in a protest in deciding whether the awardee's subsequent protest was timely.

The Air Force issued a service-disabled veteran-owned small business set-aside solicitation for courseware development and training for its aircrew flying B-52 and B-51 aircrafts. AR 489. The awardee was required to have a facility security clearance at the time of the award. Sonoran and Spectre Pursuit Group LLC were two of nine offerors that submitted proposals. At the time of proposal submission, Spectre did not have the required facility clearance. The contracting officer determined that Spectre was not eligible for award because for that reason and awarded the contract to Sonoran.

Spectre filed a bid protest challenging the CO's decision at the Government Accountability Office on the grounds that the decision to eliminate its proposal was a negative responsibility determination and therefore the Air Force was required to refer the matter to the Small Business Administration for a responsibility determination. After the GAO

dismissed the protest, Spectre filed a new protest at the COFC, and the Air Force took corrective action, which consisted of referring the matter of Spectre's responsibility to the SBA. The SBA notified the Air Force and Spectre that it could not make a responsibility determination because of the award to Sonoran. In response, Spectre filed a new bid protest at the COFC challenging the SBA's failure to make a responsibility determination.

The SBA then decided that Spectre's case presented "unique circumstances" warranting reconsideration and withdrew its earlier decision. After award to Sonoran, Spectre secured a facility clearance. The SBA determined that Spectre was responsible and issued a certificate of competency. Based on the SBA's determination, the Air Force terminated Sonoran's contract and made an award to Spectre.

Sonoran had not intervened in any of Spectre's protests. After the award to Spectre, Sonoran filed a bid protest at the COFC challenging the solicitation, the evaluation, and the corrective action.

The Air Force argued that Sonoran's protest of its corrective action should be dismissed because the protest was filed after the Air Force made its final award. Sonoran argued that it did not have sufficient notice of the Air Force's intent to take corrective action. Citing Blue & Gold Fleet, the COFC determined that Sonoran had "ample" notice because it could have intervened in the protests and become aware that the Air Force was taking corrective action that could harm Sonoran's interest:

Why Sonoran chose not to intervene in either of these protests is beyond the Court's comprehension, as Sonoran should have known that its award was at risk of being rescinded and granted to [Spectre] instead as a result of potential corrective action.

While we would usually recommend that an awardee intervene to keep tabs on the protest and protect its interest even before this decision, intervening is even more important after Sonoran. This advice also applies to protests at the GAO. While the GAO is not bound by the decision in Sonoran, its regulations and prior decisions indicate that it would likely come to a similar conclusion. Specifically, the GAO bases timeliness on when the protest grounds "should have been known," not when they were actually known.

Sonoran raises other issues that we will not discuss here but may also be important in future bid protests. First, query whether the SBA's decision to review the facility clearance requirement and issue a certificate of competency after award was appropriate. Second, in dismissing Sonoran's challenge to the Air Force's past performance evaluation of Spectre, the COFC stated that "allegations that an agency's evaluation of a proposal runs afoul of applicable statutes and regulations are challenges to the terms of the solicitation that must be brought before the close of the bidding process." It makes sense that if a solicitation provision deviates from applicable statute or regulation, an offeror could recognize the error and challenge the provision pre-award. However, if the violation does not become evident until it is applied to a specific offeror, it will be difficult to bring a nonspeculative pre-award protest.

IPKeys

As anyone who follows development in government contracts law is well aware, the government is and has been implementing new and important cybersecurity regulations. The Federal Acquisition Regulation requires contractors to protect "federal contract information" and various agency supplements contain additional requirements. For example, the U.S. Department of Defense is in the process of implementing cybersecurity regulations and all contractors that handle "covered defense information" are required to comply with the National Institute of Standards and Technology SP 800-171

by Dec. 31, 2017.

While compliance is required, we have also advised that solicitations may use cybersecurity as a technical evaluation factor. In a recent protest, the GAO confirmed both the government's ability to do so and the potential benefits of exceeding the minimum requirements.

In IPKeys Technologies LLC, the GAO denied a protest challenging the Defense Information Systems Agency's evaluation of the awardee's cybersecurity approach. The solicitation required offerors to comply with DOD Instruction No. 8510.01, Risk Management Framework for DOD Information Technology (July 28, 2017). DISA gave the awardee's proposal a "strength" because, in addition to complying with the Risk Management Framework requirements, its cybersecurity approach showed its compliance with the NIST Framework for Improving Critical Infrastructure Cybersecurity. The GAO found that DISA's determination that the awardee's "proposed framework would help to manage cybersecurity risks and lead to improved efficiencies" supported the "strength" and the decision to award the contract to the higher-priced offeror.

This point is important to remember as contractors think about their plans for complying with the various cybersecurity regulations. For example, the Defense Federal Acquisition Regulation Supplement clause 252.204-7012 requires compliance with NIST SP 800-171 by Dec. 31, 2017. For many contractors, compliance can be achieved by the deadline by having in place a "Security System Plan" and "Plan of Action and Milestones" describing how it intends to eventually meet the technical requirements. Individual solicitations, however, could require contractors to already be meeting the NIST SP 800-171 technical requirements. And even if the solicitation does not require compliance exceeding the current regulatory obligation, the IPKeys decision makes clear that an offeror who is merely meeting the minimum requirements may be at a competitive disadvantage to offerors who are exceeding those requirements.

CliniComp

Agencies must evaluate an offeror's past performance that is current and relevant (e.g., of similar size, scope, and complexity). When an offeror does not have a record or relevant past performance, "the offeror may not be evaluated favorably or unfavorably on past performance." FAR 15.305(2)(iv). This requirement reflects a policy decision to lower the barriers to new entrants. Agencies often include a "neutral" rating for such offerors. How to properly account for a neutral rating in an evaluation may be difficult and is a common protest ground, but it is clear that an offeror should not be excluded from award based on a lack of relevant past performance — both the GAO and the COFC agree on this point.

This is why the recent CliniComp International Inc. v. United States decision caught our attention. CliniComp filed a pre-award bid protest matter to enjoin the secretary of veterans affairs from directly soliciting a sole source contract to Cerner Corporation for the next generation electronic health records system for the U.S. Department of Veterans Affairs.

The COFC granted the VA's motion to dismiss for lack of subject matter jurisdiction, finding that CliniComp lacked standing. The COFC agreed with the VA that CliniComp was "not a qualified bidder that could have competed for the contract to provide the VA's new electronic health records system." The COFC based its holding on the fact that CliniComp could not have "competed for the Cerner Contract if the procurement process for that contract had been competitive," because (1) the VA's planned contract significantly exceeds the value of the government contracts that CliniComp has previously performed, (2) CliniComp does not have experience providing EHR services for the substantial number

of facilities that will be covered by the VA's planned contract, and (3) CliniComp has no comparable experience performing the comprehensive tasks required under the VA's planned contract.

This result appears to be inconsistent with the rule that an offeror cannot be penalized for having no comparable past performance. Had the VA issued a competitive solicitation for these EHR services, CliniComp could have submitted a proposal. And if it had, under FAR 15.305(2)(iv), CliniComp could not properly be evaluated unfavorably for lack of relevant past performance. While the decision does not grapple with this issue, it seems that the fact that CliniComp did not have past performance of similar size, scope, and complexity should not have disqualified it from award, much less from submitting a proposal. Had there been a competition and the VA had disqualified CliniComp for the reasons stated by the COFC, CliniComp would have had a good basis to protest. Can an agency now argue that a protester with neutral past performance does not have standing?

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