

Government Contracts Alert

November 8, 2017

Key Points:

- First, an awardee is responsible for keeping tabs on what happens in a protest of its award, or it may not be able to submit its own challenge if the protest is sustained.
- Second, mere compliance with cybersecurity requirements may not be enough. The government may evaluate the quality of your cybersecurity approach.
- Third, do offerors without relevant past performance have standing to protest?



Three October Bid Protest Decisions that May Affect Your Business

Decision 1: *Sonoran Tech. and Professional Services, LLC v. United States*

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

Background

The Air Force issued a service-disabled, veteran-owned small business (SDVOSB) set aside solicitation for courseware development and training for its aircrew flying B-52 and B-51 aircrafts. 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 (CO) determined that Spectre was not eligible for the award for that reason and awarded the contract to Sonoran.

Spectre filed a bid protest challenging the CO's decision at the Government Accountability Office (GAO) 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 (SBA). 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 the award, 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.

Holding

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 the contract 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:

"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."

Conclusion

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 that 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 the 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." (emphasis added). 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.

Decision 2: *In re: IPKeys Technologies, LLC*

Unless you have not read a government contracts blog in a while, you know that the government has implemented various cybersecurity regulations. The Federal Acquisition Regulation (FAR) requires contractors to protect "federal contract information," and various agency supplements contain additional requirements. For example, the Department of Defense (DOD) 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 (NIST) SP 800-171 by December 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 the government's ability to do so.

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

This point is important to remember as you think about how to comply 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 December 31, 2017, but, to be in compliance, a contractor need only have in place a "Security System Plan" and a "Plan of Action and Milestones" describing the way in which it intends to meet the technical requirements at some point in the future. However, individual solicitations may require a contractor to have already met NIST SP 800-171's technical requirements, and, even if not, offerors may receive higher technical ratings for having them in place.

Decision 3: *CliniComp Int'l, Inc. v. United States*

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). To accommodate this requirement, agencies often include a "neutral" rating for such offerors. How to properly account for a neutral rating in an evaluation may be difficult, and it is a common protest ground, but it is clear that an offeror should not be excluded from an award based on a neutral past performance rating—both the **GAO** and the **COFC** agree on this point.

This is why the recent ***CliniComp Int'l, 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 (EHR) system for the United States Department of Veterans Affairs (VA), pursuant to the public interest exception to the Competition in Contracting Act.

The COFC did not reach the merits and granted the VA's motion to dismiss for lack of subject-matter jurisdiction because CliniComp did not establish that it had standing. The COFC agreed with the VA and concluded 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 even "competed for the Cerner Contract if the procurement process for that contract had been competitive" because (i) the VA's planned contract significantly exceeds the value of the government contracts that CliniComp has previously performed, (ii) 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 (iii) CliniComp has no comparable experience performing the comprehensive tasks required under the VA's planned contract.

This is a surprising result. 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. The fact that CliniComp does not have past performance of similar size, scope and complexity should not disqualify it from an award, much less 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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