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PUBLIC CONTRACTS

Annual Review 2022

January 24 – 27, 2022

DAY 1

12:00 p.m. Bid Protests

2:00 p.m. Investigations, Disclosures & S&D

3:00 p.m. Labor & Employment

MONDAY, JANUARY 24, 2022

12:00 PM to 5:00 PM



Alan Chvotkin
President, Pub K Group
Partner, Nichols Liu LLP

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SESSION 2

BID PROTESTS

MONDAY, JANUARY 24, 2022

12:00 PM to 1:50 PM



Jason Carey, Partner

COVINGTON

- Waiver doctrine
- Must object to “patent error” in a solicitation prior to the close of the bidding process
- Similar to GAO’s timeliness rule for protests of solicitation terms

Several decisions this year addressed the scope and application of the doctrine.

- *Bannum*: “a formal, agency-level protest before the award would likely preserve”
- Harmonia filed a pre-award agency protest
- 5 months later, Harmonia filed a post-award protest
- COFC applied *Blue & Gold*

Lots of interest in the outcome on appeal . . .

- “Harmonia’s undisputedly timely [agency protest] removes this case from the ambit of *Blue & Gold*. . . .”
- “Our opinion should not be read as condoning delay” in filing at COFC
- COFC has “relatively broad authority . . . to fashion a remedy. . . .”

Don’t oversimplify the decision.

- Solicitation contemplated 2 tracks
- Agency held debriefings for one track before award in the other
- “a bidder . . . exercising reasonable and customary care would have been on notice of the now-alleged defect in the solicitation”

Lots of discussion about the implications of *Insero*.

- VS2: “[N]o suggestion whatsoever in *Blue & Gold* that its waiver rule applies to anything other than an action challenging the terms of a solicitation”
- *Amazon*: Prior decisions do not support applying doctrine to claim based on “allegations not directly related to the terms or structure of the solicitation itself”

Stay tuned . . .



Craig Holman, Partner

Arnold & Porter

The Basics: What Is Standing And Why Does It Matter?

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- GAO: CICA defines “interested party” as “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.” 31 U.S.C. § 3551(2)(A).
- COFC: Tucker Act grants the court “jurisdiction to render judgment on an action by an interested party objecting to ... the award of a contract” 28 U.S.C. § 1491(b)(1).
 - Standing is a threshold jurisdictional question that requires two showings by the protester: (i) actual or prospective bidder with a direct economic interest and (ii) harm/prejudice. *Asset Prot. & Sec. Servs., L.P. v. United States*, 5 F.4th 1361 (Fed. Cir. 2021) (no standing given mistake in bid).

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- GAO requires a prospective bidder or offeror which has an economic interest in the procurement (and the issue advanced). *Accenture Federal Services, Inc.*, B-418321.4, Jan. 29, 2021, 2021 WL 322130.
- “[T]o come within the Court of Federal Claims's § 1491(b)(1) bid protest jurisdiction, [the plaintiff] is required to establish that it (1) is an actual or prospective bidder and (2) possess[es] the requisite direct economic interest.” *Land Shark Shredding, LLC v. United States*, 842 Fed.Appx. 589 (Fed. Cir. 2021).
- *Practitioner Tips: GAO does not generally permit offerors to challenge requirements they meet (see Accenture). COFC applies different harm tests, depending on the facts (non-trivial competitive injury vs. substantial chance).*

- GAO: “In a post-award context, we have generally found that a protester is an interested party to challenge an agency’s evaluation of proposals only where there is a reasonable possibility that the protester would be next in line for award if its protest were sustained.”
 - ▶ *Gulf Civilization Gen. Trading & Contracting Co.*, B-419754, B-419754.2, June 10, 2021, 2021 CPD ¶ 208 (adopting *HVF* reasoning where protester failed to challenge intervening offerors’ eligibility).
- COFC: “To succeed in showing that it had a direct economic interest, *HVF* had to make a sufficient showing that it had a ‘substantial chance’ of winning the contract.”
 - ▶ *HVF W., LLC v. United States*, 846 F. Appx. 896 (Fed. Cir. 2021) (no standing where protester failed to sufficiently challenge eligibility of intervening offerors).
- *Practitioner Tip: Substantively challenge intervening offerors where necessary.*

MAIDIQ Standing Disagreement

Arnold & Porter

- Why it matters: In April 2017, GAO found that from 2011-2015, agencies obligated more than \$130 billion annually on IDIQ contracts. GAO-18-412R, Defense Contracting.
- GAO: “[T]he statutory definition of an interested party expressly bars protests where the protester is the awardee of the challenged contract.” *Aegis Defense Services, LLC*, B-412755, Mar. 25, 2016, 2016 CPD ¶ 98.
- The COFC split: *National Air Cargo Group, Inc. and Aero Spray, Inc.*
 - ▶ “National is an ‘actual’ bidder because, as a matter of fact, it bid on this IDIQ solicitation.... National’s status as a contract awardee does not by itself deprive this court of bid protest jurisdiction.” *National Air Cargo Group, Inc. v. United States*, 126 Fed. Cl. 281 (2016).
 - ▶ “[B]ecause Aero Spray has received everything to which it is entitled given its proposal and pursuant to the Solicitation, Aero Spray is not a ‘disappointed bidder’ in any sense of that phrase.” *Aero Spray, Inc. v. United States*, No. 21-1079C, 2021 WL 5023371 (Fed. Cl. Oct. 28, 2021).

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- *Land Shark Shredding, LLC v. United States*, No. 19-711C, 2021 WL 4099667 (Fed. Cl. Sept. 9, 2021) (dismissing for lack of standing).
 - ▶ “Land Shark has failed to provide sufficient evidence that Disabled Veterans could ‘stand in the shoes’ of Land Shark as a complete successor-in-interest with regard to Land Shark’s submitted quotation.”
 - ▶ “Land Shark has not established that Disabled Veterans has a ‘substantial chance’ of being awarded the shredding contract, the second requirement for demonstrating interested party status under § 1491(b)(1).”
- *Practitioners Tip: Carefully examine impact of corporate transaction on proposals prior to closing.*



Richard Rector, Partner



Procurement Record



- GAO: “Agency Report”

- Protest is to be decided based on “a complete report (including all relevant documents)” - 31 U.S.C. § 3553(b)(2)

- COFC: “Administrative Record”

- Protest is to be decided based on review of “the whole record” – 5 U.S.C. § 706

Oak Grove: GAO and COFC Protests

Oak Grove Techs., LLC, B-418427.6 et al., 2020 WL 8257984 (Comp. Gen. Dec. 18, 2020)

- ▶ Protester alleged that awardee had an OCI and challenged agency's evaluation of both its proposal and awardee's proposal
- ▶ GAO denied the protest, and did not address alleged OCI or misevaluation of awardee's proposal, because protester's proposal was technically unacceptable

Oak Grove Techs., LLC v. United States, 155 Fed. Cl. 84 (2021)

- ▶ Government violated the Court's rules on filing of Administrative Record (AR)
- ▶ Agency arbitrarily found that awardee and next-in-line offeror were acceptable
- ▶ Agency should have conducted discussions
- ▶ Agency failed to sufficiently investigate allegations of a procurement official's improper conduct

Oak Grove: COFC Decision

Oak Grove Techs., LLC v. United States, No. 21-775C, 2021 WL 5114707 (Oct . 29, 2021)

- ▶ Government sanctioned for failure to include relevant documents in the AR . . . court rejected the Government’s “cramped view” of relevance in COFC protest
- ▶ Agencies “must include in the record all documents related to their ultimate procurement decision,” including:
 - ▶ documents directly or indirectly considered by agency
 - ▶ documents relevant to the process of making the decision
 - ▶ documents that were before or available to decision-maker, even if not specifically considered by decision-maker
- ▶ Deliberative materials -- such as internal comments, draft reports, emails, and meeting notes -- may be privileged, but that’s not a matter of relevance
- ▶ Discovery regarding AR may be appropriate

Procurement Record: Takeaways

- Reasoned judgments about relevance are permitted in a GAO protest; but such judgments are not controlling in a COFC protest
- Additional documents or portions of documents may be required to complete the record at the COFC
 - ▷ Diligence by Government counsel is necessary
 - ▷ Discovery concerning the AR may be appropriate
- COFC record is more likely to:
 - ▷ include a complete set of relevant documents, without “curation” by the agency
 - ▷ include documents that support existing and supplemental protest grounds

Procurement Record: Questions

- What documents are not relevant to a protest?
 - ▷ Information on other offerors?
 - ▷ Information on evaluation factors not at issue?
- Is there a legitimate distinction between documents that are “directly” and “indirectly” relevant?
- Should there be a difference in the availability of “process” vs. “merits” documents?
- Should there be a difference in the availability of documents “considered by” vs. “available to” the decision-maker?
- Why are deliberative materials (e.g., internal comments, draft reports, emails, meeting notes) not “relevant”?



Cherie Owen, Senior Counsel

crowell  moring

Corrective Action: Background

Traditionally: Court of Federal Claims (COFC) Has Been More Receptive to Corrective Action Challenges Than GAO

■ **GAO:** “Contracting officers have broad discretion to take corrective action where the agency has determined that such action is necessary to ensure a fair and impartial competition. . . . As a general matter, the details of corrective action are within the sound discretion of the contracting agency.” *People, Tech. & Processes, LLC*, B-418781.4, July 2, 2021, 2021 CPD ¶ 252.

- ▶ “[I]t is not necessary for an agency to conclude that the protest is certain to be sustained before it may take corrective action; where the agency has reasonable concern that there were errors in the procurement, even if the protest could be denied, we view it as within the agency's discretion to take corrective action.” *Verizon Bus. Network Servs., Inc.*, B-419271.5 *et al.*, Apr. 26, 2021, 2021 CPD ¶ 191.

Corrective Action: Background

- **COFC:** *Dell Fed. Sys., L.P. v. United States*, 133 Fed. Cl. 92 (2017): “Even where an agency has rationally identified defects in its procurement, its corrective action “must narrowly target the defects it is intended to remedy.”
- *But then . . . Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982 (Fed. Cir. 2018): “We have never adopted this heightened ‘narrowly targeted’ standard . . . Instead, we have consistently reviewed agencies’ corrective actions under the APA’s ‘highly deferential’ ‘rational basis’ standard.”
 - “Adopting the ‘narrowly targeted’ standard would undermine our deferential APA review, which statutorily mandates that we determine ‘whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion.’”

Corrective Action: Status at Beginning of 2021

- Corrective Action challenges appeared to have similar chances of success at both GAO and the Court, with both applying a highly deferential standard
 - ▶ GAO indicated that it might sustain a challenge if the corrective action is too *narrow* to resolve the procurement flaw (*Peraton Inc.*, B-416916.8 *et al.*, Aug. 3, 2020, 2020 CPD ¶ 248), but continues to afford agencies wide discretion to pick their corrective action.

Corrective Action: Developments in 2021

- GAO maintains its highly deferential standard: in *Qwest Gov't Servs., Inc. d/b/a Centurylink Qgs*, B-419271.4, B-419271.7, Apr. 14, 2021, 2021 CPD ¶ 169, GAO indicates that it interprets the Federal Circuit's decision in *Dell* to align with GAO's position that agencies should be given broad discretion in their corrective action.
- But the Court gives protesters some hope . . .

Corrective Action: Developments in 2021

- *Superior Optical Labs, Inc. v. United States*, 152 Fed. Cl. 319, *aff'd*, 852 F. App'x 545 (Fed. Cir. 2021)
 - ▶ Initial protest to GAO; agency corrective action; protester objects; GAO dismisses protest as academic.
 - ▶ Senior Judge Bruggink holds that agency had no justification for its decision to take corrective action.

Corrective Action: Developments in 2021

- *SAGAM Securite Senegal v. United States*, 154 Fed. Cl. 653 (2021) – Senior Judge Sweeney holds that the Department of State lacked a rational basis for its corrective action. After one bidder was tainted by PIA and other fairness concerns, agency announced it would cancel solicitation, rather than disqualifying the bidder. The court found the government’s action irrational and concluded that the only reasonable corrective action was to disqualify the bidder from the competition; cancellation followed by issuance of new solicitation would perpetuate procurement error



Kevin P. Mullen, Partner

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Other Transaction Authority (OTA) Protests: The Current Law on Jurisdiction

- As Other Transaction Agreements (OTAs) and other non-traditional procurement methods become more common, a question has arisen about where to bring OTA protests.
- The nature of OTAs and each protest forum's jurisdiction are established by statute as follows:
 - ▶ OTAs are “transactions other than contracts, grants or cooperative agreements.” 10 U.S.C. § 2371 (emphasis added).
 - ▶ The GAO's protest jurisdiction covers objections to a solicitation for or an award of a “contract for the procurement of property or services.” 31 U.S.C. § 3551 (emphasis added).
 - ▶ The COFC has exclusive jurisdiction over protests of “any alleged violation of statute or regulation in connection with a procurement. . . .” 28 U.S.C. § 1491(b)(1) (emphasis added).
 - ▶ The federal district courts has general APA jurisdiction, except where the COFC has exclusive jurisdiction. 28 U.S.C. § 1331; 5 U.S.C. § 702 (emphasis added).

Other Transaction Authority (OTA) Protests: The Current Law on Jurisdiction

Until recently, the case law provided three main data points for OTA protest jurisdiction:

- ▶ The GAO will not consider protests of OTA awards.
- ▶ In *Space Exploration Technologies Corp. v. United States* (“SpaceX”), the Court of Federal Claims (COFC) dismissed an OTA protest for lack of jurisdiction where the OTAs at issue were “separate and distinct” from any future procurement contracts. COFC then transferred the case to federal district court for a merits decision.
- ▶ In *MD Helicopters Inc. v. United States*, the U.S. District Court for the District of Arizona dismissed an OTA protest where the OTA provided for the award of a follow-on procurement contract without further competition, pursuant to DOD’s unique authority in 10 U.S.C. § 2371b(f). The Court found this was sufficiently connected to a procurement to place the process within COFC’s jurisdiction.

Other Transaction Authority (OTA) Protests: The Current Law on Jurisdiction

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- *Kinematics, Inc. v. United States*, 2021 WL 4237169 (Fed. Cl. Sept. 10, 2021) provides a new data point and an attempt to synthesize the holdings in *SpaceX* and *MD Helicopters*.
- The Air Force issued a solicitation and award pursuant to DOD's statutory authority to award OTAs to "carry out prototype projects." 10 U.S.C. § 2371b. The solicitation sought seismic equipment for use in monitoring nuclear treaty compliance.
- The Air Force issued the solicitation as a Commercial Solutions Opening (CSO), an acquisition methodology DOD uses "to acquire innovative commercial items, technologies, or services that directly meet program requirements" under the authority of the 2017 NDAA, Section 879.
- The solicitation included one topic (Topic 9) that sought complete technical and cost proposals from all offerors at the outset, rather than first seeking white papers (as was the case for the other topics).
- The solicitation stated that any award made under the CSO would "be in the form of contracts *or* other transactions." (Emphasis added.)

Other Transaction Authority (OTA) Protests: The Current Law on Jurisdiction

- The Air Force awarded Topic 9, and a disappointed offeror challenged the award in a protest to COFC.
- After initially arguing the Court lacked jurisdiction over the protest, the DOJ eventually conceded this was “a procurement” and that “[t]he CSO authority was specifically designed to create a procurement methodology so it is within the general jurisdiction of the court.”
- Judge Lettow concluded that the award “resulted in a standard indefinite delivery, indefinite quantity contract,” over which the court has bid protest jurisdiction.
- He distinguished this protest from the one in *SpaceX*, finding the *Kinometrics* solicitation “had a direct effect on the award of a contract,” unlike *SpaceX*, “where no procurement contract was contemplated.”
- Would-be OTA protesters must decide which federal court will accept their protest.
- Under *Kinometrics*, the answer appears to hinge on whether one can draw a direct line from the OTA awarded to eligibility for a future procurement contract. If so, COFC should review the protest just like it would any other bid protest; if not, relief may be found in federal district court.

THANK YOU!

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