Notes

Contract Formation and Source Selection

Tim Sullivan, Thompson Coburn LLP

A. Sole-Source Justifications

Although there were no startling developments with respect to contract formation and source-selection issues in the past year, it is abundantly clear that some things will not change. For example, the temptation to award on a sole-source basis continues to be too much to resist for some federal agencies. While it is perfectly legal to make sole-source awards, both the Comptroller General and the U.S. Court of Federal Claims continue to look very carefully at such awards. Credit must be given to the agencies that are taking advantage of the different types of market research available, including requests for information and draft requests for proposal. *See* Federal Acquisition Regulation ("FAR") 15.201. Simple steps like these can result in a very competitive solicitation that benefits both the agency and the taxpayer. The key to such an approach is starting early enough to make it work—no small feat in many agencies.

In the last year, there were at least three instances in which agencies were found to have justified their use of a sole-source approach. In *Ridgeline Industries, Inc*., B-402105, Jan. 7, 2010, 2010 CPD ¶ 22, the GAO approved the Defense Logistics Agency's sole-source procurement of military tent systems on the grounds that they were necessary for industrial mobilization. Ridgeline protested its exclusion from the approved list of suppliers, but the GAO found that Ridgeline only manufactured tent parts and had not built a full tent system since 1985. This case is a good example of the deference that the GAO will give to Government officials who have adequately documented and justified their decision. The GAO held that "[d]ecisions as to which producers should be included in the mobilization base, and which restrictions are required to meet the needs of industrial mobilization, involve complex judgment that must be left to the discretion of the military agencies."

In *Sikorsky Aircraft Corp*., B-403471, *et al*., Nov. 5, 2010, 2010 CPD ¶ 271, the GAO, in the first case of its kind, approved the Air Force's restriction on a competition limited to suppliers of Russian-made MI-17 helicopters for use by the Afghanistan Air Force. The Air Force invoked the "public interest" exception to full and open competition. In addition to finding that the agency had clearly and convincingly demonstrated its need for a sole-source award, the GAO also found that the agency had satisfied all of the procedural requirements associated with this particular exception.

In *Emergent BioSolutions, Inc*., B-402576, June 8, 2010, 2010 CPD ¶ 136, the GAO dealt with another common occurrence in contracts—an agency's modification of an existing contract. Jealous and watchful competitors keep an eye out for such modifications and will not hesitate to file a protest if they believe the modification is actually a new requirement triggering a new, competitive procurement. In this protest, the type of contract—an R&D contract for the anthrax vaccine—was a key factor in the GAO's decision to

Notes

deny the protest. The GAO held that the modification was within the scope of the original contract because modifications of R&D contracts are given more leeway due to the nature of research, where, by definition, there is uncertainty surrounding the Government's requirements and the contract's objectives are broadly defined.

To fully appreciate these cases, it is important to understand that agency technical personnel—the customers—will often have a favorite contractor in mind and will do what they can, including withhold information from their contracting people, to make sure things work out as they wish. This creates a tension within the agencies that is often palpable. Ideally, the program people and the contracting professionals can work together as a team identifying requirements as early as possible and working together to achieve the appropriate level of competition for all requirements. Indeed, this is exactly what FAR Part 7, "Acquisition Planning," contemplates.

B. Meaningful Discussions

The concept of "meaningful discussions" continues to pop up in protest decisions. The phrase itself is not found in the statutes or the regulations, but is the product of a long line of GAO decisions holding that whenever an agency engages in discussions with offerors, those discussions must be "meaningful." It has not always been easy for agencies to know if they are going to meet the GAO standard. On one hand, the GAO has held that this does not require an agency to spoon-feed an offeror. On the other hand, the offeror should have a pretty good idea of what the agency's concerns are when it reads or hears the discussion questions.

In *AINS, Inc*., B-400760.4, *et al*., Jan. 19, 2010, 2010 CPD ¶ 32, the GAO held that the Department of Justice failed to conduct meaningful negotiations when it merely requested the submission of a new project schedule when its real concern was that the protester's proposed schedule was too aggressive. In reaching its decision, the GAO was influenced by the fact that over 18 months had elapsed between submission of the initial and final offers, and, in the GAO's view, offerors could reasonably have construed the request to be nothing more than a request for updated information.

In *AMEC Earth & Environmental, Inc*., B-401961, *et al*., Dec. 22, 2009, 2010 CPD ¶ 151, the GAO found that an agency had held misleading discussions because it asked the protester specific questions about its proposed management software tool instead of revealing its real concern that the software tool was inappropriate for the project and actually increased performance risk. The GAO also held that the agency had conducted unequal discussions because it had conducted wide-ranging discussions with some offerors within the competitive range, but not with others.

Notes

C. Past Performance

Past performance issues continue to surface on a regular basis. Although agencies are given broad discretion in their handling of past performance information, that discretion is not unlimited. In *Shaw-Parsons Infrastructure–Recovery Consultants, LLC; Vanguard Recovery Assistance, Joint Venture*, B-401679.4, *et al*., March 10, 2010, 2010 CPD ¶ 77, the GAO upheld a protest in which the agency failed to consider past performance questionnaires that it had solicited and received from offerors. The agency instead relied on information the offerors had submitted on SF 330 forms. The agency argued that the RFP gave it the discretion to seek out additional past performance information, but the GAO held that the questionnaires the agency had specifically solicited constituted information "too close at hand" to ignore.

In *CRAssociates, Inc. v. United States*, 95 Fed. Cl. 357 (2010), the Court of Federal Claims held that it was improper to rate an awardee's past performance as "unknown" when such information was in fact available. The court noted that an "unknown" rating is supposed to be used only if an offeror has no relevant past performance, and it would be inappropriate for an offeror to be evaluated in a neutral fashion simply because it failed to submit past performance information.

Most contractors are careful to address negative performance evaluations through the administrative channel provided in FAR 42.1503(b). Although the ability to challenge an adverse performance evaluation at a board or a court was in question for some time, it is now clear that the U.S. Court of Federal Claims will take jurisdiction of such a dispute. *BLR Group of America v. United States*, 94 Fed. Cl. 354 (2010). Litigation, however, should be undertaken only if all other efforts have failed.

D. Organizational Conflicts of Interest

Perhaps the most difficult challenge facing agencies and contractors alike today is dealing with organizational conflicts of interest ("OCIs") in a pre-award context. Over the past several years, this issue has increased in importance and in frequency on bid protest dockets, and that trend does not appear to be ebbing. The topic itself is addressed fleetingly in FAR Subpart 9.5, but on April 26, 2011, the Department of Defense, NASA and GSA issued a proposed rule to amend the FAR coverage. Comments on the proposed rule are due by June 27, 2011. 76 Fed. Reg. 23236. In addition, on December, 29, 2010, the Department of Defense issued a new rule addressing OCIs on major defense programs. It is too early to tell precisely what impact these new rules will have. In the meantime, the GAO and the courts continue to deal with this challenging issue.

The recent protest and subsequent court challenge of *McCarthy/Hunt, JV*, B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68 illustrates how tricky this area is. In this protest, the GAO held that an OCI existed because of biased ground rules and unfair access to information that stemmed from merger negotiations.

Notes

The Corps of Engineers contracting officer had conducted a detailed review of the allegations and had concluded that any conflicts that might have existed were insignificant. Although the corporate transaction did not close until after contract award, the GAO held that the interest of the acquiring company in the targeted company can be sufficient to create an OCI. In this particular case, the principal design subcontractor of a Corps of Engineers contractor had been engaged in negotiations to be purchased by the parent of a company that was helping the Corps prepare its specifications and evaluate technical proposals. The GAO ruled that the company's secrecy rules were inadequate to prevent unfair access to information, and, in any event, had not been approved by the contracting officer. Based on these deficiencies, the GAO recommended that the awardee be disqualified from the competition. The Corps of Engineers proceeded in accordance with the GAO's recommendation.

The losing party at the GAO then took the matter to the U.S. Court of Federal Claims, challenging the Corps' corrective action. The court held that the Corps' decision to implement the GAO recommendation was arbitrary and capricious because the GAO had applied the incorrect legal standard. Instead of reviewing the Corps' actions *de novo*, the GAO should have limited itself to reviewing whether the Corps' decision-making process was reasonable. The court directed that the agency reinstate the original award. *Turner Construction Company v. United States*, 94 Fed. Cl. 561 (2010), *appeals pending*, Dkt. No. 2010-5158, Federal Circuit.

In *Valdez International Corp*., B-402256.3, Dec. 29, 2010, 2011 CPD ¶ 13, the GAO upheld a contracting officer's determination that an awardee's contract performance would not present an OCI. The GAO decision was based on its finding that the contracting officer actually had conducted a detailed examination to determine whether an award would present an OCI and had concluded it would not. The GAO noted that the FAR charges the contracting officer with the responsibility to examine the particular facts of each situation, paying consideration to the nature of the contracts involved. The GAO also noted that its role in a bid protest is to determine whether an agency's actions are arbitrary and capricious, and that it will not substitute its judgment for an agency's judgment absent clear evidence that the agency's conclusion was unreasonable.

The nature of the contract at issue can be pivotal. In *Serco, Inc*., B-404033 *et al*., Dec. 27, 2010, 2010 CPD ¶ 302, a protester alleged that an award was improper because the awardee had an "impaired objectivity" type of OCI. The contract called for management support services at 25 expeditionary base camps in Iraq. As part of its duties, the contractor was to provide support services in connection with the closure of some of the base camps. The protester alleged that the awardee had other contracts in Iraq and that it, therefore, could not provide objective advice with respect to the closure of installations that might impact its financial interests. The GAO denied the protest because the record showed that providing such advice was not within the contract's scope of work.

Notes

E. Choice of Protest Forum

Pre-award protests may be filed at the procuring agency, with the GAO, or with the U.S. Court of Federal Claims; however, the GAO handles far more protests than the Court of Federal Claims. In FY 2010, the GAO experienced a 16 percent increase in the number of protests it received (2,299) (as compared to a 20 percent increase the year before). It issued 441 decisions on the merits and sustained 82, for a "sustain rate" of 19 percent. That signified a rise of one percent from the prior year, but it is still far below FY 2006 when the sustain rate was 29 percent.

In addition, the GAO used Alternative Dispute Resolution procedures in 159 protests, ten more than the year before. Arguably the most important statistic relating to the GAO is its "effectiveness rate," the total of its sustained decisions and the number of protests where the GAO recommended that the agency take corrective action in order to avoid an adverse decision. For 2010, the effectiveness rate was 42 percent. In 2010, the U.S. Court of Federal Claims was chosen for 88 bid protest cases, 19 of them pre-award and 69 post-award.

As noted in the discussion about the recent OCI cases at the GAO and the U.S. Court of Federal Claims, the court treats protests as a *de novo* matter, *i.e.*, the GAO's decision is not given any deference. As a result, it is theoretically possible for a company to lose at the agency level, then lose in a protest at the GAO, and finally prevail at the Court of Federal Claims. For example, in *Geo-Seis Helicopters, Inc*., B-299175 *et seq*., March 5, 2007, 2007 CPD ¶ 135, the GAO cited a long list of GAO decisions in support of its ruling that it was proper for the procurement agency to extend the closing time for receipt of proposal revisions in order to accept a late proposal revision. The agency contended, and the GAO agreed, that it enhanced competition to do so. Not to be denied, Geo-Seis filed suit at the Court of Federal Claims, which reached the opposite conclusion. *Geo-Seis Helicopters, Inc. v. United States*, 77 Fed. Cl. 633 (Fed. Cl. 2007).

Tim Sullivan has extensive experience in bidding strategies, claims resolution, small business issues and the Procurement Integrity Act. He previously served as a contract negotiator for the Central Intelligence Agency.

202-585-6930
tsullivan@thompsoncoburn.com