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Prejudice

'Gotcha' Isn't Always Enough, Contract Protesters Know

BY DANIEL SEIDEN

A government contract protester can uncover a federal agency's missteps and mistakes in a competition, but no remedy will come if the errors weren't truly harmful.

When Cleveland-based Alphaport Inc. fell short protesting NASA's technical support contract award in a decision released March 3, the Government Accountability Office (GAO) said even if NASA erred by overlooking the awardee's proposal flaw, Alphaport couldn't say NASA's mistake hurt its chances at winning.

Alphaport never said it would have adjusted its own proposal had it known that NASA allegedly relaxed a competition requirement, the GAO said.

Therefore, Alphaport failed to show competitive prejudice — regardless of any agency mistakes — which every protester needs to show to win.

''Not only must a protester prove that an agency's conduct violated various established rules and regulations, it must also prove that it was prejudiced by those actions,'' Barbara S. Kinosky, managing partner of Centre Law and Consulting LLC, Tysons Corner, Va., told Bloomberg BNA.

Andrew Shipley, firmwide chair of Perkins Coie's government contracts practice in Washington, sees demonstrating competitive prejudice as analogous to showing materiality in a contract breach.

''At the end of the day, the question is whether an agency's error mattered. Was someone hurt by it?'' he said. ''From a protester's perspective, you have to have that in mind from the outset.''

It may be sufficient at times to establish prejudice by walking through alleged procurement errors and showing that an agency didn't act rationally, he added, but suggested protesters not ''leave any wiggle room.''

Agencies are always alleging there is no prejudice, he said, and ''perfect procurements are not required.''

Demonstrating Clear Impact. A protester can't win without a conclusive answer to the age-old question: So what?

In *Electrosoft Servs. Inc.*, GAO, B-413661,12/8/16, the protester of a General Services Administration contract award showed that the agency mistakenly assigned its proposal one technical weakness, but seven other reasonably assigned weaknesses meant the one flaw wasn't prejudicial, the Government Accountability Office (GAO) concluded.

If the record doesn't show that ''but for the agency's actions, the protester would have had a reasonable chance of receiving the award, our Office will not sustain a protest, even if a deficiency in the evaluation is found,'' the GAO said.

The GAO repeatedly takes this stance, as shown in *Glen Mar Constr. Inc.—Costs*, GAO, B-410603, 4/5/16, whereby a construction contractor showed that the Veterans Affairs Department sought services it knew it couldn't fully afford, but prejudice was lacking because the awardee's price always remained lower than Glen Mar Construction's price.

Highlighting significant price disparities isn't the only anti-prejudice argument for awardees that intervene in protests, hoping to keep their contracts, Megan Connor, a partner with PilieroMazza PLLC in Washington, told Bloomberg BNA. But ''it certainly helps the awardee in a lowest-price, technically acceptable procurement where the awardee knows or strongly suspects there are many offerors between its low price and the price of the protester,'' she said.

Making similar assertions can be ''trickier'' for awardees in procurements that assess proposals on a best-value basis, Connor said. ''If the agency's evaluation error was in the least important factor, that may be a way to highlight that the mistake was not prejudicial. But every case is different.''

The number of offerors is an important factor, she said.

''I can envision a scenario in a best-value procurement where there are 20 offerors and one awardee, and if it's clear from the record that there's no way the low-rated protester will get in the range of the awardee, then I would certainly make a competitive prejudice argument that the protester is not and never will be next in line for award,'' she said.

Casting Doubt Over Result. However, the scales can tip in a protester's favor regarding prejudice when the GAO or court has an incomplete or unclear protest record to review.

The U.S. Court of Federal Claims found last month that the Forest Service failed to conduct a required price realism analysis in a procurement, without which the court ''cannot determine if the agency made a rational decision'' in its award.

Without the analysis in the record, the court said it had no way to know if the protester was prejudiced, but presumed prejudice when it directed the Forest Service to conduct and document the analysis.

Similarly, the GAO will ''resolve any doubts regarding prejudice in favor of a protester since a reasonable

possibility of prejudice is a sufficient basis to sustain a protest,'' according to a January decision.

In *Glacier Tech. Solutions LLC, GAO, B-412990, 10/17/16, for example, the GAO said it couldn't discern from the record how a solicitation deviation in an information technology contract awardee's staffing plan affected evaluation scores. Therefore, the Army should issue a new selection decision, the GAO said.*

Highlighting doubt due to incompleteness in the record is one of the better strategies a protester can use, Connor said, in addition to raising allegations about improper discussions ''because a protester can argue that if it were informed of a weakness, it would have changed its proposal, and the agency prejudiced the protester by not providing that opportunity.''

Both pro-prejudice strategies address the need for procurements to adhere to an agency's competition rules as closely as possible, and fairly apprise competitors of all necessary information.

If an agency falls short in those areas, protesters must demonstrate ''material'' harm to earn a remedy.

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