Case of the Month Club
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Roadmap

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Protest Case of the Month #1: *Obsidian*

- Full Cite:
  - *Obsidian Sols. Grp. v. United States*, No. 2021-1836, --- F.4th ----, 2022 WL 17491539 (Fed. Cir. Dec. 8, 2022).
- Brief Summary:
  - The Department of Energy (DoE) issued a solicitation seeking IT services. DoE designated the solicitation as a small business set-aside, with a maximum size limit of $20.5 million in average annual receipts.
  - Obsidian self-certified as a small business based on its five-year average of annual receipts. SBA determined that Obsidian did not qualify as small based on its three-year average of annual receipts.
  - Obsidian protested at the Court of Federal Claims (COFC) arguing that SBA's decision to apply a three-year average rather than five-year average was arbitrary and capricious.
  - COFC (Hertling, J.) held that the Runway Extension Act (REA) did not clearly and unambiguously apply to the SBA. Obsidian appealed to the Court of Appeals for the Federal Circuit (CAFC).
  - CAFC (Hughes, J.) affirmed. Held that the SBA did not err in applying the three-year lookback rather than the five-year period mandated by the REA because the structure of § 623(a)(2) and its later amendment in 2022 suggested that Congress intended for subsection (C)'s requirements not to apply to SBA.

Obsidian, Factual Background

- DoE issued a solicitation for various technical services. The solicitation was a small business set-aside with the size limit set at a maximum of $20.5 million in average annual receipts.
- On July 18, 2019, Obsidian self-certified as small based on its five-year average of annual receipts (~ $17.5 million). DoE notified Obsidian that it was the apparent successful offeror and that it would confirm Obsidian's size status with SBA before award.
- On September 10, 2020, using Obsidian's three-year average of receipts, SBA determined that Obsidian did not meet the procurement's size limits because its three-year average (~ $21.8 million) exceeded $20.5 million. SBA's Office of Hearings and Appeals affirmed SBA's size determination.
- Obsidian protested at COFC. It argued that SBA's decision was arbitrary and capricious because SBA was required to use a five-year calculation of annual receipts pursuant to 15 U.S.C. § 623(a)(2)(C), as amended by the Runway Extension Act (REA).
- COFC denied the protest because the REA did not apply to SBA.

Obsidian, Factual Background

- Obsidian appealed to the Court of Appeals for the Federal Circuit (CAFC). The court noted that at issue in the case was whether the REA's amendments to § 623(a)(2) (which became effective on December 17, 2018) were immediately binding on SBA.
- Prior to its 2022 Amendment, § 623(a)(2)(A) provided that "the [SBA] administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business . . . ."
- Before the REA was enacted in 2018, § 623(a)(2)(C) provided that "[u]nless specifically authorized by statute, no Federal department or agency may prescribe a size standard" based on average annual receipts, "unless such proposed size standard . . . [is for] a period of not less than 3 years . . . [and] is approved by the [SBA] Administrator."
- The REA changed the "3 years" in subsection (C) to "5 years."
- Following the REA's effective date, the SBA restated its longstanding interpretation that subsection (C) applies only to non-SBA agency size standards, not to SBA size standards created under (A) and (B).
  - However, to promote consistency, SBA proposed to change its existing three-year averaging period to a five-year period.

Obsidian, Factual Background

- In its proposed rule, the SBA clarified that the three-year period would apply to all bids submitted before the effective date of the final rule.
- The SBA's rule was not yet final when Obsidian submitted its proposal.
- On January 1, 2022, Congress amended § 623(a)(2) to explicitly state in subparagraph (C) that "no Federal Department or Agency (*including the [SBA] when acting pursuant to subparagraph (A)*) may prescribe a size standard" shorter than the five-year average. (emphasis added).
  - The amendment also altered (A) to clarify that the SBA Administrator is "subject to the requirements specified in subparagraph (C)."
- The amendments were made effective one year after the date of enactment and did not provide for retroactive application.
- On appeal, Obsidian argued that the phrase in § 623(a)(2)(C), "no Federal department or agency may prescribe a size standard," suggested that the five-year period should apply to all agencies, including SBA.
- It also argued that the legislative history of the REA suggested that Congress had intended that subparagraph (C) apply to SBA.

Obsidian, CAFC Decision

- CAFC held that the changes the REA made to § 623(a)(2)(C) were not clearly meant to apply to size standards set by SBA.

Section 623(a)(2)

- It reasoned that the language and structure of § 623(a)(2) evidenced Congress's intent to create two subsections regarding size factors.
- SBA, in contrast with other agencies, was given its own broader limitations for establishing size standards.
  - The court noted that while subsections (C) and (B) were similar, subsection (B) was meant to provide the SBA with greater latitude than other agencies.
- The court explained that if Congress wanted the SBA to be bound by the more stringent requirements applicable to other agencies, it would have created a single subsection outlining the categories.
- Instead, because Congress specifically authorized the SBA in subsection (A) to specify its own standards, "Congress exempted the SBA from the group of . . . Agencies limited by subsection (C)."

Obsidian, CAFC Decision cont.

The Small Business Runway Extension Act (REA)

- CAFC further explained that the REA did not change any of the language in § 623(a)(2) except to increase the timeframe for annual receipt calculations from 3 to 5 years.
  - In changing only subparagraph (C), Congress was presumed to have understood the SBA's longstanding interpretation of § 623(a)(2)(C) as only applying to *non*-SBA agencies, and to have adopted that interpretation in re-enacting the statute without change.

The 2022 Amendment

- The court further distinguished the REA's changes from Congress's later amendments to § 623(a)(2) in 2022.
  - When Congress amends a statute, it is presumed to intend to substantively change the statute rather than just clarify it.
- As such, CAFC found that the 2022 amendment supported the conclusion that prior to the amendment, subparagraph (C) of the REA did not apply to the SBA.
- CAFC noted that in contrast to the REA, the 2022 amendments "*did* explicitly change the language of the statute to make subsection (C) applicable to the SBA." (emphasis in the original).

Obsidian, CAFC Decision cont.

Other Arguments

- The court also found that a natural reading of subsection (C)'s requirement that size standards created by other agencies "be approved by the [SBA] administrator," suggested that only *non*-SBA agencies were required to comply with subsection (C).
- CAFC rejected Obsidian's arguments that the legislative history suggested Congress had intended the REA to apply to the SBA because "the only relevant bill that *did* ultimately win the approval of both chambers of Congress was the 2022 amendment."
- CAFC affirmed COFC's decision, holding that because the REA changes did not apply to SBA, its size determination based on a three-year calculation of average annual receipts was not arbitrary and capricious.

Obsidian, Questions & Takeaways

- The 2022 amendment to § 623(a)(2) became effective January 1, 2022 and apply to all future offers.
  - For bids/offers submitted after January 1, 2022, SBA should now use a 5-year range for annual average receipts
  - *Obsidian* suggests no retroactive changes or application

- What else is affected by SBA's "broader" authority to set size standards?
  - SBA seems to have been right that the REA did not apply to it.
  - Are there other aspects of REA and related law that the SBA is also excepted from?

- Is citing to legislative history ever helpful?

Protest Case of the Month #2: *MP Solutions*

- Full Cite:
  - *MP Sols., LLC*, B-420953, B-420953.2, Nov. 21, 2022, 2022 CPD ¶ 289.
- Brief Summary:
  - The Missile Defense Agency (MDA) issued an RFP for specialized engineering analysis services as a small business set aside.
  - The protestor, MP Solutions (MPS), was eliminated from the competitive range because its proposal failed to demonstrate technical knowledge in several areas that MDA identified as critical to the agency's requirements.
  - MPS filed a pre-award protest alleging an unreasonable technical evaluation and violations of the Procurement Integrity Act (PIA).
  - Government moved to dismiss the protest as untimely because the protest was filed before protestor received responses to its debriefing questions.
  - GAO held that in pre-award protests, if there is ambiguity regarding whether an agency is holding a debriefing open, a protest is timely filed if it is filed within 10 days of the original debriefing date.
  - On the merits, GAO denied the unreasonable technical evaluation protest.
  - It also denied the protest regarding violations of the PIA because the protestor only raised the argument in its comments on the agency report, more than 10 days after it should have known the ground for protest.

MP Solutions—Factual Background

- On January 5, 2022, MDA issued a solicitation for provision of engineering and technical support related to MDA's mission to develop, test, and field an integrated, layered Missile Defense System.
- The solicitation provided that award would be made on a best-value tradeoff basis considering cost and four non-cost factors.
- Three of the non-cost factors were to be evaluated on an acceptable/unacceptable basis, and any proposal with an unacceptable under one of those three factors would be ineligible for award.
- The fourth non-cost factor was composed of six equal subfactors, and any proposals receiving a technical rating of unacceptable under any of the six subfactors would also be ineligible for award.
- On July 11, the SSA notified MPS that it had been eliminated from the competitive range because it did not demonstrate sufficient technical knowledge in certain critical areas, significant government oversight and technical support would be required to ensure its successful contract performance, and its proposal was otherwise un-awardable due to a rating of unacceptable under one of the subfactors.

MP Solutions—Factual Background

- MPS's exclusion left one remaining offeror eligible for award.
- MPS requested a pre-award debriefing, which was provided by MDA on August 1. MDA notified MPS that it could submit additional relevant questions about its elimination from the competitive range within two business days. MPS timely submitted additional questions.
- On August 11, having received no response from MDA, MPS protested. It alleged that MDA unreasonably evaluated its proposal.
- On September 1, MDA responded to MPS's follow-up questions.
- MDA then moved to dismiss on the grounds that the protest was untimely because it was filed before the debriefing was concluded (citing *Celeris Sys., Inc.*, B-416890, Oct. 11, 2018, 2018 CPD ¶ 354).
- It argued that DoD's enhanced debriefing process, which dictates that a post-award debriefing is not considered concluded until the agency delivers its written responses to the unsuccessful offeror's questions, suggested that MPS had prematurely filed its protest.

MP Solutions—Factual Background

- On August 16, 2022, the only remaining offeror, nTSI, filed a request to intervene in the protest. In its request, nTSI said it "underst[ood] that it [wa]s the sole remaining offeror in the competitive range."
- MPS submitted a supplemental protest on August 22, alleging that the only way nTSI could have known that it was the sole remaining offeror in the competitive range was from the improper disclosure of source selection information by someone at MDA.
- MPS argued that this disclosure violated the PIA.
- On August 18, MDA separately confirmed in a comment posted to the protest docket that nTSI was the only remaining offeror in the competitive range.
- MPS did not mention this in its supplemental protest, but rather first argued that this disclosure was a separate violation of the PIA in its comments on the Agency Report, filed September 22.

MP Solutions—GAO Decision

Protest Timeliness

- GAO held that the protest was timely, despite being filed before the government responded to MPS follow-up debriefing questions.
- For enhanced debriefings, under GAO's Bid Protest Regulations and DoD's enhanced debriefing procedures, a protest is not timely filed until after the protestor has received a response to its follow-up questions.
- But GAO noted that enhanced debriefing procedures are only mandated in postaward debriefings. Section 818 of the FY 2018 National Defense Authorization Act (NDAA) required that DoD amend the DFARS to require "enhanced" debriefing procedures in all *post*-award debriefings.
- GAO further noted that § 818 did not require similar changes be made to the pre-award debriefing requirements for DoD under Title 10.

Post-award v. Pre-award Debriefings

- It explained that "by its plain language, [§ 818] applies only to post-award debriefings, not to pre-award debriefings" like the one provided to MPS.
- GAO distinguished its prior decisions in *Celeris* and *Harris*, noting that among other distinguishing factors both cases pertained to post-award debriefings rather than pre-award debriefings

MP Solutions—GAO Decision cont.

- In a non-enhanced debriefing environment (such as pre-award debriefings), the fact that an offeror takes advantage of an opportunity to submit additional questions does not extend the debriefing.
- Only an agency's actions can extend a debriefing. This includes circumstances where the conclusion time is extended due to ambiguity on the part of the agency concerning whether the debriefing has concluded.
- GAO found that MDA had not provided any affirmative indication to MP Solutions that its debriefing would only be considered concluded after the agency responded to further questions
- GAO also found that MDA's actions, its failure to specifically indicate whether the debriefing would remain open, and its failure to respond to MP Solutions' additional questions, all led to reasonable ambiguity regarding whether MPS's debriefing was closed.
- As a result, GAO held that MPS's protest was timely because MDA's failure to communicate or provide clarity regarding the status of the debriefing created an ambiguity such that it was not unreasonable for MPS to believe that its debriefing had concluded and to file its protest under normal timeliness deadlines as a result.

MP Solutions—GAO Decision cont.

Technical Evaluation

- GAO denied MPS's arguments regarding its technical evaluation.
- GAO held that there was no suggestion the agency failed to consider, misread, or ignored portions of MPS's proposal. Instead, the proposal suffered from a generic approach that lacked sufficient detail.

PIA Allegation 1

- GAO held that the contracting officer's (CO) review of the first PIA allegation, and his conclusion that no disclosure of source selection information had occurred, was reasonable.
- The CO based his review, in part, on a list of publicly available information provided by nTSI, upon which it had based its conclusion that it was the sole remaining offeror.
- He also reviewed the letter to request evaluation notices, the evaluation notices themselves, and the letter to request the final proposal provided to nTSI and found that none contained protected information.
- GAO denied the 1st PIA Allegation.

MP Solutions—GAO Decision cont.

PIA Allegation 2 Timeliness

- Finally, GAO also held that MPS's protest regarding MDA's post in the bid protest docket was untimely.
- While MDA's posting may have been a wrongful disclosure of source selection information in violation of the PIA, MPS should have known about the grounds for protest on August 18, when MDA originally posted the bid protest docket entry.
- Because MPS did not raise its concerns regarding the posting until it filed its comments on the agency report on September 22, the basis for MPS's 2nd PIA allegation was known more than 10 days before it raised such arguments with GAO.
- Thus, GAO held that the 2nd PIA allegation was untimely and dismissed the additional ground for protest.

MP Solutions—Key Takeaways/Open Questions

- Enhanced debriefing timelines and procedures do NOT apply to pre-award debriefings without agency action.
- What other kinds of agency actions extend the timeline for closing a debriefing?
- What types of ambiguity create reasonable uncertainty?
- Must an agency always explicitly state that it intends to keep the debriefing open until it remits its answers?
  - If an agency uses enhanced debriefing-like procedures in a non-enhanced debriefing setting, can an unsuccessful offeror ever assume that the debriefing is being held open?
- Check and be wary of posting on the EPDS and GAO bid protest docket
  - PIA violations can happen through EPDS and GAO postings

Presenters

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