Case of the Month Club
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Roadmap

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Protest Case of the Month: *VSolvit*

- Full Cite:
  - *VSolvit, LLC*, B-421048, B421048.2, Dec. 6, 2022, 2022 CPD ¶ 310
- Brief Summary:
  - USDA issued solicitation under multiple-award BPA.
  - Experience subfactor required vendors to provide up to five relevant and recently performed contract references.
  - CO/SSO and technical evaluation board (TEB) determined Vsolvit's quotation presented low confidence for technical factor, was not responsive to solicitation on several key points, and did not have balanced and complete pricing.
  - Determined only other offeror presented best value.
  - VSolvit protested that USDA unreasonably evaluated subcontractor experience, applied unstated evaluation criteria by treating subcontractor experience as less important than prime experience, and improperly failed to refer VSolvit to SBA for a Certificate of Competency (COC).
  - GAO dismissed as untimely VSolvit's claim regarding USDA's failure to consider its subcontractors' experience because it was raised more than 10 days after VSolvit's agency-level protest.
  - Denied unstated evaluation criteria claim, holding instead that USDA complied with RFQ by only considering prime's experience.
  - Held that the COC program is only available to small businesses, and because VSolvit was not registered as a small business when it applied for the COC, USDA's decision not to refer VSolvit to the SBA was reasonable.

VSolvit—Factual Background

- On July 20, 2022, USDA issued an RFQ to firms holding a BPA under the Salesforce Portal Development and Support Services Federal Supply Schedule (FSS) contract.
  - VSolvit was a small business when it submitted its offer for the FSS contract under which USDA's BPA was established.
  - No longer qualified as small.
- USDA contemplated issuance of a single, fixed-price call order.
- Award would be made using a best-value tradeoff considering three evaluation factors: (1) technical, (2) past performance, and (3) price.
  - The technical factor had 4 subfactors: (1) experience, (2) technical approach, (3) qualifications, and (4) quality control.
- USDA assigned one of five adjectival confidence ratings for the non-price factors ("Supreme Confidence" to "No Confidence") and would only award to a vendor with at least Satisfactory Confidence level or above.
- USDA received quotations from VSolvit and Deloitte.

VSolvit—Factual Background

- After initial deadline for submission of quotations, the CO requested clarification from VSolvit regarding whether it was the prime or subcontractor on the experience references included in its quotation.
- VSolvit responded that one of its proposed subcontractors exclusively performed the work. A series of emails followed:
  - The CO advised VSolvit that subcontractor work could not stand in place of the experience of the offeror as the USDA only intended to evaluate the "tasks/work that VSolvit itself did and not the intended subcontractors[.]"
  - VSolvit responded that (1) the RFQ did not prohibit use of subcontractor experience, (2) the RFQ called for consideration of the past performance of the "offeror's team," and (3) FAR Part 15 required USDA to consider subcontractor past performance.
  - The CO explained that the RFQ sought the vendor's experience, the reference to "offeror's team" meant employees directly working for the vendor, and the procurement was being conducted under FAR subpart 8.4.
    - Concluded that USDA was not required to evaluate subcontractors.
- On August 22, VSolvit emailed the senior procurement executive at USDA expressing concern with USDA's interpretation of the solicitation and the exclusion of subcontractors' and teaming partners' past performance/experience.

VSolvit—Factual Background

- On August 29, the senior procurement executive replied and explained that "[c]urrently a subcontractor's experience is not required to be considered as experience for the prime."
- VSolvit received a technical score of "Low Confidence" and an overall score of "Low Confidence."
- The TEB determined VSolvit's quotation warranted a rating of Low Confidence under the technical factor based on numerous elements that "decreased confidence in VSolvit's ability to successfully manage this type of project" including:
  - "Failure to provide demonstrable experience," and
  - VSolvit's approach "show[ed] little understanding of . . . the PWS."
- The CO/SSO agreed with the TEB and determined that "VSolvit's quotation did not receive at least a rating of satisfactory confidence, was not responsive to the solicitation on several key points, and did not demonstrate balanced pricing."
- USDA awarded to Deloitte after determining it presented the best value.

VSolvit—Factual Background

- VSolvit protested at GAO on September 12.
- Three protest arguments:
  - USDA's decision not to consider VSolvit's subcontractor experience under technical and past performance evaluation factors was unreasonable and contrary to the solicitation.
  - USDA applied unstated evaluation criteria by discounting proposed subcontractors' experience as compared to VSolvit's experience.
  - USDA unreasonably failed to refer VSolvit to the SBA for a Certificate of Competency (COC) determination because the USDA's conclusions regarding VSolvit's lack of experience were tantamount to it finding VSolvit nonresponsible.
    - While VSolvit was not registered as a small business when it submitted its quotation to USDA, it argued that it qualified as a small business because it was a small business when it was awarded the FSS contract.

VSolvit—GAO Decision

Evaluation of Subcontractor Experience

- GAO dismissed as untimely VSolvit's argument regarding USDA's refusal to consider the experience and past performance of subcontractors.
- It concluded that VSolvit's email to the senior procurement executive on August 22 was a "*de facto*" agency-level protest.
  - "[A] letter or email does not have to state explicitly that it is intended as a protest for it to be so considered, it must, at least, express dissatisfaction with an agency decision and request corrective action."
- VSolvit's email:
  - Expressed concern with USDA's interpretation of the RFQ
  - Provided a detailed legal and factual basis for VSolvit's concerns
  - Requested specific relief
- Thus, VSolvit's email had "all the hallmarks of an agency-level protest," and GAO treated it as such.
- USDA replied to VSolvit's concerns on August 29 and "conveyed that it would not implement [VSolvit]'s requested interpretation of the solicitation."
- Because VSolvit did not file its protest at GAO until September 12—more than 10 days after actual or constructive knowledge of adverse agency action—its protest was untimely.

VSolvit—GAO Decision cont.

Unstated Evaluation Criteria

- GAO rejected VSolvit's supplemental protest regarding improper evaluation of subcontractor experience.
- VSolvit highlighted a section of the TEB report:
  - "[T]he evaluation team did not evaluate VSolvit's proffered sub-contractor's experience on the same level as a Prime but noted that VSolvit's strategy is to subcontract with subcontractors possessing work experience such as those vendors."
- GAO concluded that VSolvit's "selective reading of the TEB Report does not demonstrate the agency's evaluation was inconsistent with the pre-award interpretation of the solicitation."
- USDA did not credit VSolvit for the corporate experience of its proposed subcontractors but rather noted that VSolvit's quotation relied extensively on the experience of its subcontractors.
  - Reviewers only considered the experience of the offeror.
- USDA's evaluation was thus fully consistent with its pre-award communication that only the prime's experience would be evaluated.

VSolvit—GAO Decision cont.

Certificate of Competency

- FAR 19.601: a Certificate of Competency (COC) is the certificate issued by the Small Business Administration (SBA) stating that the holder is responsible (with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting) for the purpose of receiving and performing a specific Government contract.
- Here, GAO also held that VSolvit did not qualify as a small business and thus USDA's decision not to refer VSolvit to SBA for a COC was reasonable.
  - GAO asked SBA for an advisory opinion.
- Based on the information provided by SBA, GAO rejected VSolvit's argument that 13 C.F.R. § 121.404(a) suggests that "the controlling period for determining a concern's size is at the time of submission of the offer on the GSA Schedule Contract, not the BPA issued against it."
- SBA noted that "the COC Program is only available to small businesses."
- Regarding when a firm's status should be determined, the SBA explained that "13 C.F.R. § 121.404(a) is the general rule, and . . . the accompanying provisions set forth in § 121.404(b)–(h) represent" exceptions to the rule.
- The SBA further explained that because the procurement was conducted on an unrestricted basis, 13 C.F.R. § 121.404(c) would control.
  - "[S]ize status of an applicant . . . relating to an unrestricted procurement is determined as of the date of the concern's application for the COC."

VSolvit—GAO Decision cont.

- The SBA also advised GAO that "its regulations have been clear that contracting officers can and should rely on a firm's self-certification of size." (citing 13 C.F.R.§ 121.405(b)).
- Thus, "[i]f a firm certifies it is small, absent some other intervening event or information, the contracting officer can and should accept that certification as true and accurate."
- Likewise, "if a firm certifies it is other than small, the contracting officer can and should accept that certification as well."
- As such, "SBA f[ound] no fault in the contracting officer's determination that VSolvit was not a small business (and ineligible for a COC referral), based on [VSolvit]'s lack of a certification that it was a small business under the applicable NAICS code."
- GAO held that Vsolvit's interpretation of SBA's regulations was irreconcilable with the plain text of 13 C.F.R. § 121.404(c).
- Because VSolvit was not registered as a small business at the time it would have applied for the COC, the CO's failure to refer VSolvit to SBA was not unreasonable.
- Protest dismissed in part and denied in part.

VSolvit—Questions & Takeaways

- Clarify evaluation criteria prior to proposal submission—but was that possible here?
- "*De Facto*" agency-level protests
  - Even informal communications (emails) may be considered a protest.
    - If a communication (1) expresses dissatisfaction with an agency decision; and (2) requests corrective action, the protest clock could have started.
      - "[D]oes not have to state explicitly that it is intended as a protest for it to be so considered"
    - How does this affect timing for a CICA stay?
  - What about the other agency-level protest requirements in FAR 33.103(d)(2)?
    - FAR 33.103(d)(2)(v): "Request for a ruling by the agency."
- Size status in an unrestricted procurement determined at time the entity would have applied for a COC, not when BPA awarded.
- If a business does not self-certify as small, can a CO safely assume the entity is other than small?
  - GAO and SBA say yes.

Claims Case of the Month: *Wu & Assocs.*

- Full Cite:
  - *Wu & Assocs., Inc. v. Gen. Servs. Admin.*, CBCA No. 6760. Dec. 22, 2022, 23-1 BCA ¶ 38252
- Brief Summary:
  - Wu & Associates (Wu) had contract with GSA for construction services on an elevator modernization project.
  - After award, Wu discovered floor could not support weight of equipment.
  - Wu submitted change order proposing to fix the floor.
  - Provided engineering reports suggesting GSA's specifications were defective.
  - GSA selected a plan proposed by another contractor to reinforce the floor.
  - Wu submitted a claim to GSA for various costs arising from the change.
  - GSA rejected claims for costs of the engineering analyses, and the costs of Wu's weekend site supervisor, president, and project manager.
  - CBCA held Wu was entitled to engineering analyses costs because the reports were necessary to convince GSA that its proposed method was flawed and were incurred while GSA and Wu were examining options to address the issue.
  - The Board rejected Wu's claim for the costs of its site supervisor because Wu produced the site supervisor's time sheet with its opening brief on quantum, well after close of discovery and settling the Rule 4 file.
  - The Board also rejected Wu's claim for time spent by Wu's president and senior project manager because Wu did not provide any support for the costs.
  - Appeal granted in part and denied in part.

Wu & Assocs.—Factual Background

- GSA awarded Wu a contract for construction services to modernize elevators in a federal building in New York City.
- CBCA previously held that Wu was entitled to an equitable adjustment because GSA's contract specifications were defective, and Wu relied on the defective specifications.
  - Now quantum
- Shortly after contract award, Wu determined that the building's 17th floor could not support the weight of the elevator equipment.
- Wu submitted change order request.
- Notified GSA it would provide further supporting information.
  - Submitted report prepared by Mr. Madden, a professional engineer, in which he concluded that the existing floor could not support the load of the elevator equipment by only distributing the load.
- GSA, Wu, and the other contractors on the project discussed the engineering necessary to address floor's limited load capacity.

Wu & Assocs.—Factual Background

- Wu, relying on Mr. Madden's opinion, noted GSA's preferred method (skids over the floor) would not work.
  - Wu proposed various options to safely move the equipment, and GSA asked for additional technical details.
- Wu provided GSA a detailed analysis created by Innova—another engineering firm—which suggested use of an "air sled."
- Innova's report recommended against stanchions because the solution might not be feasible based on wiring under the floor.
  - Also explained that stanchions might fail without understanding of internal forces of proprietary floor panel system
  - And installation of stanchions would be labor-intensive
- The elevator installer and another engineering firm later revisited the solution of reinforcing the floor with stanchions and obtained a quote to install the stanchions, which they provided to GSA.
- GSA decided to install stanchions to reinforce the flooring.

Wu & Assocs.—Factual Background

- Wu submitted claim to GSA related to installation of the additional floor stanchions, which included, among other costs, Mr. Madden's and Innova's engineering analyses and additional work performed by Wu's weekend site supervisor, senior project manager, and president.
- GSA originally denied Wu's claim, but the CBCA found Wu was entitled to an equitable adjustment.
- In its briefing on costs, Wu produced (for the first time) a time sheet showing the site supervisor had worked 23.5 hours during weekends.
- Wu also estimated that its president and senior project manager spent twelve and twenty-four hours on the project, respectively.
  - Explained in briefing that it did not keep time records for those individuals, so the time had to be estimated.
  - No salary records for either individual were produced in Wu's discovery responses or its Rule 19 supplement.
- Raised, for the first time, entitlement to release of retainer fee.
- GSA disputed Wu's entitlement to the costs incurred concerning the engineering analyses and the additional time worked by Wu's weekend site supervisor, senior project manager, and president.

Wu & Assocs.—CBCA Decision

Release of Retainer Fee

- Because Wu had not first presented the claim to the CO, CBCA dismissed Wu's retainer fee claim for lack of jurisdiction.

Engineering Reports

- The CBCA held that Wu was entitled to reimbursement for the costs of Mr. Madden's and Innova's engineering reports because Wu incurred the cost while discussing options to resolve the flooring issue with GSA and GSA repeatedly sought information while attempting to resolve the issue.
  - Explained that Wu was entitled to an equitable adjustment for increased costs reasonably incurred attempting to comply with GSA's defective specifications.
- Wu argued that the Madden report was necessary to convince GSA that its proposed method was infeasible and the Madden and Innova reports were good faith attempts to address a problem "GSA caused by failing to perform the necessary engineering during the design phase of the project."
- The Board accepted Wu's arguments and found that it incurred the expenses only after GSA requested additional information.
- The CBCA rejected GSA's argument that the cost of the reports was unreasonable because the engineers reached the wrong conclusions.

Wu & Assocs.—CBCA Decision cont.

- The Board further noted that GSA produced no evidence that it was imprudent for Wu to request the analyses or that Wu pursued the options identified in the reports knowing they may have been incorrect.
  - Instead, GSA had engaged in an "iterative approach in which [it] was actively engaged in addressing the issues with the flooring," and it "repeatedly sought information from Wu at the time the company was attempting to resolve the flooring issue."
- Thus, "it was reasonable for Wu to incur the costs of the various engineering analyses, including the analysis . . . which supported the use of stanchions to address the flooring issue . . . as well as the analyses done by Mr. Madden and Innova during the period when Wu and GSA were still examining options to address the problem."

Supervisory and Executive Costs

- The Board could not "ignore that Wu first produced the [site supervisor's] time sheet with its opening brief on quantum . . . ."
  - 16 months after discovery and 15 months after Rule 4 supplementation was due
- Board Rule 1(c) allows it to use the Federal Rules of Civil Procedure (FRCP) to resolve issues not addressed by the Board's rules.

Wu & Assocs.—CBCA Decision cont.

- Applied FRCP 37—gives discretion to redress discovery failures.
  - FRCP 37(b)(2)(A)(ii): "If a party fails to provide information . . . as required [by the court's rules], the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or a trial, unless the failure was substantially justified or is harmless."
  - Wu failed to explain why it did not produce the site supervisor's time sheet in a timely manner, and it likewise failed to explain why its late submission was either substantially justified or harmless.
- The Board refused to consider the time sheet as evidence.
- Because Wu presented no other evidence supporting its claim for the costs of the site supervisor, the claim was denied.

President and Project Manager

- The CBCA also rejected Wu's claims concerning additional time spent by its President and Project Manager, noting that Wu failed to provide support for the costs.

Wu & Assocs.—CBCA Decision cont.

- The Board relied on Federal Circuit precedent to explain that "guesstimates" are only permissible "where the contractor can demonstrate a justifiable inability to substantiate the amount of his resultant injury by direct and specific proof."
  - But "once a contractor is aware that it has a potential claim . . . or that it is having to perform extra or changed work, it has an obligation to create and maintain contemporaneous records tracking and showing its increased costs and/or segregating increased costs from costs for unchanged work."
- The CBCA reasoned that while Wu's standard business practice was to not keep time records for its president and senior manager, "Wu knew that it had a potential claim when it submitted its first change order request and should have started tracking the time spent by its salaried employees to resolve the raised floor issue."
- Wu also did not produce any other business records or documentation in support of its claim.
  - No declarations or affidavits attesting to the estimated hours worked
  - No contemporaneous business records showing salaries
- Because Wu could not provide proof of its incurred costs, the Board declined to award damages for these claims.
- Appeal granted in part and denied in part.

Wu & Assocs.—Key Takeaways/Open Questions

- May be able to recover costs incurred to show specifications are defective.
  - Engineering reports, feasibility studies
  - Proposed solutions need not be correct?
- Agency continually asks for more information—constructive change?
  - What kind of information does agency need to ask for?
  - Only technical or engineering reports?
- CBCA may use FRCP for discovery failures.
- In bifurcated appeal, do not wait until quantum portion of litigation to produce cost records.
  - Board might refuse to consider.
  - Be prepared to explain why delay is substantially justified or harmless.
- Segregate costs arising from constructive changes.
  - Even if not normal business practice
  - At least beginning for submission of change request
    - "[O]bligation to create and maintain contemporaneous records tracking and showing its increased costs"
      - Declarations or affidavits?
      - Contemporaneous business records?

Presenters

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