Case of the Month Club

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Public Contracting Institute

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STI–Claim Case of the Month

- Full Cite:
  - *Strategic Technology Institute, Inc. v. Secretary of Defense*, --- F.4th ---, 2024 WL 253316 (Fed. Cir. Jan. 24, 2024) (J. Hughes)
  - Brief Summary
    - Strategic Technology Institute (STI) performed a cost-reimbursable contract for the Navy.
    - STI submitted and the Navy paid monthly invoices based on "provisional" indirect rates.
    - FAR provisions in the contract required STI to submit an incurred cost proposal (ICP) after each fiscal year, which the Government would audit to determine the final indirect rates and related adjustments to payments.
    - STI did not timely submit its 2008 and 2009 ICPs.
    - After a request from the Defense Contract Audit Agency (DCAA), STI submitted the ICPs in 2014.
      - DCAA audited the ICPs and issued reports questioning certain direct and indirect costs.
      - In 2018, the Contracting Officer issued a final decision unilaterally establishing final direct rates and demanding payment of $1.1 million.
    - STI appealed to the Armed Services Board of Contract Appeals (ASBCA), arguing the claim was time barred because it accrued when the ICPs were due in 2009 and 2010 and the Government knew it had not received them.
    - Based on its precedents, the ASBCA found the claim did not accrue until DCAA received the ICPs in 2014.
    - The Federal Circuit affirmed, finding "[t]he event that fixed STI's liability is the submission of inadequate cost proposals" in 2014.

STI–Factual Background

- In April 2008, the Department of the Navy awarded Contract No. N00178-05-D-4580 to STI to provide aircraft engineering and support services to the Naval Surface Warfare Center. This was a cost-reimbursable contract with a performance period of one year, plus four one-year option periods. The contract incorporated FAR 52.216-7, Allowable Cost and Payment, and FAR 52.242-4, Certification of Final Indirect Costs.
- Under FAR 52.216-7, STI charged provisional indirect cost rates based on anticipated costs to be incurred that contract year.
  - Six months after the end of each contract year, STI was supposed to submit an ICP substantiating its actual costs. STI would receive additional payment if its actual costs were higher, or remit payment to the Government if its actual costs were lower—or, as the Federal Circuit put it, "settle the difference" between the anticipated and actual costs.
- In 2014, DCAA was auditing STI's 2010 ICP and found no record of the 2008 and 2009 ICPs. STI had prepared the ICPs with its accountants in 2009 and 2010, and it provided them to DCAA when requested in 2014.
- DCAA audited those submissions and issued audit reports in 2015 that questioned direct and indirect costs.
  - Examples: lack of documentation of business purpose for travel and meals; misallocation of direct and indirect labor costs; excessive pass-through charges on subcontracts; personal use of company car; unallowable purchases for advertising; unsupported overhead labor costs.
- On November 30, 2018, the Administrative Contracting Officer issued a final decision unilaterally establishing final indirect rates for 2008 and 2009 and demanding payment of $1,107,788, including $117,245 in penalties and interest.

STI–Factual Background cont.

- STI appealed the claim to the ASBCA.
- STI did not challenge the claim on the merits, stating it was unable to do so "due to the passage of time."
- STI argued the claim was barred by the Contract Disputes Act's six-year statute of limitations. This is an affirmative defense, and therefore the burden of proof was on STI.
- STI believed that it had timely submitted ICPs for 2008 and 2009.
  - Following Rule 11 ("Submission Without a Hearing") briefing from the parties, the Board found: (1) STI had not established that it submitted the ICPs, and (2) the Government had established through its contemporaneous mail log that it did not receive them.
  - STI had timely prepared the ICPs, and its president and office manager thought they had been submitted, but STI provided no proof (e.g., mail log, shipping receipt).
- The Board then found that prior Board precedent holds that government claims relating to ICPs accrue on receipt of the proposal, not on the date that the ICPs were due.
  - STI "cannot fail to comply with its contractual duties, while at the same time contending that the statute is running on the government's claim."
  - This is a fact-specific inquiry of when the Government had sufficient information to know of the claim.

STI–Fed. Cir. Decision

- STI appealed to the Federal Circuit, arguing that the Government's claim accrued on the date the ICP was due, rather than when it was received.
  - STI did not challenge the ASBCA's finding that it had not submitted the ICPs in 2009 and 2010.
- The Federal Circuit affirmed the Board's decision.
- Claim accrual is not defined in the Contract Disputes Act.
  - FAR 33.201: "*Accrual of a claim* means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred."
- The Court held that the Government did not know, and had no reason to know, that discrete costs included in the ICPs were unallowable until it received the ICPs in 2014.
- The Federal Circuit was unpersuaded by STI's argument that the Government could have learned of the unallowable costs at any time due to its virtually unlimited audit rights, or that the Government had a duty to act when it did not receive an ICP by the contractually mandated date.
- Rather, the Court reasoned, the contract contemplated that the charged rates would be provisional and would be adjusted upon receipt of an ICP; it was the receipt of that ICP that was the triggering event for a claim to reduce those rates.
  - A breach of contract claim for failure to submit the ICPs would accrue on the date the ICPs were due. But this was a cost claim for alleged overpayments based on the information in the later-submitted ICPs.

STI–Fed. Cir. Decision cont'd

- In notable dicta, the Federal Circuit stated that the Government also had causes of action for a contractor's failure to provide an ICP.
  - The Government could have unilaterally set rates based on the information "available" to it at the time, or it could have brought a claim for breach of contract—both actions having the effect of reducing the rates charged.
- Presumably, if those claims were appealed, they would be reviewed *de novo* at a board or court, which would, with the benefit of discovery, ultimately set the rates based on the same information that should be included in the ICP and result in the same monetary relief to the Government.
- In other words, that dicta's practical effect is to toll the six-year statute of limitations period for the Government to recover overpayments from the ICP's due date to the date it is ultimately received.
- Nothing in the opinion addresses whether contractors have a similar ability to recover for under-charging if they are late to discover that their actual indirect costs were higher than anticipated.

STI–Key Takeaways

- Always meet your deadlines!
- Cost-type contractors now have additional risks.
  - To mitigate those risks, contractors should adopt a best practice of obtaining and maintaining confirmation of Government receipt of contractually required cost data.
  - Consider retaining back up documentation until after a government audit is completed, even if the FAR/contractual retention period has passed.
- Federal Circuit—not a great place for contractors….????
  - Panel was Judges Hughes, Cunningham, and Stark.
    - Two of the three judges on the panel are patent lawyers by trade—like a majority of the judges on the Court as a whole.

L3Harris—GAO Protest

- Full Cite
  - *L3Harris Technologies*, B-422006 *et al*., Dec. 20, 2023, 2023 CPD ¶ 290
- Brief Summary
  - NASA, specifically the Goddard Space Flight Center (GSFC), awarded a $486.9 million contract to Ball Aerospace to develop an instrument for the Geostationary Extended Observations, or GeoXO, weather satellite program for the National Oceanic and Atmospheric Administration.
  - L3Harris's proposal received a technical approach score of 600 points out of 750, while Ball's proposal received 563 points. Ball submitted a proposal of $486.9 million, while L3Harris's proposal was $764.9 million.
  - L3Harris argued that the agency's evaluation of technical proposals and its cost realism analysis was unreasonable, irrational, and inadequately documented; that the agency failed to properly assess the cost impact of the acquisition of Ball by BAE; and that the award decision could not stand as the result of an unmitigable appearance of impropriety resulting from NASA's appointment of a former senior Ball executive to be the new GSFC director.
  - GAO denied all aspects of L3's protest.

L3Harris–Factual Background

- GSFC issued Request for Proposals (RFP) No. 80GSFC22R0055 for the GeoXO sounder (GXS) instrument implementation on February 11, 2023.
  - The GXS will provide, for the first time, sounding observations of the western hemisphere from geostationary orbit—critical information that will be used for weather prediction.
- The GeoXO program is a collaborative mission that is fully funded by the National Oceanic and Atmospheric Administration (NOAA), and NOAA has delegated to NASA the procurement of the GeoXO series of spacecraft and its five instruments, including the GXS.
  - NASA will manage the development of the satellites and launch them for NOAA, which will operate them and deliver weather data to users worldwide.
- The RFP stated that the competition would result in the award of a cost-plus-award-fee contract for the development of one flight model (FM1), with two options for building two more flight models (FM2 and FM3), and four options to perform additional engineering studies valued at $2 million per option. The anticipated period of performance for this contract includes support for 10 years of on-orbit operations and 5 years of on-orbit storage, for a total of 15 years for each flight model.

L3Harris–Factual Background cont'd

- The RFP stated that proposals would be evaluated under three factors: mission suitability, cost, and past performance.
  - Cost was significantly less important than the mission suitability and past performance factors combined; as individual factors, mission suitability was more important than cost, and cost was more important than past performance.
  - Offerors' proposed costs would be assessed for reasonableness and realism in accordance with FAR 15.305(a)(1) and NASA FAR Supplement (NFS) 1815.305(a)(1)(B).
- L3Harris Technologies, Inc. (L3Harris), of Fort Wayne, Indiana, and Ball Aerospace & Technologies Corporation (Ball), of Boulder, Colorado, were the only two offerors.
- The offerors were evaluated as follows:

	Ball	L3Harris
Technical Approach	Very Good (563)	Very Good (600)
Management Approach	Good (87)	Good (90)
Small Business Utilization	Good (60)	Good (58)
Mission Suitability -- Total Points	710	748
Proposed Cost and Fee	$486,863,957	$764,912,447
Probable Cost with Fee	$553,897,346	$790,953,918
Past Performance[3]	High Confidence	High Confidence

- On September 11, 2023, the agency notified L3Harris that the contract had been awarded to Ball.
- L3Harris received a debriefing on September 20 and then filed a protest at GAO.

L3Harris – GAO Decision

- Acquisition of Ball by BAE
  - L3 argued that NASA failed to reasonably consider the impact of BAE's planned acquisition of Ball on Ball's proposed costs.
  - Specifically, L3 argued that Ball's indirect rates will likely increase because of the acquisition, resulting in significantly higher costs, and the agency unreasonably failed to make additional upward cost adjustments to account for the planned corporate transaction.
  - GAO Precedent:
    - "Where a change in an offeror's corporate status shows that it will perform the contract in a manner materially different from that represented in its proposal, an award based on such a proposal cannot stand, since both the offeror's representations, and the agency's reliance on such, have an adverse impact on the integrity of the procurement process. We have also found, however, that where a corporate acquisition or restructuring does not appear likely to have a significant impact on cost or technical impact on contract performance, the corporate transaction does not render the agency's evaluation and award decision improper."
  - Here, after the public announcement of the planned acquisition by BAE, the CO opened an inquiry to determine what effect the transaction would have on Ball's proposal.
  - Based on this inquiry, the CO concluded there would be no material impact on Ball's proposal and GAO found this reasonable:
    - Other than its expectation that Ball's rates will be higher, the protester does not demonstrate that NASA had a justifiable basis to make such an adjustment since the transaction had not been completed, or even possessed reliable data to form a basis to compute what the adjustment should be.
    - Since the contract is awarded to Ball—based on Ball's proposal submission and not a proposal from BAE—the contracting officer properly sought representations from Ball as the entity with which NASA would have privity of contract. Moreover, the protester has not shown that any of the planned resources or facilities proposed to perform the contract have been rendered unavailable by the planned acquisition such that Ball cannot implement its proposed approach.

L3Harris – GAO Decision cont'd

- Appearance of Impropriety
  - L3 argued that the agency created an unmitigable appearance of impropriety while the procurement was underway by appointing as its new GSFC director the senior Ball executive responsible for Ball's proposed technical approach and to whom the Source Selection Authority (SSA) now reports. L3 argued that this should have resulted in Ball being disqualified and the contract awarded to L3Harris.
  - The CO stated that the SSA was appointed on October 16, 2022, after which the Source Evaluation Board (SEB) was selected. According to the CO, all procurement participants were reminded of the requirement to comply with the FAR, NFS, and Procurement Integrity Act, "which prohibits the disclosure of information to individuals not also participating in the same evaluation proceedings," and only the SSA, SEB members, consultants, and ex officio agency participants were granted access to SEB information.
  - The SSA stated that there was no communication about the award decision outside of this group.
  - Dr. X, the former Ball employee, stated he left Ball in September 2022 (before the RFP was issued) and that prior to entering civil service, beginning in October 2022, Dr. X divested all Ball Corporation assets, including cashing out a pension.
    - Dr. X also took steps to separate deferred compensation to which Dr. X was entitled from Ball Corporation stock and place it into an index fund so that when paid, the deferred compensation would not be based on the performance of Ball Corporation stock.
    - Additionally, Dr. X stated that all Ball Corporation stock had been converted to index funds by the time the deferred compensation payment was made in August 2023, and neither Dr. X nor any family hold any financial interest in Ball Aerospace or Ball Corporation.
  - GAO found that "the facts here do not reasonably suggest that the SSA could not make an impartial selection decision simply because one of the competitors formerly employed Dr. X, an individual to whom the SSA reports. We disagree with the protester that the SSA was faced with any conflict of interest, and as discussed, the record shows that neither the SSA nor Dr. X would benefit financially or otherwise from Ball's selection for award."

L3Harris – GAO Decision cont'd

- Technical Evaluation & Cost Realism
  - Technical
    - L3 raised numerous arguments that the agency deviated from the solicitation when awarding to Ball and that Ball should have been deemed ineligible for award based on the terms of the solicitation.
    - GAO disagreed: None of Ball's alleged weaknesses constituted "a flaw that appreciably increases the risk of unsuccessful contract performance," or "a material failure of the proposal to meet a Government requirement" that elevated "the risk of unsuccessful contract performance to an unacceptable level."
    - "Rather, as permitted under the mission suitability evaluation, the [evaluators] determined that cost realism adjustments would be required to address its findings underlying the three weaknesses. Despite the weaknesses, when considered against the strengths and significant strength identified, the [evaluators] assigned Ball a rating of very good under the technical approach subfactor, and ratings of good under the management approach and small business utilization subfactors."
  - Cost Realism
    - L3 raised numerous arguments to try to reduce the over $240 million cost delta—all were denied by GAO.
    - GAO accepted the agency's post-protest explanation of its cost adjustments: "To the extent that the record does include further information to explain the methodology used to compute Ball's most probable cost, the information was provided in response to specific arguments raised by the protester but is otherwise consistent with the contemporaneous documentation."
    - Allegations based on differences between offerors' proposed costs and the government estimate were denied because the agency documented a reasonable basis for disregarding the government estimate despite it being much higher than both offerors' proposed costs.

L3Harris – Key Takeaways

- COs have significant discretion when considering the effects of a potential corporate transaction.
  - If the transaction is imminent and essentially certain, the CO must consider its effects—which the CO did here.
  - The CO did not have enough information to predict changes in rates and adjust costs accordingly.
  - No obligation to seek data from the acquiring entity that was not a bidder.
- Former employment by a contractor, alone, is insufficient to create the appearance of impropriety.
  - Dr. X took multiple steps to ensure all financial connection to Ball was severed.
- IGCEs are generally useless?
  - Agencies have significant discretion to discard IGCEs if they are significantly different from the proposals received. Is that when the agency should be taking a closer look, to figure out WHY the IGCE is so different from the proposals?

Presenters

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