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Case of the Month Club

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Roadmap

- Introduction
- Claims Case of the Month
- Protest Case of the Month
- Presenter Information

Amentum–Claims Case

- Full Cite:
  - *Amentum Services, Inc.*, ASBCA Nos. 63250 *et. al.*, Feb. 5, 2024, 2024 WL 773339
- Brief Summary
  - Amentum Services, Inc. (Amentum) held Air Force contracts to perform airport maintenance services at two naval air stations in California.
  - Amentum filed claims for increased costs incurred to comply with California and Navy requirements related to COVID-19.
  - The Air Force rejected the claims in full, and Amentum appealed to the ASBCA.
  - The Board held that the paid time off (PTO) granted under California's COVID-19 sick leave laws was a fringe benefit under the terms of a collective bargaining agreement (CBA) between the company and employees working at one of the bases, which entitled Amentum to a contract price adjustment under FAR 52.222-43 (governing Service Contract Act price adjustments).
    - Amentum's CBA with its employees doing the same work at the other base, also in California, did not include the same language, so costs for additional sick leave incurred as part of that task order couldn't be reimbursed under the FAR, according to the Board.
  - The Board rejected Amentum's alternative arguments for reimbursement based on constructive change and mutual mistake.
    - The Navy's 14-day Navy COVID-19 quarantine requirement was a sovereign act so the Government was immune from any liability.
    - The mistaken facts (COVID-19 and related state and federal actions) did not exist when the contracts were executed.

Amentum–Factual Background

- On December 1, 2016, the Air Force awarded the contract at issue to URS Federal Services, Inc., which is now known as Amentum.
- On June 28, 2018, the Air Force issued Task Order No. 52 under the contract for Amentum to provide airport maintenance services at Naval Air Station (NAS) Lemoore in California.
- On April 1, 2019, the Air Force issued Task Order No. 13 under the contract for Amentum to provide airport maintenance services at NAS North Island, also in California.
- The contract includes the Service Contract Labor Standards clause at FAR 52.222-41.
- The contract also includes:
  - FAR 52.222-43, Fair Labor Standards Act and Service Contract Labor Standards—Price Adjustment (Multiple Year and Option Contracts)
  - FAR 52.243-1, Changes—Fixed Price, Alternate I

Amentum–Factual Background cont.

- On July 1, 2019, Amentum entered into a Collective Bargaining Agreement (CBA) with the International Association of Machinists and Aerospace Workers (IAM) for work performed at NAS Lemoore.
  - The Lemoore CBA expired on February 1, 2021.
  - The Lemoore CBA provides: "Personal medical leave will be granted in accordance with the Family Medical Leave Act, Company policy, and all state of California and federal laws."
- Amentum submitted the Lemoore CBA to the contracting officer, who incorporated it into the Lemoore Task Order by modification on August 1, 2019.
- On June 30, 2020, Amentum entered into a CBA with IAM for work performed at NAS North Island.
  - The North Island CBA expired on June 30, 2022.
  - The North Island CBA requires Amentum to provide PTO to covered employees for "personal illness [and] doctor and dental visits," but it does not include a similar provision to the Lemoore CBA granting leave in accordance with California state law.
- Amentum submitted the North Island CBA to the contracting officer, who incorporated it into the North Island Task Order by modification on October 30, 2020.

Amentum–Factual Background cont.

- On May 13, 2020, Amentum notified the contracting officer about the impact of COVID-19 and resultant quarantine of some contractor employees:
  - "Amentum is [] experiencing delays in bringing personnel on-site due to 14 day Government imposed quarantine periods, other local or State Government imposed restrictions, or other various issues."
- On September 9, 2020, during Option Year Two of the Lemoore Task Order and Option Year One of the North Island Task Order, California enacted a statute that provided for up to 80 hours of paid sick leave for COVID-19. The law was later extended through September 30, 2021.
- On September 30, 2020, and November 4, 2020, the Navy issued internal guidance describing the Navy's COVID-19 quarantine process.
  - This guidance was updated numerous times.
  - The Air Force contracting officer did not send the guidance to Amentum or modify the contract to incorporate it.
- Amentum submitted REAs to cover additional costs incurred at both bases, followed by certified claims. All were denied, and Amentum appealed to the ASBCA.
- The parties sought summary judgment on entitlement.

Amentum–ASBCA Decision

- Lemoore Task Order Claims
  - The Board found Amentum was entitled to recover for its SCA claim under the Lemoore order.
  - FAR 52.222-43 requires contract price adjustments based on increases in the applicable wage determination (or CBA) for SCA-covered contracts.
  - The CBA for Lemoore required Amentum to provide PTO "in accordance with… all state of California and federal laws." Thus, the costs associated with California's COVID-19 leave law could be reimbursed under FAR 52.222-43.
  - The Government argued that Amentum's recovery was barred because its notice to the contracting officer of the additional medical leave was untimely under FAR 52.222-43(f). The Board rejected this argument because the Government failed to show how it was prejudiced.
  - Quantum on the $644,670 claim will be determined later.
- North Island Task Order Claims
  - The Board rejected Amentum's SCA claim for nearly $354,000 in costs related to the California COVID-19 leave law under the North Island task order.
  - The CBA covering workers at that base included a different PTO clause that did not tie medical leave to statutory requirements. The California law therefore did not count as an "increased wage determination" under the FAR, even though Amentum was presumably required to comply.

Amentum–ASBCA Decision cont.

- Claims Under Both Task Orders Relating to the Navy's Quarantine Requirement
  - The Board rejected Amentum's alternative claims relating to the Navy's 14-day quarantine requirement, which sought roughly $1.5 million across the two task orders.
  - Amentum claimed that the quarantine requirement increased its sick leave costs and was a constructive change to its task orders.
  - The Board found that the Navy's COVID-19 related guidance, including the quarantine requirement, was a sovereign act because it was "public and general" and not aimed at nullifying Amentum's contractual rights.
    - Sovereign Act defense "requires that the government prove that (1) the governmental action was public and general; and (2) the act must render performance of the contract impossible."
      - Public and General: "In order to determine if the government's act is public and general, we examine whether the act is specifically directed at nullifying contract rights, and whether the act applies exclusively to the contractor or more broadly to include other parties not in a contractual relationship to the government." Both prongs were met here.
      - Impossibility: The "Navy's 14-day COVID-19 related quarantine requirements made performance of each party's contractual obligations impossible during the particular 14-day time periods at issue."
  - Lastly, the Board held that Amentum could not claim a mutual mistake of fact in contract formation related to the quarantine requirement, which would have permitted reformation of the contract.
    - The Board found there was no erroneous belief about any existing fact held by either party at the time of contract formation. COVID-19 did not yet exist, and any related events "could not have been within the contemplation of the parties" at the time of contract formation.

Amentum– Key Takeaways

- A rare success for a contractor seeking to recover costs related to COVID-19!
  - But applicability to other contracts and contractors may be limited.
  - Reliance on specific "statutory requirement" language that may not be present in all CBAs.
  - No applicability to SCA-covered contracts subject to Department of Labor wage determinations.
- Consider including similar language when negotiating future CBAs?
- Expect more Sovereign Acts decisions—with same outcome—related to COVID-19 costs.

Deloitte—GAO Protest

- Full Cite
  - *Deloitte Consulting LLP*, B-422094.2, Jan. 18, 2024, 2024 WL 402292
- Brief Summary
  - The Department of Homeland Security (DHS) issued an RFP seeking technical systems integration support services that would modernize and integrate various financial management systems to firms holding an Enterprise Financial System Integrator BPA.
  - Quotes were submitted by CGI and Deloitte.
  - DHS determined that a teammate of CGI created an organizational conflict of interest (OCI) and held "discussions" with CGI related to it, resulting in CGI notifying DHS that it was removing the teammate from its quote—no other changes were made to CGI's technical or price proposal.
  - CGI was awarded the call order and Deloitte protested.
  - GAO denied Deloitte's allegations relating to unequal discussions (based on a lack of prejudice) and specific aspects of the evaluation of Deloitte's and CGI's quotes. However, GAO sustained Deloitte's argument alleging that DHS unreasonably evaluated CGI's quote when it failed to consider the impact the removal of the teammate would have on CGI's technical approach and price.

Deloitte–Factual Background

- The fixed-price and time-and-materials call order solicitation was issued under FAR 8.405-3 to firms holding General Services Administration, Federal Supply Schedule Enterprise Financial System Integrator (EFSI) BPAs.
- DHS sought technical systems integration support services that would modernize and integrate the financial management systems—collectively known as the DHS Cube—for the DHS Office of the Chief Financial Officer Joint Program Management Office.
- The period of performance was a 10-month base period and five 12-month option periods.
- The solicitation contained two technical evaluation factors: technical approach and capabilities; and management approach.
  - The technical approach and capabilities factor was more important than the management approach factor.
  - When combined, those two factors were significantly more important than price.
- As part of its price quotation, each vendor was required to complete a pricing template providing its proposed labor categories, rates, and hours.
- The solicitation also advised vendors that the services in the price volume must be consistent with the services described in the technical volume, and that any unexplained inconsistencies might render the quotation ineligible for award.

Deloitte–Factual Background cont.

- On July 25, 2023, the agency received quotations from two firms: CGI and Deloitte.
- CGI's quotation identified Company X as one of CGI's teaming partners on the current procurement.
- On August 30, the contracting officer informed CGI "there may be a potential Organizational Conflict of Interest (OCI) with one of CGI's teaming partners on RFQ 70RDAD23Q00000111 for the Cube Financial Systems Modernization (Cube FSM) requirement."
  - The CO's email included a copy of the OCI clause from Company X's DHS Cybersecurity and Infrastructure Security Agency contract, which contained restrictions on the work it could perform in the future because of OCI concerns.
  - CGI responded two days later, informing the contracting officer that "[a]fter reviewing your August 30 email regarding mitigation, Company X and CGI Federal mutually agreed that Company X would not participate on any resultant Cube FSM award. Effective immediately, Company X will not be part of CGI Federal's team."
  - CGI did not submit a revised quotation.

Deloitte–Factual Background cont.

- The agency then evaluated the quotes, which resulted in the following:

Evaluation Factors	Vendor	
	Deloitte	CGI
Technical Approach and Capabilities	High Confidence	Some Confidence
Management Approach	High Confidence	Some Confidence
Total Proposed Price	$311,010,821	$225,358,337

- The CO conducted a tradeoff between the two quotations, recognizing that Deloitte's quotation was stronger under both evaluation factors and concluded that "Deloitte's superior approach is not so exceptional as compared to CGI's that paying the exceedingly higher price premium" of $85,652,484 or 28% was justified.
- The agency issued the call order to CGI, and Deloitte filed a protest at GAO.

Deloitte–GAO Decision

- GAO denied Deloitte's assertion that DHS's exchanges with CGI regarding its OCI constituted unfair discussions because DHS did not conduct comparable exchanges with Deloitte.
  - DHS argued that, where an agency holds exchanges with a vendor regarding the vendor's plan to mitigate identified conflicts of interest, such exchanges do not constitute discussions, and, consequently, the exchanges do not trigger a requirement to conduct discussions with all vendors. Instead, DHS asserted that exchanges are properly considered matters of a vendor's responsibility.
  - Deloitte argued that the exchanges resulted in CGI fundamentally changing its method of performance when it removed Company X from its team and transformed an unacceptable quotation into an acceptable one, which, by definition, constitutes discussions.
  - GAO found that, while the agency ultimately issued an OCI waiver, it did not do so at the time it identified the potential OCI related to Company X in July—instead, it conducted exchanges with the awardee that permitted the awardee to change its method of performance to ameliorate a conflict that otherwise would have rendered its quotation ineligible for award.
  - Accordingly, GAO found that DHS engaged in discussions—not merely exchanges—with CGI and that they were unequal because the agency did not also engage in discussions with Deloitte.
  - However, Deloitte had failed to allege with specificity what it would have done differently had DHS held discussions with it. Thus, GAO denied the unequal treatment argument based on a lack of prejudice.

Deloitte–GAO Decision Cont.

- GAO sustained Deloitte's protest allegation that DHS's evaluation of CGI's quotation unreasonably failed to consider the impact of CGI's removal of a teaming partner.
  - Deloitte argues that DHS's evaluation of CGI's technical quotation was unreasonable because it was based on a quotation that was no longer an accurate statement of how the awardee would perform the solicitation requirement.
  - GAO agreed: "The record does not support the agency's contention that CGI did not materially alter its quotation by severing [DELETED] from its team. In support of its protest, Deloitte correctly highlights the fact that 'CGI's proposal stated that including [DELETED] in the proposal provided strength to Team CGI.' The record reflects that, as one of the 'strengths' of CGI's team, CGI specifically identified [DELETED]'s experience [DELETED]. The areas of strength that CGI's quotation identified in [DELETED] unsurprisingly appear to align with the solicitation's contract performance and deliverable requirements."
  - The contemporaneous record had no evidence of the agency considering that Company X was no longer on CGI's team—so, the agency relied on two declarations produced during the protest to establish that the contemporaneous evaluation of CGI's technical quotation considered the elimination of Company X as a CGI team member.
  - "These agency declarations are the only documentation in the record that the agency considered the elimination of [DELETED] from CGI's quotation during the evaluation. The declarations do not fill in gaps in the record; they attempt to create a record. For that reason, we accord the two declarations little weight. CGI's quotation contained [DELETED] as a teaming partner because it brought to contract performance unique experience and expertise relevant to performance of the contract. The agency's failure to consider the elimination of [DELETED] in the evaluation of CGI's quotation was therefore unreasonable, and we sustain this allegation."

Deloitte–Key Takeaways

- Importance of consistency among all aspects of the proposal.
  - See this issue often when agency asks questions about specific aspect of proposal and contractor fails to update when changes have impact elsewhere in the proposal.
- Should CGI have requested the opportunity to revise its proposal?
  - Risk that the agency would have held discussions with all bidders.
  - Alternative is to assume the agency will revise its evaluation.
- Prejudice!
  - It's an essential element of every protest.
  - Demonstrating an error in the procurement is not enough.
    - **How** did that error affect the protester?
      - Be specific!
    - Would the protester have had a substantial chance of receiving the award but for the error?

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