

Best Prime/Sub Practices in Connection with Bid Protests

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WHAT IS A PROTEST?

- **“Protest” means a written objection by an interested party to any of the following:**
 - (1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services
 - (2) The cancellation of the solicitation or other request
 - (3) An award or proposed award of the contract
 - (4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract

FAR 33.101

TYPES OF PROTESTS

Kinds of Protests:

■ Pre-Award Protests

- Allegation: Agency is conducting a procurement in violation of procurement laws or regulations
- Examples: Illegal solicitation provisions, unduly restricting competition, improper sole-source determinations, improper insourcing

■ Post-Award

- Allegation: The Agency's award decision was improper
- Examples: Failure to conduct evaluation in accordance with the Solicitation; unreasonable evaluation of proposals; failure to conduct meaningful discussions; unequal treatment of offerors; application of unstated evaluation criterion

WHO CAN FILE?

- **Must be an “Interested Party”**
 - “an actual or prospective offeror”
 - “whose direct economic interest would be affected by the award of a contract or by the failure to award a contract”
- **Who is not an Interested Party?**
 - Subcontractors (more on this later)
 - In post-award protests, companies who did not submit a proposal
 - Unsuccessful offeror “not in line for award”
Example: recent *Universal Marine* case

Lining Up to Protest

Bid protest dismissed as company fails to allege it was “next in line” for award

By Alex D. Tomaszczuk and Alexander B. Ginsberg

The United States Court of Federal Claims, in a decision issued February 10, 2015, dismissed the bid protest complaint filed in Universal Marine Company, K.S.C. v. United States, No. 14-1115C because the protester was not “next in line” for award and, therefore, lacked standing to protest. As described below, this decision ultimately was an easy one for the Court. The case, however, serves as a critical reminder for potential protesters of the necessity of demonstrating, through a carefully crafted complaint, that they were “prejudiced” by the agency’s actions.

Background

Universal Marine involved a solicitation issued by the U.S. Army to operate a facility in Kuwait that repairs and refurbishes commercial shipping containers. The procurement was conducted under a lowest price, technically acceptable (LPTA) evaluation scheme, wherein the Army would make award to the offeror that submitted the lowest-priced proposal also deemed technically acceptable. Four firms, including *Universal Marine*, submitted proposals in response to the solicitation, and the Army deemed all of the proposals technically acceptable. The Army then proceeded to make award to the lowest-priced offeror per the terms of the solicitation. *Universal Marine*, which submitted the *highest* proposed price of the four offerors, was not selected for award.

Universal Marine then filed a bid protest with the Government Accountability Office (GAO) in which it challenged the awardee’s technical and price evaluations. GAO dismissed this protest, finding that *Universal Marine* was “not an interested party.” The company then filed the instant protest with the Court, raising the same allegations. The government immediately moved to dismiss, arguing that *Universal Marine* lacked standing because it was not “next in line” for award.

Lack of Standing

Granting the government's motion, the Court explained that, under its bid protest jurisprudence, a contractor must establish that it is an "interested party" to have standing to pursue a protest. The Court explained further that the standing inquiry is essentially a three-part test. First, the protester "must show that: (1) it was an actual or prospective bidder or offeror, and (2) it had a direct economic interest in the procurement or proposed procurement. ... A third test has added that a protestor must show the alleged errors in the procurement were prejudicial." Moreover, a protester demonstrates prejudice when "it can show that but for the error, it would have had a substantial chance of securing the contract."

Although Universal Marine was an actual offeror, it could not demonstrate that it was prejudiced by the errors it described because it was the highest-priced of the four offerors—or fourth in line for award under the solicitation's LPTA evaluation scheme. In order to have standing, the Court stated, Universal Marine "would have to challenge the bona fides of each of the other three offerors' eligibility or the solicitation as a whole ... even if the court were to set aside the award to [the awardee], the award would go to the second-place offeror. ... Without any challenge to the intervening offerors, Universal Marine cannot prevail."

Thus, Universal Marine failed even to *allege* that it should have been "next in line" for award—because it failed to raise allegations directed at the second- and third-priced offerors. As such, Universal Marine failed to meet the standard for what the Court termed "allegational prejudice," which made the case easy for the Court to dismiss for lack of standing.

The case should serve as a warning to all potential protesters to take great care in crafting their pleadings. Because of the solicitation's LPTA evaluation scheme, it was incumbent on Universal Marine to raise allegations regarding all of the higher-ranked offerors. The company evidently failed to realize the necessity of such allegations and thereby lost its opportunity to protest (not to mention the contract itself).

A Distinction with a Difference: The Two Types of Prejudice

It is important to note that the "allegational prejudice" relevant in *Universal Marine* is distinct from, but often confused with, a second variety of prejudice necessary for a protester ultimately to prevail on the merits of its protest. This second variety of prejudice—often referred to as "APA [Administrative Procedure Act] prejudice"—requires a protester to demonstrate that, but for any errors it identifies during the protest, it had a "substantial chance" of receiving the award. See *Linc Govt. Servs., LLC v. United States*, 96 Fed. Cl. 672, 695-96 (2010). ("In order to prevail in a bid protest, however, a plaintiff must satisfy a second type of prejudice requirement, one that has caused a good deal of confusion because it is often mistaken for its standing doctrinal fraternal twin. ... The need for this second showing of prejudice is captured in section 10(e) of the Administrative Procedure Act. ... In particular, the APA instructs that 'due account shall be taken of the rule of prejudicial error' when determining whether to set aside any unlawful agency decision.") Thus, the first variety of prejudice—that discussed in *Universal Marine*—relates to the protest *as alleged*, while the second variety of prejudice examines the effect of errors actually demonstrated on the merits. See *USfalcon, Inc. v. United States*, 92 Fed Cl. 436, 450 (2010). ("Since the prejudice determination for purposes of standing necessarily occurs before the merits of a protest are reached, the Court must accept the well-pled allegations of agency error to be true. ... Normally, if the protester's case rests on just one allegedly irrational action, or just one purported violation of a law or regulation, the finding of prejudice in the standing context will be replicated on the merits, once the asserted error is confirmed. But a different outcome is possible if more than one ground is raised, as multiple errors might cumulatively establish prejudice, but not a smaller combination of them.")

Thus, a protester ultimately must show both types of prejudice for its protest to succeed. The Court, however, will never reach consideration of “APA prejudice” if the protester fails to allege—as Universal Marine failed to allege—that it is an interested party.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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WHO CAN FILE?

- **Must be able to show “prejudice”**
 - Protester must show that, but for the agency’s actions, it would have a “substantial chance” of receiving award
 - See, again, *Universal Marine*

Awardee Protests: A New Horizon?

In departure from GAO precedents, Court of Federal Claims finds awardee under multiple-award contract has standing to protest award of an additional contract.

By John E. Jensen and Alexander B. Ginsberg

*The bid protest long has been the province of the disappointed bidder/offeree—the government contractor that competed for the award of a federal contract and lost. A new decision from the United States Court of Federal Claims opens the door to the possibility of a bid protest by an offeror that competed and **won**.*

In *National Air Cargo Group v. United States*, No.16-362C (April 28, 2016),¹ the Court held that an awardee under a multiple-award indefinite delivery, indefinite quantity (IDIQ) contract had standing to protest the award of an additional contract under the IDIQ. The *National Air Cargo* holding contradicts recent protest decisions from the Government Accountability Office (GAO), which have determined that IDIQ awardees *categorically* lack standing to protest other awards under the same IDIQ vehicle.

National Air Cargo involved a solicitation for IDIQ contracts to provide shipping services to the U.S. Transportation Command (TRANSCOM). The solicitation provided that TRANSCOM would award “approximately” four such contracts. Under IDIQ contracts, generally, the actual work is performed upon the government’s issuance of task or delivery orders to the contract holder(s). Under multiple-award IDIQ contracts, like the one here, contract holders compete for such task or delivery orders and otherwise are entitled to only a nominal minimum purchase by the government (e.g., \$2,500). The solicitation stated that TRANSCOM would award task orders up to a total maximum value of nearly \$300 million.

After proposal submission, TRANSCOM initially announced the award of five IDIQ contracts, to the protester (National) and four other offerors. A month later, however, TRANSCOM announced an additional award. National filed a bid protest with GAO, arguing that the five initial awardees constituted the “original pool” and that, under the terms of the solicitation, the pool of awardees could be expanded only through a new competition, upon TRANSCOM’s demonstration of a “shortfall” in meeting its requirements with the existing pool.



¹ The Court’s decision is available at https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0362-32-0

GAO ultimately² dismissed the protest for lack of standing, finding that National was not an “interested party” because its “direct economic interest” would not be adversely affected by the additional award.³ Relying on longstanding GAO case law, GAO stated that National had not “credibly alleged that its contract would be reduced, increased, or otherwise affected by the agency’s decision to award a sixth contract. . . . Under circumstances such as these, and where the solicitation contemplates multiple awards, an existing contract awardee is not an interested party to challenge the agency’s decision to award another contract.”⁴ Essentially, GAO determined that the economic harm presented by having to compete with an additional firm for future task orders categorically represents too remote a harm to establish protest standing. This decision was consistent with the “blanket rule” against protests by IDIQ awardees established in other recent GAO cases⁵ and also, arguably, in previous decisions of the Court of Federal Claims.⁶ National then raised the same allegations in a complaint before the Court.

The Court expressly rejected the categorical rule that multiple-award IDIQ awardees lack standing to protest, concluding that “National’s status as a contract awardee does not by itself deprive this court of bid protest jurisdiction.” The Court reasoned instead that National could establish standing if it could establish a “non-trivial competitive injury which can be redressed by judicial relief.”⁷ Ultimately, the Court determined that National had demonstrated such an injury because it credibly alleged that competition for future task orders “will be significantly increased” by the introduction of an additional awardee.⁸ In granting National standing to protest, the Court declined to follow GAO case law and analyzed in detail, but distinguished, previous decisions of the Court of Federal Claims.

National Air Cargo is a significant decision that may give rise to a new category of protest—at least at the Court of Federal Claims. GAO is not bound by the Court’s decisions, nor are Court of Federal Claims judges bound by the decisions of their fellow judges. Yet *National Air Cargo* may prove influential on both GAO and other judges at the Court. For the time being, IDIQ awardees have a new possibility of protest when they feel that the government has violated applicable requirements in making award to their prospective competitors for future task orders.

² The full procedural history of the protest is not directly relevant here; however, before GAO reached the decision in question, it dismissed an earlier protest by National on other grounds, after which National filed a protest at the Court of Federal Claims. TRANSCOM opted to take corrective action in that protest, and it then reaffirmed the sixth award. The relevant protest ensued.

³ GAO’s decision is available at <http://gao.gov/assets/680/675863.pdf>.

⁴ GAO cited its decision in *Recon Optical Inc.; Lockheed-Martin Corp., Fairchild Sys., B-272239, et al.*, July 17, 1996, 96-2 CPD ¶ 21 at 3-4.

⁵ See *Aegis Defense Services LLC*, B-412755, March 25, 2016, 2016 CPD ¶ 98 at 2. (“[A] protester’s status as an awardee precludes its interested party status irrespective of any alleged economic interest.”)

⁶ See, e.g., *Trailboss Enters. Inc. v. United States*, 111 Fed. Cl. 338, 340 (2013). (“Where the plaintiff is the awardee of the contract, however, it no longer has standing . . . as an interested party for the purpose of challenging the terms of the award.”) *Automation Technologies Inc. v. United States*, 73 Fed. Cl. 617 (2006). (Awardee under a multiple-award contract failed to establish it had a direct economic interest in challenging an additional award under the contract, and therefore lacked standing to protest.)

⁷ The Court held that this test, established by *Weeks Marine Inc. v. United States*, 575 F.3d 1352, 1361-62 (Fed. Cir. 2009) in the context of a *pre-award* bid protest, was appropriate in this case to determine the existence of a direct economic interest.

⁸ Despite granting National standing, the Court declined to issue a preliminary injunction in the case because it found that National was not likely to succeed on the merits of its allegations.

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WHERE TO FILE

- **Three Options**

- Government Accountability Office (GAO)
- Court of Federal Claims
- Agency itself

- **Different Costs and Benefits**

- Automatic Stay, Two Bites at the Apple, Expense, Remedies, Timing, Timeline for Decision, Optics

DEBRIEFINGS

DEBRIEFINGS

- Unsuccessful offeror must request debriefing within three days of receiving notice of award. (41 U.S.C. § 253b(e))
 - **Key to preserving Automatic Stay and timely protest**
- Agency generally offers debriefing within five days of request
- Debriefing can be a meeting, a teleconference, or simply written information

DEBRIEFINGS

■ **Required Disclosures under FAR 15.506**

- Significant weaknesses and deficiencies in the debriefed offeror's proposal
- the overall evaluated cost and technical rating of the awardee and the debriefed offeror
- the overall ranking of all offers
- a summary of the rationale for the award
- **reasonable responses to relevant questions posed by the debriefed offeror**

GAO PROTESTS

GAO PROTESTS

■ Filing Deadlines

- **Pre-Award Protests:** Prior to time set for receipt of initial proposals or prior to bid opening. Untimely when trying to challenge RFP provisions after the fact
- **Post-Award Protests:**
 - **Default Rule:** within 10 days after you “should have known” the basis of protest (*applies to supplemental protest grounds brought later)
 - **If debriefing requested:**
 - *not later than 5 days after the debriefing to trigger the automatic stay*
 - otherwise, 10 days after debriefing to be timely

GAO PROTESTS

- **Automatic Stay:** If the Agency receives notice of a timely protest, the Agency (FAR 33.104):
 - May not award a contract;
 - May not authorize performance of the contract while the protest is pending; or
 - If applicable, must direct the awardee to cease performance under the contract and suspend related activities
 - **The Automatic Stay remains in effect for the duration of the protest**
- **Agency may seek override under “urgent and compelling circumstances”. Unusual – may be protested at Court of Federal Claims**

GAO PROTESTS

■ Deadlines after filing:

- **1 Day:** GAO notifies agency/ agency implements Automatic Stay (if triggered)
- GAO issues Protective Order (if requested)
- Awardee often intervenes (as an awardee, this can be critical to defend what you have won and to protect your confidential information)
- **30 Days:** Agency Report due (includes agency's production of all relevant documents)
- **10 Days after Agency Report:** Protester's Comments and Supplemental Protests due (where protests often are won)
- Further briefing; optional hearing; optional ADR
- **100 Days:** GAO decision (followed strictly)

GAO PROTESTS

■ Protective Orders

- Post-Award Protests involve a review of confidential and proprietary information and trade secrets, including the competing proposals and the Agency's source selection materials created in evaluating such sensitive information
- POs create “attorneys eyes only” solution
- Critical role of outside counsel in protest process, even for experienced protesters
- Limits communication between attorney and client
- Strict penalties for violations

STANDARD OF REVIEW

- Generally, GAO will make sure agencies follow the procedures set forth in the solicitation and adequately document the source selection
- On substantive issues, GAO will defer to the agency as long as its evaluation was “reasonable.” GAO will not substitute its judgment for that of the Agency
- Several common protest issues: unequal treatment, relaxation of material requirement, failure to conduct meaningful discussions, flawed or undocumented best value trade-off, unreasonable technical evaluation

GAO PROTEST STATISTICS

- In FY2014, 2,561 cases filed.
 - Up 5 percent from FY2013
 - 292 cases dismissed for lack of task order jurisdiction.
 - Separate legal issue important in both GAO and Court of Federal Claims protests. See client alert on following slide. Dynamic legal issue: Federal Circuit has already overruled holding discussed in alert.
- 556 reached the merits
 - 72 sustains – 13 percent sustain rate
- 43 percent “effectiveness rate” based on some form of relief
 - Fairly steady for last several years

Task Order Protests: The Trek Toward Clarity on the Court of Federal Claims' Jurisdiction

By C. Joël Van Over and Alexander Ginsberg

The United States Court of Federal Claims' July 18, 2014 decision in [Orbis Sibro, Inc. v. United States](#), represents one of the few straightforward decisions by the court in recent months relating to the court's subject matter jurisdiction over protests of task or delivery order procurements. The court easily dismissed plaintiff's complaint in that case for lack of jurisdiction, citing the general statutory prohibition on task and delivery order protests described generally below. In several recent decisions preceding [Orbis](#), however, the court has accepted jurisdiction over protests related to task or delivery order procurements, despite the statutory prohibition. For example, earlier this year, in [SRA International, Inc. v. United States](#), 114 Fed. Cl. 247 (2014), the court granted jurisdiction over a bid protest challenging a federal agency's decision to waive an alleged organizational conflict of interest ("OCI") in the context of a task order procurement. [SRA](#) and other decisions lay the groundwork for further challenges to adverse award decisions involving task and delivery orders. [Orbis](#), by contrast, signals that the court remains mindful of its jurisdictional limitations. On balance, the law interpreting jurisdiction over task and delivery order protests remains somewhat unsettled.

Background

Beginning in 1994, with the passage of the Federal Acquisition Streamlining Act ("FASA"), Congress placed statutory limitations on task and delivery order protests before the Government Accountability Office ("GAO") and before the Court of Federal Claims – the limitations on the court's jurisdiction being significantly broader. The Court of Federal Claims lacks jurisdiction over all protests "in connection with the issuance or proposed issuance" of task and delivery orders under Federal Acquisition Regulation Part 16,

unless such orders increase the scope, period, or maximum value of the underlying prime contract. 41 U.S.C. § 4106(f); 10 U.S.C. § 2304c(e). GAO has exclusive jurisdiction over task and delivery order protests under FASA, but its jurisdiction is limited to protests in connection with task and delivery orders valued in excess of \$10 million (including option periods). Thus, by statute, a protester would appear to have no recourse to protest a task or delivery order procurement at the Court of Federal Claims (unless the order increases the scope, period, or maximum value of the underlying contract).

Despite this general limitation on the Court of Federal Claims' protest jurisdiction, in several recent instances the court nonetheless has accepted jurisdiction over protests related to task or delivery order procurements. In these cases, the court has traversed the statutory bar through interpretations of the phrase "in connection with" – holding that the protested actions were not "in connection with" the issuance or proposed issuance of the orders themselves. The SRA decision follows this trend.

The SRA Decision

SRA involved a procurement for a task order under the General Services Administration's Alliant Government-Wide Acquisition Contract to provide network infrastructure support to the Federal Deposit Insurance Corporation ("FDIC"). SRA was the incumbent. After the government announced the award of the task order, SRA learned that one of the awardee's proposed subcontractors had recently performed an FDIC contract to conduct audits of SRA's network security, which SRA argued provided the proposed subcontractor "access to SRA's proprietary information" and knowledge of "how the FDIC evaluated SRA's work."

Because the task order was valued at greater than \$10 million, SRA filed a bid protest at GAO, alleging that the subcontractor suffered from an OCI based on both impaired objectivity and unequal access to information. Ultimately, several months after SRA filed its protest, the government announced that it had decided to waive the alleged OCI. GAO then dismissed SRA's protest as academic. SRA subsequently filed a complaint in the Court of Federal Claims seeking, among other relief, an injunction and a declaration that the OCI waiver violated ethical standards set forth in the Administrative Procedure Act and FAR 9.503. Citing the FASA bar to task order procurements, the government moved to dismiss.

The court denied the motion and found that, while the government's alleged unlawful conduct was *related* to the issuance of a task order, the conduct was not "in connection with" the issuance of a task order and, thus, FASA's jurisdictional bar did not apply. Although the United States Court of Appeals for the Federal Circuit previously described the identical phrase "in connection with" in the Court of Federal Claims' jurisdictional statute (the Tucker Act) as "very sweeping in scope,"¹ SRA dismissed this characterization as mere "dicta" as it relates to the same phrase in FASA.

The Court of Federal Claims agreed with SRA that the conduct in question – the OCI waiver – was segregable from the issuance of the task order and represented an "independent, discretionary agency action." The court emphasized the timing of the agency's actions, stating that "the best evidence that the Waiver was not made 'in connection with' the award of the Task Order . . . is th[e] fact that the Waiver was issued well after the award." The court also reasoned that, because the agency's waiver was discretionary, it was not a "necessary step towards issuance of the task order." As such, the court accepted jurisdiction. The court explained that "a careful analysis of the connectedness of each challenged procurement decision to the issuance or proposed issuance of a task order is required [in determining jurisdiction]."

¹ *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999).

Circumstances That Have Avoided The Statutory Bar To Jurisdiction

The SRA decision follows several others from the Court of Federal Claims that permitted task or delivery order protests despite the statutory bar. For example, the court has found that FASA does not preclude jurisdiction over a protest of: (1) an agency's **brand name justification** because the agency "began the process of determining its need for [new services] long before it issued the delivery order" – *McAfee, Inc. v. United States*, 111 Fed. Cl. 696, 707 (2013); (2) an agency's decision to **cancel a solicitation**, which the court viewed as "a discrete procurement decision and one which could have been the subject of a separate protest" – *BayFirst Solutions, Inc. v. United States*, 104 Fed. Cl. 493, 507 (2012) (noting that the case was a "close question" and that "the law is not entirely clear on the application of the task order protest ban"); (3) an agency's failure to conduct a "**rule of two**" analysis before conducting a small business set-aside on a task order procurement – *MORI Assocs. Inc. v. United States*, 102 Fed. Cl. 503, 529 (2011); (4) a **modification** to an existing task order – *Global Computer Enters. v. United States*, 88 Fed. Cl. 350 (2009). (5) The court also has found jurisdiction where plaintiff alleged a **breach of contract** related to a task order procurement. See *Digital Technologies, Inc. v. United States*, 89 Fed. Cl. 711 (2009). In *Digital*, the plaintiff sought damages, alleging that the government breached plaintiff's master indefinite delivery, indefinite quantity ("ID/IQ") contract by engaging in conduct that denied plaintiff a fair opportunity to compete for task orders under the ID/IQ contract. The Government had argued, unsuccessfully, that plaintiff's complaint was a bid protest "thinly disguised" as a contract dispute. *Digital*, 89 Fed. Cl. at 717.

The Orbis Decision And Other Barred Protests

Orbis, by contrast, involved the court's straightforward application of the FASA jurisdictional bar. *Orbis* involved a bid protest challenging the award of a task order by the U.S. Department of the Navy (the "Navy") under the Navy's Seaport-e Program. The plaintiff in that case alleged that the Navy prejudicially misevaluated its proposal, as well as that of the awardee. Unlike in the foregoing cases, the court in *Orbis* did not identify any relevant exceptions to the FASA bar. Rather, the court stated that it held a hearing in which "the court reviewed the complaint with protestor's counsel count by count and confirmed with counsel that each count alleged by *Orbis* was a challenge to the evaluation of the protestor's submission in response to the Solicitation, or a related claim for declaratory and injunctive relief" and, thus, that "the claims filed by *Orbis* are not breach of contract claims of the umbrella contract, but are 'straight bid protest.'"

More analytically complex decisions from the Court of Federal Claims also have evidenced a strict view of the statutory bar to task and delivery order jurisdiction at the court. Most notably, *DataMill, Inc. v. United States*, 91 Fed. Cl. 740, 759 (2010), held an agency's decision to proceed with a sole-source procurement was "in connection with" the agency's proposed issuance of a delivery order designed to effect that decision. In so holding, the court cited the same "sweeping" scope of the phrase "in connection with" that SRA minimized as dicta. Other decisions have followed *DataMill* and concluded a protester could not challenge an agency's choice of task order vehicle – *MORI Assocs., Inc. v. United States*, 113 Fed. Cl. 33, 37-38 (2013) – or an agency's corrective action on a task order procurement. *Mission Essential Pers., LLC v. United States*, 104 Fed. Cl. 170 (2012).

Conclusion

The Court of Federal Claims' decisions, though far from uniform, demonstrate the court's overall willingness to consider protests related to task and delivery order procurements, where distinctive facts or circumstances are alleged, despite the FASA bar. Certain decisions, including SRA, focus on the *timing* of the challenged conduct in the context of the overall procurement process and the direct causal connection between the challenged conduct and issuance or proposed issuance of a task or delivery order. Other

decisions, however, apply a broad a definition of “in connection with” that largely obviates such an inquiry. Still other decisions seem to focus on the substance of the challenged conduct. The *BayFirst* decision, itself, cited a lack of clarity in the court’s application of the FASA bar. Because judges at the Court of Federal Claims are not bound by the decisions of their fellow judges, whether the court will accept jurisdiction in a given task or delivery order protest ultimately may depend in part on which judge is assigned to the case – at least until the Federal Circuit or Congress provides further guidance in this area.

It is important for contractors who compete for task and delivery orders to know that their protest remedies may not be foreclosed. Because the Court of Federal Claims decisions in this area are evolving and are heavily fact-specific, the presentation of those facts – and their juxtaposition with existing case law – will be critical in influencing the court’s perspective on jurisdiction.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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OTHER PROTESTS

COFC PROTESTS

■ Key Differences

- Formal proceeding, greater available remedies, not merely a “recommendation”
- No “Automatic” Stay
 - Must persuade Court to issue a Preliminary Injunction
- Opportunity for discovery
- No strict filing deadlines after award
 - Pre-award protests must be filed before proposals are due or bids opened
- No time-limit to issue a decision
- No recovery of costs and fees except if small business under EAJA. Recovery of bid and proposal costs possible

AGENCY PROTESTS

- A useful tool under certain circumstances
 - Unique agency procedures, but similar to GAO in terms of format and deadlines
 - Less public
 - Generally informal
 - Less objective/independent review
 - Keeping matters within the agency
 - FAR instructs agency to attempt to resolve agency-level protest within 35 days
 - Can still file at GAO but does not extend timeline for Automatic Stay

SITUATIONS TO CONSIDER PROTESTING

PROBLEMS WITH SOLICITATIONS

- **Restrictive Provisions that are not necessary to meet the agency's minimum needs**
 - **License or certification requirements**
 - **Limiting technical requirements**
 - **Geographic restrictions**
- **Vague and ambiguous provisions and SOW**
- **Unreasonably short deadlines to prepare proposal or revisions**
- **Clauses deviate from FAR requirements**

INCUMBENCY

ORGANIZATIONAL CONFLICTS OF INTEREST (OCIs)

- **Competitor has an OCI (See FAR 9.5)**
 - **Impaired Objectivity**
 - Contract work involves evaluation of itself or related entity
 - **Biased Ground Rules**
 - Sets ground rules for competitive award of another contract by writing SOW or specifications
 - **Unequal Access to Information**
 - Access to non-public information provides unfair competitive advantage
- **Also PCIs (agency officials involved in procurement have personal interest)**

COMPETITOR'S INABILITY TO MEET MANDATORY RFP REQUIREMENTS

- **Protester's knowledge of competition reveals competitor's inability to satisfy mandatory requirements**
 - Mandatory performance capabilities **required at time of proposal submission** (as opposed to following award)
 - **Definitive responsibility criteria** -- required licenses, certifications, or security clearances
 - **“Bait and Switch”** of proposed personnel

IMPROPER SMALL BUSINESS AWARDS

- **RFP Should Be Set-Aside:** The agency ignored the “Rule of Two.” FAR 19.502-2 (CO sets aside acquisition over \$100,000 when reasonable expectation that (1) offers will be obtained from two responsible small business concerns and (2) award will be made at fair market prices)
- **RFP Should Not Be Set-Aside:**
There are not two SBs that can perform the requirement
- **RFP Applies Wrong NAICS Code**
- **The Awardee:**
 - **Is not Small** (doesn’t satisfy NAICS Code size limit)
 - **Not owned by an SDV or Disadvantaged Person; not a HUBZone; unduly reliant on “ostensible” subcontractor**

IMPROPER SOLE SOURCE AWARDS

- More than **“one responsible source”** that can meet the agency’s requirements
- Circumstances were not **“unusual and compelling”**
- No compromise of **“national security”**
- Not in the **“public interest”**

FAR 6.3

NON-MEANINGFUL DISCUSSIONS

- **Where the agency holds discussions in a negotiated procurement:**
 - The discussions must be “meaningful”
 - Not “meaningful” where agency fails to notify offeror of a **significant weakness or deficiency**
 - Offeror could have improved its proposal (prejudice)

UNREASONABLE EVALUATION

- Agency relaxed a material Solicitation requirement
- Unequal evaluation of proposals
- Agency did not follow Section M criteria
- Agency applied an unstated evaluation criterion
- Agency ignored Past Performance information that was “too close at hand”
- Agency’s conclusions or best-value decision unreasonable or unsupported
- Price “realism” and “reasonableness”

OTHER CONSIDERATIONS

- Decision to protest, not to mention before which forum, can be a complex business decision
 - **Business/Client Relations Factors**
 - **Legal Factors**
- A “win” often means “corrective action,” not necessarily award (see following alert discussing corrective action in the context of a protest before GAO and COFC)
- Important to discuss all such factors with your attorney and to set reasonable expectations

NEW ROLE FOR SUBCONTRACTOR?

- Just as a subcontractor is not an “interested party” with standing to protest, a subcontractor also has no “privity of contract” with the government for the purposes of pursuing claims.
- Many subcontracts have clauses that relate to litigating claims against the government and the concept of “claim sponsorship.”
- **Teaming Agreements** could include provisions for protest sponsorship, as well.

“CLAIM SPONSORSHIP” PROVISIONS

- **Example:**

- A) The Parties acknowledge that the Prime Contract includes a Disputes clause, FAR 52.233-1 (the “Disputes Clause”), pursuant to which Prime Contractor may pursue certain procedures in the event of a dispute between the U.S. Government and Prime Contractor and that the Sub has no privity of contract to pursue contract disputes directly against the U.S. Government. Accordingly, any claim, controversy, dispute or disagreement arising out of or related to this Subcontract shall be settled in accordance with the following procedures.

“CLAIM SPONSORSHIP” PROVISIONS

- **Example (cont'd):**

- B) If Subcontractor believes it has a “Claim” (as defined in FAR 52.233-1 of the Prime Contract) or other Request for Equitable Adjustment that arises under or relates to actions or inactions by the Government and which, if it were Prime’s claim, could properly be submitted for a decision of the Government Contracting Officer under the “Disputes” clause of the Prime Contract, the Sub must submit such Claim to the Prime. The Sub shall be responsible for providing any and all certifications required by law or regulation relating to matters subject to the Disputes Clause and any and all information requested by the Prime or the Government to enable the Sub or the Government to verify, support, or confirm the Sub’s Claim and certification.

“CLAIM SPONSORSHIP” PROVISIONS

- **Example (cont'd):**

- C) The Prime agrees to submit such Claim to the Government Contracting Officer on behalf of the Sub for decision in the manner required by the Contract Disputes Act, provided that the Sub has provided sufficient supporting data and information to allow the Prime to certify to the Government its belief that there are good grounds for the claim and that it is made in good faith. The Prime agrees to diligently pursue a favorable resolution of all such claims, or disputes on behalf of the Sub with the Government Contracting Officer in accordance with the procedures of the Disputes clause of the Prime Contract, and the Prime and the Sub further agree to cooperate fully with one another in pursuit of a favorable resolution of the dispute.

“CLAIM SPONSORSHIP” PROVISIONS

- **Example (cont'd):**

- D) In the event that Prime has the right, pursuant to the “Disputes” clause of the Prime Contract, to appeal any Contracting Officer’s final decision which adversely affects Sub, but elects not to appeal such decision(s) on its own behalf, Sub may request that the Prime “sponsor” the Sub’s appeal of such decision(s) in the name of the Sub by giving written notice to the Prime at least forty-five (45) calendar days before the expiration of the period of appeal under the “Disputes” clause of the Prime Contract. Upon receipt of such request, Prime agrees to sponsor the Sub’s appeal by permitting the Sub to file the appeal in the appropriate forum in the Prime’s name. Each Party further agrees to provide the other Party with reasonable assistance in the prosecution of such appeal.

“CLAIM SPONSORSHIP” PROVISIONS

- **Example (cont'd):**

- E) Sub shall bear all reasonable costs and expenses incurred by Sub and Prime in prosecuting any Request for Equitable Adjustment, Claim or appeal sponsored by Prime on behalf of Sub , including but not limited to, any legal fees or costs incurred, provided, however, that Sub shall have the right to select counsel for such purpose and to determine the litigation strategy for all sponsored REAs, Claims or appeals.

PROTEST SPONSORSHIP PROVISIONS?

- Such a provision could:
 - Address the sub's agreement to cooperate in protest prosecution, for example by being prepared to address any protest grounds that relate to the sub.
 - State that the sub will share in or pay in full the cost of the protest.
 - Address the distribution of protest costs in the event of a successful protest.
- Particularly relevant for protests involving small business set-asides, where it is our experience that large business teammates often agree, *ad hoc*, to pay protest costs and often select the attorneys.

SAMPLE “PROTEST SPONSORSHIP” CLAUSE

- A) If Prime decides to challenge an adverse award decision by the Government in response to the Proposal, it may elect to file a “Protest” (as defined in FAR 33.101). If the Prime elects to file a Protest, Sub agrees to cooperate in good faith with this effort, including, but not limited to, by reviewing and commenting on protest-related documents provided by Prime and conferring with legal counsel for Prime, upon request.

SAMPLE “PROTEST SPONSORSHIP” CLAUSE

- B) In the event that Prime has the right, but elects not to file a Protest, Prime must provide Sub immediate written notice of such decision. Upon receipt of such notice, Sub may request that the Prime “sponsor” a Protest by Sub, and Prime agrees to sponsor such Protest by permitting the Sub to file the appeal in the appropriate forum in the Prime’s name. Each Party further agrees to provide the other Party with reasonable assistance in the prosecution of such appeal.

SAMPLE “PROTEST SPONSORSHIP” CLAUSE

- C) Sub shall bear all reasonable costs and expenses incurred by Sub and Prime in prosecuting any Protest sponsored by Prime on behalf of Sub , including but not limited to, any legal fees or costs incurred, provided, however, that Sub shall have the right to select counsel for such purpose and to determine the litigation strategy for all sponsored Protests.
- D) The Parties agree that any legal fees recovered following a successful Protest will be distributed in proportion to the fees by each for such Protest.

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