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DOJ Issues New Guidance on Determining Whether Information Is "Confidential" Under FOIA Exemption 4

By Tracye Winfrey Howard

In response to the Supreme Court of the United States' decision in *Food Marketing Institute v. Argus Leader Media,* No. 18-481 (June 24, 2019), the U.S. Department of Justice's Office of Information Policy (OIP) recently revised its **guidance** to government agencies responding to requests for information under the Freedom of Information Act (FOIA). The new guidance dramatically changes the analysis under which agencies determine whether information provided to the Government by individuals and companies (frequently government contractors) is considered "confidential" under FOIA Exemption 4, which shields from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or

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Bumpy Road to Recovery: Two Recent CBCA Decisions Analyze Recovery of Service Contract Act Related Cost Issues

By Eric W. Leonard, Craig Smith, Adam Briscoe

The Civilian Board of Contract Appeals recently issued two decisions, *Sotera Defense Solutions* and *Stobil Enterprise*, that may provide federal service contractors with better comfort in administering contracts subject to the McNamara-O'Hara Service Contract Act (SCA). Both rejected certain agency objections to contractors' efforts to recover SCA-related cost increases, albeit in different contexts. Both decisions reveal guidance that contractors facing similar SCA cost recovery situations may find helpful.

The SCA applies broadly to many federal service contracts. The thresholds for coverage are low and interpreted liberally by the enforcement authority, the Department of Labor (DOL). But FAR 22.1003-7 puts the

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onus on the contracting agency to determine affirmatively if a service contract is covered by the SCA. As a result, it is not uncommon for service contractors to find themselves in the uncomfortable position of receiving award of a service contract that appears to be SCA-covered, yet does not incorporate any SCA clause or SCA wage determination directly or by reference. Under such circumstances, must the contractor still comply with the SCA even though the SCA is not included in the contract?

The initial instinct may be to think of the *Christian* doctrine here, which provides that "a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy" is read into a contract by operation of law if it has been omitted by the agency. *S.J. Amoroso Const. Co., Inc. v. United States*, 12 F.3d 1072, 1075 (Fed. Cir.1993). Under this doctrine, courts and boards have read into contracts particular SCA clauses and wage determinations omitted from contracts, such as the FAR 52.222-43 SCA price-adjustment clause. *E.g., Call Henry, Inc. v. United States*, 855 F.3d 1348, 1351 n.1 (Fed. Cir. 2017).

But in *Sotera Defense Solutions*, the CBCA drew a line. *See* CBCA 6029, 6030 (Aug. 29, 2019). The appeal concerned in part a task order that had not incorporated any SCA obligations at all. (The underlying contract likewise did not incorporate SCA obligations.) After award, DOL determined the SCA applied to the task order and directed retroactive application of the SCA back to task-order award. When the contractor appealed the denial of its claim for the resulting cost increases, the contracting agency argued that the SCA should have been read into the task order from the beginning, under the *Christian* doctrine, such that the contractor already had the obligation to pay SCA-specified wages and fringe benefits and could not recover for the increased costs of complying with the SCA mid-stream.

Not so, said the Board, finding that application of the SCA "cannot just be read into the contract under the *Christian* doctrine." Although particular SCA provisions have been read into contracts under *Christian*, in those cases the contracting agency had already determined that the SCA applied to the contract. Thus, "[t]he SCA requires a determination that it applies to a contract" in the first place before the *Christian* doctrine can apply to read in any specific SCA obligations that may have been omitted from the contract.

Overall, *Sotera Defense* may help contractors in recovering increased costs under contracts determined only after award to be SCA covered. Still, in our experience, contractors should consider addressing SCA coverage proactively in some circumstances. When a solicitation or contract calls for services not clearly outside the SCA's coverage, yet no SCA clauses or wage determinations appear in the documents, it may be worth raising the issue with the contracting agency. Early SCA incorporation could save the future costs and administrative effort of applying the SCA mid-performance at DOL's direction, and potentially retroactively. In addition, DOL data has often classified retroactive SCA payments to employees as resolving "violations," even when the payments cover periods when the SCA was not incorporated in the contract at all. So even if the increased compensation costs might be recoverable under *Sotera*

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Defense, the better course may be to address the obligations up front.

The second recent CBCA decision addressed a more routine aspect of adjusting SCA-covered contract pricing. Contracting agencies must incorporate updated SCA wage determinations at specified intervals. Under clauses such as FAR 52.222-43, contracting agencies must adjust prices in certain types of contracts (typically fixed-price, T&M, and labor-hour contracts) when the updated wage determinations result in increased costs for the contractor. FAR 52.222-43 requires contractors to submit price adjustment requests within thirty days of receiving these updates. But calculating adjustments can be complex. What happens when the request goes to the contracting agency after thirty days have passed?

In *Stobil Enterprise,* the Board held that a price adjustment is not foreclosed solely by submission of the request after thirty days. *See* CBCA 5698 (Sept. 10, 2019). The Board reaffirmed the view of one of its predecessor boards that "a late notice does not defeat a contractor's claim unless a contract clearly states an untimely submission will cause a contractor to lose rights, or unless an agency can demonstrate it was prejudiced by a late notice." The Board found neither circumstance present, so the contractor had not lost its right to seek a price adjustment more than thirty days after receiving the updated wage determinations.

This holding should offer contractors some comfort if, for some reason, they submit a price-adjustment request under FAR 52.222-43 or a similar clause more than thirty days after receiving updated wage determinations for an SCA-covered contract. *Stobil Enterprise* is no free pass, however—a contract clause might expressly foreclose late submission, or an agency may be able to show prejudice from a delay past thirty days. Submission within thirty days thus remains the best policy.

In addition, we recommend using any time taken to gather and prepare detailed support for adjustment requests, such as payroll and accounting data. Doing so will help avoid the ultimate outcome in *Stobil Enterprise*: the CBCA denied the claim because the contractor failed to provide records showing its costs had actually increased. Even if *Sotera Defense* and *Stobil Enterprise* help with procedural-type aspects of recovering SCA-related cost increases, contractors will still need to show entitlement to the recovery at the end of the day.

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confidential." The new policy will make it easier for contractors to protect their information from public disclosure.

In *Argus Leader,* the Supreme Court overturned the long-standing test that required entities that had submitted information to the Government to demonstrate a likelihood that they would suffer substantial competitive harm from disclosure of their information for that information to be considered "confidential" and, thus, protected from release under FOIA Exemption 4. The Court held that "confidential" should instead be given its ordinary meaning of "private" or "secret" such that a party need show only that the information at issue is customarily kept private, or at least closely held, by the individual or company providing it to the Government for Exemption 4 to apply. Government assurances of keeping the information secret would also make the information "confidential" under Exemption 4.

OIP's new step-by-step guidance closely tracks the Supreme Court's analysis. Agencies are instructed to ask three questions to determine whether information is "confidential" under Exemption 4:

1. Does the submitter customarily keep the information private or closely held?
2. Did the Government provide an express or implied assurance of confidentiality when the information was shared with the Government?
3. Were there express or implied indications at the time the information was submitted that the Government would publicly disclose the information?

If the answer to the first two questions is yes, the information is confidential under Exemption 4. Even if the Government did not provide specific assurances of confidentiality, however, the information will still be considered confidential under Exemption 4 as long as the answer to the third question is no. In other words, government silence as to whether information will be kept private is interpreted in the submitter's favor, and the submitter loses the expectation of confidentiality only when the Government has indicated the information will be disclosed.

Contractors whose information is the subject of a FOIA request should ensure that agencies are applying the correct standard when determining whether to release the data. Agencies that are still asking contractors to demonstrate the likelihood of substantial competitive harm to prevent disclosure of their information should be directed to the new OIP guidance.

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DCAA Offers Some Relief from Recent "Expressly Unallowable" Cost Decisions, But Risks Remain

By George E. Petel

The Defense Contract Audit Agency (DCAA) updated its "expressly unallowable costs" guidance for the first time since 2015, following decisions by the Armed Services Board of Contract Appeals (ASBCA) on "expressly unallowable costs," including disputes over costs associated with lobbying and political activities. *See* DCAA MRD 19-PAC-002(R) (May 14, 2019). This updated guidance attempts to reconcile an apparent divergence between the ASBCA caselaw and prior DCAA guidance. While the updated guidance may lead to greater predictability in how DCAA will approach the issue of whether costs not identified in the FAR or DFARS as "expressly unallowable" should, in fact, be deemed "expressly unallowable," it may also increase the risk that contractors could be subject to penalties for incorrectly seeking reimbursement of a broader array of unallowable costs where there are "unique facts and circumstances." The updated guidance also adopts a seeming arbitrary line drawn by the ASBCA (and recently upheld by the United States Court of Appeals for the Federal Circuit) in its treatment of salary and bonus compensation for employees engaged in lobbying and political activity.

FAR Cost Principles

The cost principles outlined in FAR Part 31 describe the types of costs that are "expressly unallowable" as charges to the Government under cost-type contracts. FAR 31.206, Accounting for Unallowable Costs, prescribes the appropriate treatment of these costs. Contractors must identify and exclude unallowable costs from all invoices, bills, or proposals submitted under a U.S. Government contract (such as annual incurred cost submissions under FAR 52.242-3). FAR 31.206(a) further provides that "[a] directly associated cost is any cost that is generated solely as a result of incurring another cost, and that would not have been incurred had the other cost not been incurred. When an unallowable cost is incurred, its directly associated costs are also unallowable." The Government bears the burden of proving that a submitted cost is unallowable, and the ASBCA requires the Government to "show that it was unreasonable under all the circumstances for a person in the contractor's position to conclude that the costs were allowable."

The FAR, as well as the Cost Accounting Standard 405, define an "expressly unallowable cost" as "a particular item or type of cost which, under the express provisions of an applicable law, regulation, or contract, is specifically named and stated to be unallowable." The inclusion of expressly unallowable costs in submissions to the Government can result in penalties up to two times the amount of a disallowed cost, and therefore contractors and the Government often dispute whether submitted costs later found to be unallowable are "expressly unallowable" and therefore subject to the penalty provisions.

ASBCA Expressly Unallowable Lobbying Cost Decisions

One FAR cost principle, FAR 31.205-22, Lobbying and Political Activity Costs, was at issue in recent ASBCA cases on expressly unallowable costs, which helped precipitate DCAA's updated guidance. The prohibition includes six enumerated types of costs that are expressly unallowable. With a handful

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of exceptions, generally a contractor must exclude costs for attempts to influence elections, legislation, or referendums; legislative liaison activities supporting efforts to engage in unallowable activities; attempts to improperly influence congressional or federal employees to give consideration to or act regarding a regulatory or contract matter; and contributions to political parties, political action committees (PAC) or similar organizations.

In *Raytheon Co.*, ASBCA No. 57743, 17-1 B.C.A. ¶ 36,724 (Apr. 17, 2017), the contractor disputed several cost issues that arose from its annual incurred cost submissions, and ultimately prevailed on many of those issues during negotiations and in the appeal. For example, the ASBCA sided with the contractor in finding that FAR 31.205-46(c), Travel Costs, does not specifically name "aircraft fractional lease costs" as unallowable, so the "expressly unallowable" penalty did not apply. But the ASBCA ruled against Raytheon on a remaining dispute over whether employee salaries related to unallowable political activity costs were "expressly unallowable" and thus subject to penalties. Among the costs at issue on appeal were salaries and other employment expenses for employees who at times engaged in lobbying activity. The ASBCA upheld DCAA's determination that these were "expressly unallowable costs."

The lobbying cost principle, FAR 31.205-22, does not specifically mention salaries or compensation. The contractor argued that even if its compensation costs were unallowable, FAR 31.201-6(e)(2)—which states that salary expenses for "employees who participate in activities that generate unallowable costs shall be treated as directly associated costs to the extent of the time spent on the proscribed activity"—dictates that the unallowable salary costs be treated as "directly associated costs," not "expressly unallowable costs" subject to penalty. Previously, the ASBCA held that bonus and incentive compensation (BAIC) for employees who were engaged in lobbying activities were not "expressly unallowable," even if they were unallowable as directly associated costs. *Raytheon Co.*, ASBCA No. 57576, 15-1 BCA ¶ 36,043 (June 26, 2015). In that decision, the ASBCA stated that "[n]either 'BAIC' cost nor 'compensation' cost are specifically named and stated as unallowable under [FAR 31.205-22], nor are such costs identified as unallowable in any direct or unmistakable terms." Despite this earlier ruling that Raytheon's BAIC costs were not expressly unallowable, the ASBCA pivoted and held that Raytheon's salary costs were expressly unallowable, holding that "material salary expenses of employees who engage in activities that generate unallowable lobbying costs are named and stated to be unallowable under the combination of FAR 31.201-6(a) and FAR 31.201-6(e)(2)." Recently, the Federal Circuit affirmed the ASCBA's decision in *Raytheon Co. v. Secretary of Defense*, No. 18-2371 (Oct. 18, 2019) holding that despite the language of the cost principle, the intention was to include salaries under "costs associated with" lobbying.

In so holding, the ASBCA appeared to expand the range of costs that could be subject to penalties for inclusion in the submission, even while taking a more textual view of other FAR cost principles. Its interpretation of the FAR cost principles appeared to go beyond the

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plain language of the lobbying cost principle in FAR 31.205-22, and relied on other sections of FAR Part 31 and the ASBCA's innate "common sense" that salaries were obviously an "express" part of unallowable lobbying costs.

DCAA Guidance

DCAA has provided guidance to its auditors for determining whether FAR and DFARS cost principles amount to "expressly unallowable costs" through Memorandums for Regional Directors (MRD). Contractors use these MRDs to anticipate how auditors will treat various costs, and to structure their accounting practices accordingly. The MRDs specifically provide lists of FAR and DFARS cost principles that DCAA presumes to be "expressly unallowable," with a caveat that the list is not "comprehensive." DCAA has sought before to expand the scope of what costs are "expressly unallowable," even where the cost principles are not so explicit.

For example, DCAA's 2014 MRD included multiple FAR and DFARS cost principles that did not include costs "specifically named or stated to be unallowable," but which DCAA would treat as expressly unallowable—such as certain lease costs under FAR 32.201-11(h)(1), which identifies limits on an "allowable" cost but does not separately identify any specifically "unallowable" cost. In 2015, DCAA issued another MRD that it claimed "enhanced" the 2014 MRD, and which further emphasized that "[t]he mere fact that the cost principle does not include the word 'unallowable' or phrase 'not allowable' does not mean that costs questioned based on that cost principle are not expressly unallowable." Contrary to the FAR definition of "expressly unallowable costs," but consistent with the ASBCA's decisions expanding the scope of the term beyond a plain reading of the cost principles, contractors lacked clear guidance.

Enter DCAA's May 2019 MRD, which "supersedes" prior guidance and addresses some of the gaps between DCAA's guidance and the ASBCA's case law, on one hand, and the plain language of the FAR on the other. The 2019 MRD, however, does not fully close the gap between the ASBCA's broader approach to determining whether costs are expressly unallowable based on common sense and whether the relevant FAR/DFARS cost principle specifically identifies the cost as "expressly unallowable." Notably, the 2019 MRD deleted prior references to *Emerson Electric Co*., ASBCA No. 30090, 87-1 BCA ¶19,478 (Nov. 19, 1986), which DCAA had cited as a basis for identifying such "expressly unallowable costs." In *Emerson*, the ASBCA held that "expressly" should be defined "in the 'broad dictionary sense,'" meaning that where the "only logical interpretation" is that costs are unallowable, they are expressly unallowable. In jettisoning references to Emerson and the decision's interpretation that costs would be deemed expressly unallowable where that is the "only logical interpretation" of the cost principle, DCAA takes a step forward to conform its guidance to the FAR and CAS definition of "expressly unallowable." But DCAA takes a step backward by also allowing for a finding of expressly unallowable costs under "unique facts and circumstances," and continuing to include several cost principles on its "expressly unallowable" list in the MRD, despite the absence of language in the FAR that these costs are "specifically named and stated to be unallowable." Whether DCAA's

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actual practice will narrow, or if it will continue expanding its discretion to deeming a cost expressly unallowable under the ASBCA's "common sense" approach, is yet to be revealed.

As for DCAA's treatment of lobbying and political activity costs, the 2019 MRD leaves FAR 31.205-22 in its entirety on the list of presumptively expressly unallowable cost principles, despite culling the list from 110 to 91 principles. The MRD, however, revised the "notes" regarding FAR 31.205-22 to incorporate the two *Raytheon* lobbying cost decisions discussed above. The notes attempt to reconcile the ASBCA's divergent approaches embracing the distinction the ASBCA adopted between BAIC and salary costs.

Conclusion

Wiley Rein has extensive experience assisting government contractors throughout the entire contracting and compliance life cycle, including DCAA audits and cost accounting litigation at the Boards of Contract Appeals. The updated MRD will hopefully be a welcome relief to contractors which should have more certainty on how DCAA intends to treat "expressly unallowable costs," particularly for cost principles that have been removed from the MRD list. Yet questions remain on how the new guidance will be implemented in practice by DCAA auditors on the ground, and whether any further updates will be made to address the inconsistencies that remain between the guidance and the FAR language. The fact that DCAA issued this new MRD on "expressly unallowable costs" may also signal that the agency intends to focus on its updated list of expressly unallowable cost principles to more vigorously pursue penalties against contractors that submit such costs to the Government.

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Federal Circuit Clarifies Relationship Between Standing and Prejudice

By Nicole Giles and Martha G. Vázquez*

In *American Relocation Connections, LLC v. United States*, No. 1:18-cv-00963 (Oct. 11, 2019), the U.S. Court of Appeals for the Federal Circuit clarified the relationship between the dual requirements that a protester demonstrate both standing and prejudice in order to pursue a protest. The decision provides a valuable lesson on why contractors must be careful not to assume they have prejudice simply because they demonstrate standing, and must allege facts that satisfy all of the jurisdictional predicates for bringing a protest.

American Relocation Connections involved a pre-award bid protest challenging a request for quotations (RFQ) issued by U.S. Customs and Border Protection (CBP) for employee relocation services. American Relocation Connections, LLC (ARC) argued that CBP violated Small Business Administration (SBA) regulations by failing to consult the SBA during its market research under 13 C.F.R. § 125.2(c)(2) in determining whether to set the competition aside for small businesses.

ARC had performed the employee relocation services contract under a small-business set-aside since 2014. In August 2017, the CBP chose to re-compete its employee relocation services contract and issued an RFQ under the Federal Supply Schedule. The 2017 RFQ stated that the procurement would be set aside for small businesses; however, due to an outdated version of the Statement of Work within the RFQ, CBP cancelled the 2017 RFQ. CBP then conducted new market research and concluded that there was only one certified small business available to compete, which would not satisfy the requirements for a small business set-aside procurement. CBP did not confer with the SBA when conducting its market research. As a result of its market research, CBP issued a new RFQ in 2018 on an unrestricted basis.

Upon learning that the re-competition of its incumbent contract would not be set aside for small businesses, ARC contacted CBP to learn the agency's rationale. CBP then issued RFQ Amendment 1, clarifying that the 2018 RFQ was being issued under North American Industry Classification System (NAICS) Code 531210 and CBP did not expect that there would be sufficient small businesses under that code who could compete for the work as a set-aside.

Following this exchange, ARC pursued a protest at the Government Accountability Office (GAO), which was dismissed. ARC then filed a pre-award protest at the U.S. Court of Federal Claims (COFC). At COFC, ARC argued that CBP erroneously failed to set aside the RFQ for small businesses and failed to consult the SBA during its market research that showed only one firm capable of competing. The failure to consult with SBA, ARC alleged, was a prejudicial error. COFC denied the protest, noting that CBP conducted acquisition planning and market research prior to issuing an unrestricted solicitation; that CBP was not required to consult with the SBA under section 125.2(c)(2); and that ARC was not prejudiced by CBP's failure to consult.

ARC appealed to the Federal Circuit, which noted that the principal dispute on the merits was whether the requirements of section 125(c)(2) apply when a federal agency issues an order against a multiple award contract (here, the Federal Supply Schedule). However, the Court never reached the merits

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of that issue because it held that while ARC had standing to bring the protest, ARC could not show it was prejudiced by CBP's actions.

The Federal Circuit determined that ARC had fully addressed whether it had standing to bring the claim but had not fully alleged facts to show it also had been prejudiced by the agency's failure to consult with SBA. ARC argued that it needed only prove it had standing to proceed, and that any prejudice was assumed to flow from the existence of standing, which may involve an element of prejudice. The Court disagreed, stating that the existence of standing, alone, does not establish prejudicial error and that a protester must allege sufficient facts to establish both standing and competitive prejudice.

Under 28 U.S.C. § 1491(b)(1), a protester must both have standing and show prejudice in order to bring a bid protest. The standing inquiry is a jurisdictional one; if the contractor does not have standing, the protest cannot proceed. To have standing, a contractor must be an "interested party"—*i.e.* an actual or prospective bidder—and it must possess a direct economic interest in the challenged procurement. The protester satisfies the direct economic interest requirement differently depending on whether it is a post- or pre-award protest. In the pre-award setting that ARC faced, a protester must demonstrate a non-trivial competitive injury which can be addressed by judicial relief. (In a post-award protest, a prospective bidder must demonstrate that it had a substantial chance of receiving the award but for the agency's error.)

Prejudice, on the other hand, requires an evaluation of whether a protester can establish that, based on the record evidence, the agency committed an error that affected the substantial rights of the contractor. To do so, the Court applies a "harmless-error" test: the correction of the error must yield a different result in order for the error to be harmful and be prejudicial to the party.

As the Federal Circuit stressed throughout its analysis, the assessment of any prejudice should not be viewed as the same standard as the jurisdictional requirement for a protester to demonstrate standing by "a non-trivial competitive injury." While prejudice can be and often is a factor in determining whether there has been a competitive injury, a protester should never assume that the inverse is also true—that where there is standing there must necessarily also be prejudice.

ARC, CBP, and the Federal Circuit agreed that as the incumbent and a prospective bidder, ARC had standing to bring the protest and challenge CBP's market research. Ultimately, however, the Federal Circuit determined that the prejudice analysis rested heavily upon CBP's decision to issue the 2018 RFQ under NAICS code 531210. Under 13 C.F.R. § 121.1103(b)(1), ARC was required to appeal a contracting officer's NAICS code within 10 calendar days after the RFQ's issuance. Because ARC did not appeal the NAICS code, it had waived its right to challenge the chosen code. Thus, even if CBA had consulted the SBA, the record indicated it still would have issued an unrestricted procurement due to a lack of qualified contractors under the selected NAICS code. Therefore, ARC failed to prove that CBP's failure to consult the SBA would affect CBP's ultimate decision to issue the 2018 RFQ on an unrestricted basis.

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Although *American Relocation Connections* is nonprecedential, the decision underscores three important considerations for federal contractors. ***First***, a protester should not assume that having standing to pursue a protest eliminates the additional need to ultimately demonstrate prejudice, such that the outcome of the protest could lead to a different result for the protester. Although it is not always clear and the relationship may be muddled, protesters need to show both standing and prejudice. As the Court made clear, standing does not necessarily establish prejudice even though prejudice may sometimes be part of establishing standing. Contractors should be careful to address both in any protest and never assume that one will automatically lead to the other. ***Second***, the case highlights the importance of diligently and timely pursuing all possible arguments, even if an argument does not appear from the outset to be a material one. Here, the protester did not timely challenge the NAICS code that CBP had selected for its market research, which was ultimately fatal to its protest because the record demonstrated that there were not sufficient small businesses under that NAICS code to warrant a set-aside. ***Finally***, because the Federal Circuit did not reach the underlying merits, it remains an open question whether an agency must consult SBA under 13 C.F.R. § 125.2(c)(2) for an order under a multiple award contract, such as the GSA FSS.

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COFC Reiterates Risks for Contractors Regarding Availability of Key Personnel

By Tracye Winfrey Howard

A recent decision by the COFC demonstrates the need for contractors to carefully review the availability of proposed key personnel before submitting final proposal revisions (FPRs). In *NetCentrics Corp. v. United States*, No. 19-839C (Sept. 6, 2019), the COFC held that the U.S. Department of Defense Washington Headquarters Services (WHS or the Agency) acted within its discretion when it rescinded NetCentrics' contract award and disqualified the company from the procurement upon discovering that NetCentrics had misrepresented the employment status and availability of its proposed Deputy Program Manager (DPM) in its FPR. The court was not swayed by NetCentrics' claim that the misrepresentation was inadvertent—it held that disqualification is reasonable if a misrepresentation is material, regardless of whether the contractor intended to actually deceive the agency.

In *NetCentrics*, offerors were required to submit resumes for key personnel, including the DPM. The solicitation warned that "an offer can be rejected if it does not have a firm commitment from the persons that are listed in the proposal" as key personnel. NetCentrics proposed for its DPM a then-current employee who was working on the incumbent contract, and committed that its incumbent client delivery team would continue on the new contract for at least one year. NetCentrics stated that its proposed key personnel, including the proposed DPM, were immediately available to perform on the contract.

The proposed DPM left the company approximately two weeks before the Agency opened discussions with NetCentrics. The Agency did not raise any issues regarding NetCentrics' key personnel during discussions, and NetCentrics did not make any changes in its FPR related to the proposed DPM or his availability to begin work immediately after award for at least the one year thereafter. In performing its incumbent contract, however, NetCentrics had notified the contracting officer and customer personnel for the incumbent contract of the proposed DPM's departure.

WHS awarded the contract to NetCentrics on January 31, 2019. NetCentrics received at least two strengths regarding its proposed key personnel, and the source selection decision highlighted NetCentrics' use of incumbent personnel as an advantage of the proposal that the Agency expected to mitigate performance risk. Following a protest at the GAO, the contracting officer sought documentation from NetCentrics confirming that the proposed DPM had committed to work on the contract—either before NetCentrics submitted its FPR or before contract award. NetCentrics responded that it intended at the time of its FPR submission to rehire the proposed DPM, and that in February 2019 (after the award) the proposed DPM had expressed strong interest in returning to NetCentrics.

Based on that response, the Agency determined that NetCentrics' December 2018 FPR contained material misrepresentations regarding the proposed DPM's immediate availability to perform the contract and his continued availability for the first year of the contract. As a result, it rescinded the award to NetCentrics, reopened the procurement, and disqualified NetCentrics from the competition. NetCentrics protested the

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Agency's decision to GAO and, after GAO denied the protest, to the COFC. Because the proposal had misrepresented the proposed DPM's availability, and the Agency had relied on those statements in awarding the contract to NetCentrics, the court held the Agency's decision was reasonable. The decision explained that "offerors have an 'obligation to ascertain the continuing availability of key personnel' before submitting FPRs," even if an agency does not raise key personnel issues during discussions with the offeror.

The COFC's decision in *NetCentrics* is consistent with GAO's approach regarding the unavailability of key personnel. In *Paradigm Technologies, Inc.*, B-409221.2, Aug. 1, 2014, 2014 CPD ¶ 257, GAO addressed a similar fact pattern. There, a proposed key personnel of the awardee left the company after the company had submitted its FPR, but before contract award. After the agency learned the proposed key personnel was no longer available to work on the contract, it reevaluated the FPRs and assigned the awardee a weakness for the relevant evaluation factor, but subsequently reaffirmed its award to the same offeror. GAO concluded that this decision was irrational because the awardee's revised proposal no longer satisfied the solicitation's key personnel requirements. In such a situation, GAO said, the agency "should have either rejected [the awardee's] proposal as technically unacceptable for failing to meet a material requirement or reopened discussions to permit the firm to correct this deficiency." Likewise, in *URS Federal Services., Inc.*, B-413034, July 25, 2016, 2016 CPD ¶ 209, GAO dismissed a protest by an unsuccessful offeror who had been rated "Unacceptable" where one of its proposed key personnel had resigned after proposals were submitted.

The COFC's decision in *NetCentrics* and GAO's trend of similar outcomes offer two significant lessons for government contractors. First, they highlight the importance of carefully reviewing key personnel identified in an initial proposal and confirming that they remain available for their proposed roles before including them in the FPR, even if the availability of key personnel was not raised in discussions by the agency. Otherwise, a contractor could be excluded from the competition or exposed to litigation risk due to an inadvertent (but material) misrepresentation.

Second, and relatedly, if an offeror proposes a current employee as a key personnel but that individual is no longer employed by the company following the initial and/or final proposal submission, the offeror must have at least "reasonable grounds to believe it could make [that] individual immediately available to work." As the COFC noted in *NetCentrics*, however, "the existence of reasonable grounds in any particular case is very fact specific."

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Death Knell for LPTA?

By John R. Prairie and Nicole Giles

Has the era of "lowest-price technically-acceptable" (LPTA) competitions ended? Although recent reports confirm the declining use of LPTA by procuring agencies across the government, two recent rulemakings will place significant regulatory limits on LPTA procurements for the foreseeable future.

On September 25, 2019, the U.S. Department of Defense (DOD) released a final rule restricting the use of the LPTA contracting model, which rose in popularity ten years ago following the Great Recession and in response to tightening agency budgets. The DOD rule follows Congressional efforts in recent years to restrict the use of LPTA in response to complaints from government buyers and industry, which have long resisted the use of LPTA on complex acquisitions—such as technology and professional services contracts—that are better suited to a best value model that rewards offerors who go above and beyond the minimum requirements. The LPTA model, by its very nature, discourages creativity and innovation that could benefit the government and taxpayers.

The new rule amends the DFARS to implement the LPTA restrictions set forth in both the 2017 and 2018 National Defense Authorization Acts (NDAAs). Section 813 of the 2017 NDAA required a change in the DFARS to incorporate six factors that contracting officers must consider in determining if LPTA is an appropriate procurement model. Subsequently, Section 822 of the 2018 NDAA modified these requirements to include two additional factors. The new rule incorporates these factors, identifies types of products and services for which LPTA competitions should be avoided whenever possible, and identifies certain products, services and programs for which the LPTA model is strictly prohibited.

Following issuance of the new DFARS rule, the FAR Council issued a proposed rule that would apply many of the same LPTA restrictions to civilian agencies as well.

DOD's New LPTA Restriction

LPTA contracts are awarded to lowest-priced offerors who meet the minimum required technical or performance standards. Unlike other competition models, the agency gives no additional credit to offerors who exceed the minimum requirements, nor does the agency conduct any qualitative analysis or comparison of the relative merits and/or risks of an offeror's proposed technical approach or past performance. The new rule sets restrictions on when a defense agency can conduct a procurement using the LPTA model. Under the new rule, LPTA competitions may be used only when the following eight factors are satisfied:

1. Minimum requirements can be clearly described and measured;
2. No, or minimal, extra value would be added by proposals exceeding the technical or performance requirements;
3. Proposed technical approaches require no, or minimal, subjective judgment from the source selection authority (SSA) to determine awardee;
4. SSA is confident that reviewing all technical proposals would not result in additional characteristics that would provide value or benefits;

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5. No, or minimal, additional innovation or future technological advantage would be achieved by using a different procurement model;
6. Goods being procured are predominantly expendable, nontechnical, or have a short life expectancy/shelf life;
7. Contract file contains a determination that the lowest price reflects full life-cycle costs; and
8. Contracting officer documents the contract file describing the circumstances justifying the use of LPTA.

While the new rule does not strictly ban the use of LPTA under these circumstances, it states that agencies must avoid LPTA procurements "whenever possible" when acquiring any of the following:

1. IT services, cybersecurity services, systems engineering and technical assistance services, and advanced electronic testing services;
2. Items designated by the requiring activity as personal protective equipment; or
3. Services designated by the requiring agency as knowledge-based professional services.

The new rule also specifically prohibits the use of LPTA competitions when an agency solicits auditing services, engineering and manufacturing development for future major defense programs, or for personal protective equipment and aviation critical safety items where any differences in quality or any failure could result in combat causalities. In addition, LPTA cannot be used for personal protective services—even those deemed not a risk for combat causalities—and training and logistics services for operations outside of the United States.

While the DOD stated it does not intend for the new policy to act as a blanket ban on all LPTA use, these new requirements strongly imply that LPTA should only be used in the narrowest of circumstances and require thoughtful and detailed justification to do so. The LPTA model can no longer be used in circumstances in which the DOD should be taking advantage of potential innovation or future technological advantages. Defense agencies can use the LPTA model only when there is no additional value available from an offeror who proposes to exceed the solicitation's minimum requirements.

Recent Data on the Use of LPTA by Procuring Agencies

The day after the release of the DOD's final rule, GAO released a report, GAO-19-691, providing information on its study of agencies' uses of the LPTA model. While the report does not consider the release of DOD's final rule, it was written in anticipation of the final rule and highlights the potential impact of the rule's restrictions on LPTA competitions going forward. For example, GAO found that in FY2018, DOD agencies (Army, Navy, Air Force, and Defense Logistics Agency) used LPTA for an estimated 25% of competitive contracts and orders valued at $5 million or more. With the new restrictions, this percentage should decrease considerably.

In addition, the GAO report also reviewed six agencies' guidance for the use of LPTA

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and found that only DOD and DHS had existing source selection guidance reflecting criteria to use the LPTA process such as those outlined in the 2017 and 2018 NDAAs. Acquisition policy officials from VA, GSA, USDA, and HHS all stated that they did not have agency-specific guidance for using the LPTA process beyond what is available in the FAR. However, these officials also stated that they were waiting for regulations to be finalized before determining if additional guidance was needed.

Because the DFARS applies only to defense agencies, the new rule does not apply government-wide. Among civilian agencies (GSA, VA, HHS, DHS, and USDA), GAO found that they used the LPTA model for an estimated 7% of their competitive contracts and orders valued at $5 million or more. Industry groups are urging the civilian agencies to follow DOD's lead in restricting the use of the LPTA model. These industry efforts may have impacted the inclusion of legislation included in the 2019 NDAA aimed at restricting the LPTA model government-wide. The 2019 NDAA requires that the FAR be revised to incorporate similar provisions within 120 days after enactment, which would have been in December 2018.

Proposed FAR Rule

On October 2, 2019, the FAR Council released a proposed rule that would implement the relevant sections of the 2019 NDAA that specify the criteria that agencies must consider in order to conduct a civilian agency procurement using the LPTA model. The proposed rule is not a mirror image of the DFARS rule but shares many similarities. The FAR rule would include six of the eight criteria adopted in the DFARS, including whether:

1. Executive agency can clearly describe and measure minimum requirements;
2. Executive agency would realize no, or minimal, extra value by proposals exceeding the technical or performance requirements;
3. Proposed technical approaches require no, or minimal, subjective judgment from the source selection authority (SSA) to determine awardee;
4. Executive agency is confident that reviewing all technical proposals would not result in additional characteristics that would provide value or benefits;
5. Contracting officer documents the contract file describing the circumstances justifying the use of LPTA; and
6. Contract file contains a determination that the lowest price reflects total costs—including for operations and support.

Unlike the DFARS rule, the proposed FAR rule would not completely ban the use of LPTA under any circumstances. But, the proposed rule requires agencies to avoid the use of LPTA, to the maximum extent possible, for procurements involving: IT services; cybersecurity services; systems engineering and technical assistance services; advanced electronic testing services; audit or audit readiness services; health care services and records; telecommunications devices and services; or other knowledge-based professional services; personal protective equipment; and knowledge-based training or logistics services in contingency operations or other operations outside of the United States.

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The Awardee's Protest Dilemma: Managing Cost Risk While an Award Hangs in the Balance

By Richard B. O'Keeffe, Jr.

The awardee weathering a bid protest haunts a wretched nether-world on the narrow margin between success and failure. It is a place where—following award—hope, euphoria, and the desire to maintain good customer relations are in constant tension with the need to mitigate the financial risks associated with maintaining the status quo during a potentially protracted protest process. And then there is the need to defend the award against the substantive critiques advanced by the protester. In theory, it beats being the unsuccessful offeror/protester. But, in practice it involves a delicate balance of competing considerations and relationships. And, as highlighted by a recent ASBCA decision, it demands a high level of discipline, timely communication, prudent planning and meticulous documentation.

Advanced Global Resources, LLC, ASBCA No. 62070 (Sept. 10, 2019), highlights these risks, and how things can go terribly wrong even after the protest is over. From the ashes of the Advanced Global Resources (AGR) dispute failure, others can sift lessons to avoid a similar fate. The set-up for *Advanced Global Resources* is a familiar tale, played out hundreds of times, year after year: the Army awarded AGR a contract; the disappointed incumbent protested the award to GAO; the Army issued a stop work order; GAO denied the protest; and the Army lifted the stop work order and turned AGR on to perform the contract. The ASBCA's decision, however, provides a cautionary tale for contractors who incur costs during the stop work period.

The day after award, AGR hired a key employee to work on the contract. When the protester filed at GAO and the contracting officer issued a stop work order a week later, AGR retained the new hire on standby. After the stop work order was lifted, AGR filed a claim to recoup the direct labor costs it incurred to keep the key employee in a standby role pending protest resolution, and unabsorbed overhead costs incurred during the protest. The Army denied the claim, AGR appealed, and the Board ultimately denied on both counts.

The Board rejected the direct labor costs claim, holding that although it was reasonable for AGR to retain the employee, AGR did not take "reasonable steps to minimize its costs," noting that the employee "did not do any work on the project, apart from preparing himself." AGR believed that this preparation and standby capacity was sufficient, but in hindsight it could have bolstered the case for reimbursement by: (1) having the employee keep detailed records of what he was doing to prepare for contract performance; (2) assigning other productive tasks unrelated to the contract under protest; and (3) seeking real-time contracting officer buy-in for retaining the employee and his work during the protest. Contracting officer engagement is a tricky thing indeed considering that, during protests, they can be skittish, overly conservative or downright uncommunicative in their dealings with awardees. Even so, foresight, planning and documentation would have put AGR in a much better position to seek an adjustment to cover the costs of keeping the employee during the protest.

The Board denied AGR's claim for unabsorbed overhead because the company could not prove that the protest was a delay of indefinite duration, that the company was "on standby" (i.e., potentially required to resume

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work at full speed and immediately), and that it was impractical to obtain replacement work during the protest. The intricacies of unabsorbed overhead entitlement law are beyond the scope of this newsletter treatment, but the holes in AGR's case for this claim element highlight lessons with applicability to broader claim theories. The teaching point is that, during ***any*** protest, a prudent awardee needs to assess the costs incurred to cope with delays and determine how best to mitigate the associated financial risks. In the AGR case, the company might have created contemporaneous documentation of its reasoning for whatever plan it took, or it might have taken concrete steps to lessen the effect of the delay and potentially obviate the need to seek reimbursement.

But again, the business imperative is to think about the problem as far in advance as possible and conceive ways to manage risk as events unfold, rather than after the fact, when the red ink appears on the balance sheet. And of course, while engagement with government customers in real time can be beneficial later in avoiding or winning a dispute over costs stemming from protest delays, such interactions are fraught with the risk of eroding the alliance with the customer at a point during which the Government may take corrective action in response to the protest that could jeopardize the award. The awardee must carefully weigh this risk against the potential advantage in a dispute over protest-related costs. We take no exception to business judgments favoring restraint in attempts to gain government concurrence to awardee decisions during protests. The point is to at least think about what can be done through direct dealings with agency officials.

And even without government engagement, an awardee can do much on its own to lessen the risk that it will lose a dispute over protest-related costs by: (1) assessing the risks of inaction during a protest against the costs of maintaining capability to resume performance quickly when the protest is over; (2) conceiving ways to re-purpose personnel and other resources required for performance; and, (3) where such actions are impossible or commercially practicable, documenting the rationale for maintaining the status quo.

Yes, it's a big challenge to harmonize competing business development and financial interests during the whirlwind experience of a bid protest. But an awardee has nothing to lose and much to gain by actively evaluating all potential risks and taking timely action to maximize the company's ability to recover the costs imposed by protest delay.

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Paul F. Khoury

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Comments on the proposed rule are due on or before December 2, 2019.

Assuming the proposed FAR rule is adopted, civilian agencies will likely further reduce their use of LPTA going forward. This, coupled with the new DFARS rule, may signal the beginning of the end to the LPTA procurement era for the foreseeable future . . . until it reemerges in another 10 or 20 years.

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