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NEWSLETTER

Bid Protest Lessons Learned From Oak Grove Technologies

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With another government fiscal year in the books, contractors may be anticipating the next season of bid protests. The Federal Circuit's recent decision in *Oak Grove Technologies v. United States* offers a timely set of pointers for successful protests and, more broadly, managing protest expectations within the organization.

Tip #1: Remember that review of agency decision making is deferential.

Capture teams sometimes exit debriefings citing multiple judgments they believe evaluators got wrong. And the disappointment in losing the award can be amplified by any perception that the competition had been tilted unfairly towards a competitor by organizational conflicts of interest (OCIs).

Oak Grove reminds contractors of contracting officers' discretion in evaluating OCI issues and similar considerations. The Federal Circuit flagged the underlying U.S. Court of Federal Claims (COFC) decision for applying a "non-deferential standard of review" to find the Army had investigated a potential OCI inadequately. The Federal Circuit acknowledged that the OCI allegations were cause for concern and that the agency would have been justified in conducting more fact-gathering interviews than it did. But the appellate decision emphasized that just because the additional interviews could have been helpful, under the circumstances those additional interviews were not necessary for the OCI investigation to be legally sufficient.

Courts' deferential standard of review should not necessarily dissuade any contractor from protesting an OCI or any other evaluation issue. (One never knows what the administrative record

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may reveal.) But *Oak Grove* indicates that the deferential standard should perhaps receive renewed emphasis when evaluating whether to include certain protest arguments in a filing and, more broadly, setting expectations within the organization about a given protest argument's chances of success.

Tip #2: Recognize how solicitation terms might or might not be deemed material.

The *Oak Grove* decision also addressed when proposals are deemed non-compliant with "material" solicitation terms and therefore not awardable. COFC had determined that the awardee's proposal should have been found unacceptable for failure to include copies of teaming agreements that were, in COFC's view, required by the solicitation.

The Federal Circuit reversed, finding that the solicitation's terms left some flexibility on inclusion of teaming agreements, and that their inclusion or omission didn't bear on "price, quantity, quality, or delivery" under the circumstances. The discussion in the *Oak Grove* decision implicitly suggests that the Federal Circuit focuses (or will focus) on "price, quantity, quality, or delivery" in assessing whether a solicitation term is material.

This "price, quantity, quality, or delivery" framing of materiality has appeared in both COFC and the Government Accountability Office (GAO) decisions addressing protests of negotiated procurements. (The phrasing is promulgated in FAR Part 14, so it is quoted with regularity in protests involving sealed bids). But far more common at GAO is a framing of material solicitation terms as those that are "clearly stated," which suggests a seemingly broader scope for materiality. For example, solicitation terms addressing an offeror's responsibility might be "clearly stated" in the solicitation but not bear on "price, quantity, quality, or delivery."

To be sure, these two different framings can still yield the same result in a protest. For example, GAO might deem an awardee's noncompliance with a term bearing on responsibility to be noncompliance with a material solicitation term, but then find that the noncompliance did not result in any competitive prejudice. But it will be interesting to see if GAO decisions start to use the "price, quantity, quality, or delivery" framing with any greater frequency—and if so, whether there is any discernible difference in protest outcomes over time.

Until that trend data emerges, and even afterwards, contractors should carefully evaluate arguments about a proposal that might not comply with solicitation terms. If the argument about whether the terms were material appears stronger under one framing or the other, that assessment might influence an offeror's decision on whether to pursue a protest at COFC or GAO.

Tip #3: Beware of patent, if subtle, solicitation ambiguities.

Defense Federal Acquisition Regulation Supplement (DFARS) 215.306(c) provides that "[f]or acquisitions with an estimated value of $100 million or more, contracting officers should conduct discussions." In *Oak Grove*, DFARS 215.306(c) applied, and COFC had found the Army's decision to award without discussions to have been insufficiently justified and therefore arbitrary and capricious.

The Federal Circuit reversed, finding the argument waived as untimely under *Blue & Gold Fleet*. The solicitation had included the basic version of Federal Acquisition Regulation (FAR) 52.215-1, which advises of the agency's intent to award without discussions. The Federal Circuit found that the solicitation should have included FAR 52.215-1 Alt. I, which says the agency will conduct discussions, to be consistent with DFARS 215.306(c). The Army's use of the basic version created a patent ambiguity that should have been protested pre-award, such that the argument here in a post-award protest was untimely.

The Federal Circuit's holding is striking because prior protest decisions had come out the other way. Decisions at COFC (*IAP World Services*, *SLS Federal Services*) and GAO (*SAIC*) had found similar protest arguments timely even though the solicitations in those cases conveyed the agency's intent to award without discussions. Those decisions had reasoned that, notwithstanding the language of DFARS 215.306(c), it wasn't until award that an offeror knew whether the agency would, in fact, award without discussions or instead decide to hold discussions—as, for example, the FAR 52.215-1 basic clause advises that an agency might choose to do.

Oak Grove thus represents a rather noticeable U-turn on protests involving DFARS 215.306(c). More broadly, the decision represents a nudge to be quicker to protest solicitation ambiguities even if the ambiguity may seem rather subtle.

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As protest season heats up, keep these lessons in mind to ensure that your decision of whether, when, and what to protest is well-founded and strategically sound—and the likelihood of success well calibrated internally.