

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

November 2019

The awardee weathering a bid protest haunts a wretched netherworld 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

Practice Areas

Government Contracts

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 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.