

Contract Procurement and Award

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Agenda

- Acquisition and Protest Statistics
- Congressional Study on Bid Protests
- FY 2018 NDAA
 - Enhanced Debriefing Procedures
 - Limitation on Use of LPTA Acquisitions
 - GAO Fee Shifting Pilot Program
- GAO Changes to Bid Protest System
- Common Concerns

Acquisition and Protest Developments

Protests at the COFC

- Historical comparison of COFC cases from FY2012-2017

	FY 2017	FY2016	FY2015	FY2014	FY2013	FY2012
Protests Filed	129 (up 4%)	124 (down 1.5%)	126 (up 15%)	110 (up 31%)	84 (down 15%)	99 (up 1%)
Pre-Award	41	31	35	35	20	42
Post-Award	88	93	91	75	64	57

- 2017 specifics
 - 74 protest decisions in total
 - 70 published opinions

Acquisition and Protest Developments

Protests at the GAO

- Historical comparison of GAO cases from FY2012-2017

	FY2017	FY2016	FY2015	FY2014	FY2013	FY2012
Cases Filed	2,596 (down 7%)	2,789 (up 6%)	2,639 (up 3%)	2,561 (up 5%)	2,429 (down 2%)	2,475 (up 5%)
Cases Closed	2,672	2,734	2,647	2,458	2,538	2,495
Merit (Sustain + Deny) Decisions	581	616	587	556	509	570
Number of Sustains	99	139	68	72	87	106
Sustain Rate	17%	22.56%	12%	13%	17%	18.6%
Effectiveness Rate	47%	46%	45%	43%	43%	42%
ADR (Cases Used)	81	69	103	96	145	106
ADR Success Rate	90%	84%	70%	83	86%	80%
Hearings	1.70% (17 cases)	2.51% (27 cases)	3.10% (31 cases)	4.70% (42 cases)	3.36% (31 cases)	6.17% (56 cases)

Acquisition and Protest Developments

Task Order Protests

- Historical comparison of GAO Task Order Protests from FY2012-2017

	FY2017	FY2016	FY2015	FY2014	FY2013	FY2012
Total Number of Cases Filed	2,672	2,734	2,639	2,561	2,429	2,475
Total Number of Task and Delivery Order Protests	256	375	335	292	259*	209
Percent of Total	9.6%	13.7%	12.7%	11.4%	10.6%	8.4%

*Beginning in 2013, GAO reported the number of task and delivery order protests as a subset of the number of cases closed rather than the number of cases filed

- Update: GAO jurisdiction determined by the value of the task order issued after corrective action (even if original award exceeded jurisdictional threshold) (*AMAR Health It, LLC*, B-414384.3, 2018 CPD ¶ 111 (Comp. Gen. Mar. 13, 2018))

Acquisition and Protest Developments

Congressional Study of Bid Protests

- Relevant findings
 - "[B]id protests are exceedingly uncommon for DoD procurements"
 - Protests by 11 largest contractors "has remained relatively constant and may be slightly declining" at GAO and filed less than 10% of cases between 2008-2016
 - Protest by small businesses account for more than half of all protests
 - Increase in protest filings is not a result of the filing of meritless cases
 - Task order protests are "generally more likely to be sustained or have corrective action compared with other types of protests"
 - More contractors appear willing to file protests with COFC
 - Roughly 13% of procurements with a protest had some form of contract extension (bridge contract or contract extension)
 - Roughly 25% of protests were associated with incumbents; "while incumbents may protest task orders more frequently, incumbents are also much more likely to be successful"

Acquisition and Protest Developments

Congressional Study of Bid Protests (cont.)

- Recommendations
 - Enhance the quality of post-award debriefings
 - Be careful in considering any potential reduction to GAO's decision timeline
 - Be careful in considering any restrictions on task-order bid protests at GAO
 - Consider implementing an expedited process for adjudicating bid protests of procurement contracts with values under \$0.1M
 - Consider approaches to reduce and improve protests from small businesses
 - Consider collecting additional data and making other changes to bid protest records to facilitate future research and decision-making

FY 2018 NDAA

Debriefing

- Sec. 818: establishes enhanced debriefing procedures
 - Disappointed offerors in an acquisition that exceeds \$100M will be provided, as part of their debriefing, a redacted source selection decision document; small businesses and nontraditional contractors may request this disclosure in acquisitions exceeding \$10M
 - Debriefing required for all contract and task order awards for contracts valued at \$10M or greater
 - Within 2 business days of the debriefing, the offeror will have an opportunity to pose additional questions in writing, and the agency will have 5 business days to respond to the questions
- DOD Class Deviation, issued Mar. 22, 2018, extends the GAO automatic stay to protests filed within 5 days after government provides written response to questions
- Appears to seek to limit protests through providing additional information to disappointed bidders

FY 2018 NDAA

Lowest Price Technically Acceptable (LPTA)

- Sec. 827: limits use of LPTA acquisition methodologies to acquisitions where
 - DOD will not realize any (or only minimal) additional innovation or future technological advantage by using a different acquisition methodology
 - The goods that are being acquired are predominantly expendable in nature, nontechnical or have a short life expectancy or shelf life
- Sec. 832: prohibits use of LPTA for an "engineering and manufacturing development contract of a major defense acquisition program"
- Appears to be a response to the increase in the DOD's use of LPTA acquisitions, including for more complicated or technical acquisitions, as a strategy to limit or avoid protests

NDA FY 2018

Fee Shifting

- Sec. 827: establishes pilot program (Oct. 1, 2019 and Sept. 30, 2022) requiring protestors to reimburse DOD for the costs it incurs in defending against the protest if
 - The contractor had \$250M in revenue (in 2017 dollars) in the preceding year; and
 - GAO denied the protest
- Pilot program does not apply to protests that are brought before the COFC; consider filing bid protest with the COFC over GAO to avoid this fee-shifting provision
- Remains unclear how DOD will determine its costs and, more importantly, whether the existence of this pilot program will affect the DOD's decisions to take corrective actions versus litigating a protest

GAO Changes to Bid Protest System

- Unveiled new electronic filing system, Electronic Protest Docketing System (EDPS), on May 1, 2018
 - Utilized to file new protests, as well as update and monitor existing cases
 - Implemented \$350 filing fee "to recover the costs of establishing and maintaining the system"
 - Filing deadline remained 5:30 EST; filing must be "received in the EPDS" by that time
 - Filing by other means (mail or email) does not constitute a filing; exception for classified materials or documents too large
- Rule also clarified that, where the basis for challenging a solicitation becomes known after the solicitation close date, the protest must be filed within 10 days of when the protest knew or should have known of that basis

Common Concerns

Forum Selection

- Issue: where should I file my protest?
 - 28 U.S.C. § 1491: grants COFC jurisdiction over actions "by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement;" argument existed that any violation of statute or regulation committed in connection with a procurement could be protested
 - *Cleveland Assets, LLC v. United States*, 883 F.3d 1378 (Fed. Cir. 2018)
 - Contractor alleged a violation of an appropriation statute
 - CAFC held that the COFC jurisdiction is limited to violations of procurement statutes or regulations

Common Concerns

Quantifying Trade Offs

- Issue: may the agency consider its cost savings?
 - *Kiewit Infrastructure W. Co. v. United States*, No. 18-76C, 2018 WL 1940472 (Fed. Cl. Apr. 25, 2018); *Kiewit Infrastructure W. Co.*, B-415421, 2018 CPD ¶ 55 (Comp. Gen. Dec. 28, 2017) (holding agency may consider its cost savings in using a higher priced offeror in its best value tradeoff)
- Issue: must the agency quantify its best value tradeoff conclusion?
 - *Enter. Servs. LLC*, B-415517, 2018 CPD ¶ 83 (Comp. Gen. Jan. 18, 2018) (holding agency is not obliged to quantify the value of the competing offers or test its tradeoff conclusion)

Common Concerns

Organizational Conflicts of Interest (OCIs)

- Issue: what is necessary for the agency to disqualify a potential bidder on the basis of an OCI?
 - *A Squared Joint Venture v. United States*, No. 17-835C, 2018 WL 1081444 (Fed. Cl. Feb. 28, 2018)
 - OCIs of a partner to a joint venture are imputed to the joint venture
 - COs have "considerable discretion" in determined whether an OCI is significant
 - COFC considered existence of "hard facts" that showed a significant potential OCI
 - Partner of JV had files containing confidential business information regarding a competitor; and
 - Failed to take action to prevent its managers from accessing that information
 - COFC determined disqualification over mitigation was proper, in part, because contractor had an OCI plan, but failed to bring the issue to CO "as early as possible" as required under the plan

Common Concerns

Insourcing

- Issue: when may an agency insource, rather than procure from an incumbent, a service or item of supply?
 - *Loomacres, Inc. v. United States*, 134 Fed. Cl. 779 (2017); *Loomacres, Inc. v. United States*, No. 17-824C, 2018 WL 1004385 (Fed. Cl. Feb. 21, 2018)
 - Air Force decided to insource program-related services for airbases and Loomacres, the incumbent, asserted the insourcing decision violated the Competition in Contract Act (CICA)
 - COFC held
 - Loomacres had standing to challenge the Air Force's insourcing decision
 - Air Force's insourcing decision did not violate CICA because a different statute, the Sikes Act, exempts procurements for certain services from OMB Circular A-76 and requires the Air Force to give priority to federal agencies charged with managing natural resources
 - OMB Circular A-76 mandated a cost comparison analysis before an agency may insource work
 - 10 U.S.C. § 2463(e)(1)(C) requires trade off analysis before replacing a contractor with DOD civilian employees

Questions?