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Court of Federal Claims Decision Offers Potential Recovery Opportunity for Energy Savings Performance Contracts and Task Order Bid Protests

By Olivia Lynch, Cherie J. Owen, Robert J. Sneckenberg and Eric Herendeen*

In this article, the authors discuss a recent decision by the Court of Federal Claims that offers interesting takeaways with respect to both energy savings performance contracts and bid protests.

A recent Court of Federal Claims decision addressed a novel fact pattern involving a bid protest (seeking bid preparation costs) relating to an energy savings performance contract (ESPC) and has the potential to expand contractor recovery opportunities in both areas of law.

In *Siemens Government Technologies, Inc. v. United States*,¹ Siemens was pursuing task orders under a Department of Energy indefinite delivery, indefinite quantity (IDIQ) ESPC for energy conservation measures (ECMs) at six overseas Navy bases. ESPCs are vehicles that allow agencies to procure ECMs with little to no up-front capital costs, as the ECM installation costs are typically financed and paid back over the course of the contract (which can last up to 25 years) through the cost savings generated by the project. ESPC projects commonly consist of five phases:

- (1) Acquisition planning;
- (2) Contractor selection and preliminary assessment;
- (3) Project development;
- (4) Project implementation and construction; and
- (5) Post-acceptance performance.

In the second phase, Siemens conducted a preliminary assessment of the Navy bases, after which the Navy issued a notice of intent to award Siemens task orders for work at each site. Siemens then proceeded to the third phase, in which it was to perform a more in-depth “investment grade audit” of each site to substantiate the cost savings that could be achieved and that would

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¹ https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2022cv0698-36-0.

ultimately fund the project. Based upon the investment grade audit, Siemens would submit a technical and price proposal, upon which the final awards would be based.

Proceeding with the investment grade audits, Siemens visited each of the six Navy bases. At two of the bases, Siemens discovered that similar work had already been started by another company performing under a different contract, and thus an ESPC project at those two bases was no longer viable. The Navy ultimately awarded Siemens task orders for the other sites, but the Navy did not pursue projects at the two bases where the work was nonviable.

Siemens asserted that it incurred approximately \$5 million in costs associated with its investment grade audits and proposal preparation related to the two Navy bases at issue. Had the project gone forward at those bases, Siemens may have been able to recover its costs through the resulting task order and later-generated cost savings. However, with the projects not proceeding, Siemens launched a two-pronged legal challenge to recover its costs.

First, Siemens filed a contract claim with the Navy contracting officer, arguing *inter alia* that the Navy had breached its duty of good faith and fair dealing by causing Siemens to expend money performing the investment grade audits and preparing its proposals for the two bases, all while knowing that those projects were not viable. The contracting officer denied the claim. Siemens appealed that decision to the Armed Services Board of Contract Appeals (ASBCA), which affirmed denial of the claim, finding that Siemens had incurred the costs prior to task order award (and, therefore, no contract existed under which recovery was possible) and noting that language in the project solicitation documents informed Siemens that the Navy was not responsible for proposal/audit costs unless a subsequent task order was awarded. Siemens appealed the ASBCA's decision as well, but the Federal Circuit affirmed.

Second, Siemens filed a bid protest at the Court of Federal Claims (CFC) seeking bid preparation costs. The CFC stayed Siemens' case pending the resolution of its contract claim at the ASBCA and Federal Circuit, but when the contract claim was unsuccessful the CFC resumed its consideration of the bid protest.

Because Siemens' bid preparation costs related to pursuit of task orders under a FAR Part 16 IDIQ contract, the Department of Justice sought dismissal of the protest under the Federal Acquisition Streamlining Act (FASA), which prohibits the CFC from exercising jurisdiction over protests "in connection with the issuance or proposed issuance of a task or delivery order." The court, however, concluded that the FASA bar was inapplicable here for two reasons.

THE DECISION

First, the court held that, for the FASA bar to apply, “a proposed or issued task order must exist to be protested.” But here, where the government knew or should have known from the beginning that it had previously awarded a contract to another corporation for the same services, there was no legitimate government need; therefore, the “solicitation was illegitimate.” The court concluded that, under these circumstances, the Navy “could neither have awarded a contract to Siemens nor could Siemens have accepted that award.” Thus, “FASA’s bar is inapplicable because the task order was void from the start.”

Second, the court noted that, for the FASA bar to apply, the protest must be predicated upon a “proposed or issued task order.” According to the court, assessment of this element required consideration of the relief sought. If Siemens had sought to rescind a task order or block award of a task order, the matter would “obviously” have been in connection with the issuance of a task order, according to the court. However, because Siemens “only wishes to be made whole after being led astray by the U.S. Navy’s false procurement needs,” the court concluded that the claim did not challenge the “issuance or proposed issuance of” a task order and was not barred by FASA. With the government’s motion to dismiss denied, the case will proceed to briefing on the merits.

TAKEAWAYS

While the facts here were unique, this decision offers interesting takeaways with respect to both ESPCs and bid protests.

1. Although pre-award costs associated with pursuing an ESPC are normally not recoverable in the event that the company does not receive an award, there may be situations in which recovery is possible—such as where the agency induces a company to expend resources in pursuing the contract despite knowledge that no contract is viable.
2. When assessing potential venues for a suit, companies should not rule out the Court of Federal Claims based solely upon the fact that the case is associated with a task or delivery order. As demonstrated by the decision here, the court’s consideration of the FASA bar may be more nuanced than a simple assessment of whether a task or delivery order was involved.