Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Contractors Must Deal With Integrity Issues In Proposals

Law360, New York (March 16, 2016, 3:25 PM ET) --


David Robbins


Peter Eyre


Olivia Lynch

A Court of Federal Claims protest decision unsealed on March 14, 2016, Algese 2 SCARL v. United States, No. 15-1279C (Fed. Cl. March 14, 2016), may herald a new high water mark in self-policing required from government contractors and grant recipients. This decision begins in dramatic fashion that "[t]his post-award bid protest presents the question of whether the Navy may award a contract to an offeror that has materially misrepresented and concealed its corporate parent's long history of public corruption and fraud in government procurement." Id., at 2. The answer, in 19 pages of detail, is that a wide range of integrity matters arising anywhere within a corporate family may need to be disclosed to the government, and the failure to do so in this case was a "material misrepresentation" and a "false certification to the United States." Id.

While significant standing alone, when combined with other disclosure and present responsibility evaluation trends the Algese decision suggests that contractors and grant recipients must identify, disclose, mitigate, and discuss these issues in their proposals to avoid loss of vital contracts in the bid protest (and, potentially, suspension and debarment) proceedings. Robust compliance reviews by third parties that benchmark policies and procedures are useful tools — and one of very few available to contractors and awardees with these sorts of violations somewhere in their corporate families — to prevent these mitigate these risks in the future.

Algese Case

The Algese case focuses on the April 6, 2015, proposal submission and related certifications of the eventual awardee, Louis Berger Aircraft Services. "At the time of Louis Berger Aircraft Services' certification and proposal submission ... , the Louis Berger family of companies had faced, and was facing, government investigations and prosecution for fraud and bribery related to multiple procurements around the world." Id. at 3-4. These issues were not disclosed to the Navy during the procurement at issue. Id. at 4. Among the integrity-related issues cited by the Court of Federal Claims:

- On Dec. 12, 2014, Derish Wolff, the former chairperson of Louis Berger Aircraft Services' parent corporation Berger Group Holdings, pleaded guilty to a 20-year

conspiracy to defraud the federal government. Id. Four years earlier, in 2010, the Louis Berger Group entered into a deferred prosecution agreement with the U.S. government regarding the same misconduct. Id.

- On July 7, 2015, Berger Group Holdings and Louis Berger International Inc. entered into deferred prosecution agreements with the U.S. government regarding Foreign Corrupt Practices Act violations between 1998 and 2010.

- In February 2015, the World Bank debarred Louis Berger Group and imposed a one-year conditional nondebarment on Berger Group Holdings for making "corrupt payments to government officials in Vietnam." Id. at 5.

These integrity related concerns were problematic for the Navy contract at issue because the solicitation contained FAR 52.212-4(t), which requires the contractor to be responsible throughout contract performance and through final closeout for "the accuracy and completeness of the data within the [SAM.gov] database, and [to be responsible] for any liability resulting from the Government's reliance on inaccurate or incomplete data." Id. at 5 (citing 48 C.F.R. § 52.212-4(t).)

One such required certification concerned "Responsibility Matters," which covers suspensions/debarments/eligibility for award and certain indictments, convictions and civil judgments of the company "and/or any of its Principals." Id. at 6 (citing 48 C.F.R. § 52.209-5.) The Navy, during its diligence, reviewed the System for Award Management and the Federal Awardee Performance and Integrity Information System, and located no "adverse integrity reports" because of the failure of the offeror to make appropriate disclosures. Id. at 6. Indeed, the Navy was unaware of the integrity matters until Algese filed a Government Accountability Office protest regarding the award of a parallel Navy procurement. Id.

The Court of Federal Claims followed the standard that "[m]aterial, intentional misrepresentations in a proposal disqualify an offeror from competing for the contract award," Id. at 10 (citing Microdyne Outsourcing, Inc. v. United States, 72 Fed. Cl. 230, 233 (2006).) And a misrepresentation is "material" if the contracting officer "relied on it in forming his opinion." Id. (citing Acrow Corp. of Am. V. United States, 97 Fed. Cl. 161, 175 (2011).) A contracting officer's reliance on an offeror's misstatement makes an award "arbitrary and capricious." Id. (citing Acros, 97 Fed. Cl. At 175-76 (2011).)

Applying this standard, the Court of Federal Claims found false the Louis Berger Aircraft Services certification under FAR 52.209-7 that neither it nor "any of its principals ... within five years, in connection with the award to or performance by the offeror of a Federal contract or grant, have been the subject of a proceeding ... that resulted in ... a conviction." Id. at 11 (citing AR 419). The Court of Federal Claims found that Derish Wolff's conviction required disclosure because Wolff was a "principal" as defined in the Federal Acquisition Regulation. At the time of the disclosure, Wolff was retired from the offeror's parent company. However, he owned 25 percent of the company at the time, which caused the Court of Federal Claims to find him a principal. In addition, the Court of Federal Claims stated "[u]ndoubtedly, he was [also] a principal when he committed the misconduct" and noted its confusion concerning how a contracting officer could not find a 25 percent ownership share indicative of being a principal. Id., at 11-12.

Finding that the "purposes of the disclosure requirement" require a broader reading of the disclosure requirements with respect to Wolff, the Court of Federal Claims noted:

If the Court were to accept the [contrary] argument, offerors seeking to avoid certification requirements could simply extricate any employees, or in this case, chairpersons, engaging in misconduct before submitting a proposal. Allowing this type of loophole in the certification process would significantly undermine the government's anti-corruption regime and reduce confidence in the competitive procurement process.

Id. at 11. (citing Planning Research Corp. v. United States, 971 F.2d 736, 741 (Fed. Cir. 1992).)

Additionally, the Court of Federal Claims focused attention on a corporate parent's ultimate ownership interest in an offeror sufficient to make the parent a "principal" for disclosure purposes. Because Berger Group Holdings owned — directly in its own name and indirectly through its ownership of Louis Berger Group — 100 percent of Louis Berger Aircraft Services, then Berger Group Holdings was a "principal" of Louis Berger Aircraft Services, thus prompting a certification requirement. Id. at 14.

Perhaps tellingly, the Court of Federal Claims found intent to deceive in the creation of "a new subsidiary in which to dump its criminal liability problems." And that the only named defendant in the 2015 deferred prosecution agreement, Louis Berger International, had not been founded until after the conclusion of the integrity related issues. Id. at 16. This new subsidiary was "not simply deficient or unknowing ... [but instead] willful and intentional." Id.

Final Rule Regarding Disclosing Parent, Subsidiary and Successor Entities to Provide More Complete Performance and Integrity Information

Perhaps in order to make hiding convictions within a new subsidiary more difficult, on March 7, 2016, the U.S. Department of Defense, the General Services Administration and the National Aeronautics and Space Administration published a final rule that requires the disclosure of any immediate owner or subsidiary and all predecessors of an offeror that held a federal contract or grant within the preceding three years. The final rule is designed to provide contracting officers with a "more comprehensive understanding of the performance and integrity of the corporation before awarding a federal contract." Information on Corporate Contractor Performance and Integrity, 81 Fed. Reg. 11988 (March 7, 2016) (to be codified at 48 C.F.R. pts. 1, 4, 9, 22, and 52).

Fair Pay and Safe Workplaces

The trend to require disclosure of violations of law and regulation is also apparent in the Fair Pay and Safe Workplaces proposed rule which requires disclosure of a variety of adverse findings, including "administrative merits determination," "arbitral award or decision," or "civil judgment" decisions rendered against the contractor within the preceding three-year period for violations of 14 number of enumerated federal labor laws, and "equivalent state laws." Fair Pay & Safe Workplaces, 80 Fed. Reg. 30548 (May 28, 2015) (to be codified at 48 C.F.R. pts. 1, 4, 9, 17, 22, 52) (hereinafter "Proposed FAR 22.2002"). The disclosures are required upon proposal submission, upon award and every six months during contract performance. Id. After learning of violations, the contracting officer must request government labor compliance advisor analysis focused on whether the violations are serious, repeated, willful, or pervasive. Proposed FAR 22.2004-1. The contracting officer can then decide whether to award a contract, exercise an option, terminate a contract, or refer the matter to the agency suspending and debarring official. Proposed FAR 22.2004-2 and -3.

Analysis

These trends suggest we are potentially reaching a high water mark for self-policing and self-disclosure with economic and enforcement consequences for contractors and awardees that fail to do so. We are also entering an era where corporate structure may not be as viable a defense to disclosure requirements as it may have been in the past. Indeed, a lack of information available to a contracting officer concerning integrity issues or a contracting officer's failure to reasonably consider this sort of information has caused at least two significant bid protests to be sustained in the past 18 months (Algese and FCi Federal, B-408558.4, .5, .6, 2014 WL 5374675 (Comp. Gen. Oct. 20, 2014).)

So what are contractors to do?

Disappointed bidders aware of integrity related issues concerning awardees have increasingly viable protest grounds. As explained herein, recent protests have been sustained at both the Government Accountability Office and the Court of Federal Claims on these grounds.

Offerors with integrity issues (or perhaps even adverse labor and employment findings) within their corporate family have more work to do. The thrust of the Algese and FCi Federal decisions is that an agency's lack of awareness of the problems, much less successful mitigation of the issues, can be fatal to award in the bid protest context. And the representations and certifications are broad. Therefore, offerors should keep records of integrity related issues within their corporate family sufficient to fully respond to the certifications at FAR 52.209-5, to include:

- Suspensions, debarments and proposed debarments;
- Declarations of ineligibility for the award of contracts by any federal agency;
- Conviction, civil judgment, indictment, or otherwise criminally or civilly charged by an government entity with: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state or local) contract or subcontract;
- Violations of federal or state antitrust statutes relating to the submission of offers;
- Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property;
- Notification within three years of the offer of any delinquent federal taxes in an amount that exceeds $3,000 for which the liability remains unsatisfied; or,
- Termination of one or more contracts for default by any federal agency.

In light of these decisions, offerors might consider their disclosure obligations broadly and err on the side of overdisclosing these items to limit protest risk of a contracting officer not being aware of these issues. But that is only half of the story. Then these offers are also well advised to offer mitigating evidence to provide a reasonable basis for the government to issue an award notwithstanding these disclosures, rather than leave the analysis in the hands of an otherwise busy contracting officer.

Ethics and compliance reviews by an independent third party that benchmark the offeror against industry best practices are also viable methods of providing the contracting officer with independent assurance concerning present responsibility sufficient to make a FAR 9.1 responsibility determination.

Conclusion

The Algese decision is the latest data point on the rising trend line of self-policing and self-disclosure for government contractors and awardees. Given that the Government Accountability Office and the Court of Federal Claims require contracting officers to be aware of, and to reasonably consider, adverse responsibility information, identification and mitigation of these concerns takes on added importance. Third-party ethics and compliance reviews that benchmark offerors with integrity issues in their corporate families against industry best practices can offer important mitigation (and one of the few avenues for mitigation available in these circumstances) that certain offerors may wish to summarize in their proposals.

—By David Robbins, Peter Eyre, Olivia Lynch and Laura Baker, Crowell & Moring LLP

David Robbins and Peter Eyre are partners and Olivia Lynch and Laura Baker are associates in Crowell & Moring's government contracts group in Washington, D.C.