Bid Protests: Trends and Developments

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Agenda

• Reading the Protest Statistics
• GAO’s jurisdiction over task and delivery order protests
• Challenging in-sourcing decisions
• Substantive developments
GAO and Court of Federal Claims Statistics
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## Court of Federal Claims Statistics

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Reading into the numbers

• Causes for spike in protests

• Impact on the GAO and Court protest process

• Predicting future trends
GAO Jurisdiction over Task and Delivery Order Protests
Task and Delivery Order Protests

Background

• Task and delivery orders are issued in accordance with FAR 16.5
  – Does not include GSA Schedule or Blanket Purchase Agreements

• Prior to May 27, 2008: GAO and COFC only had jurisdiction over task and delivery order protests alleging that the order “increases the scope, period, or maximum value of the contract under which the order is issued.”
Task and Delivery Order Protests
Background

• Effective May 27, 2008, GAO was granted exclusive jurisdiction over task and delivery order protests where award is valued in excess of $10 million

• Dual conforming statutes covering Title 10 and Title 41

• The 2008 statute contained an automatic sunset provision – May 27, 2011
Task and Delivery Order Protests Extension of Jurisdiction

• FY2011 NDAA extends GAO’s supplemental protest authority over DOD task and delivery order procurements in excess of $10 million
• Until September 30, 2016
• Change to Title 10 only, not Title 41
Task and Delivery Order Protests
Extension of Jurisdiction

• On May 12, 2011, Senate passed S. 498, the Independent Task and Delivery Order Review Extension Act
• Extends GAO’s supplemental protest jurisdiction over civilian task and delivery orders valued in excess of $10 million until September 30, 2016
Task and Delivery Order Protests
Extension of Jurisdiction

- House introduced, H.R. 899, To Amend Title 41, United States Code, To Extend The Sunset Date For Certain Protests Of Task And Delivery Order Contracts
- Would extend GAO’s supplemental protest jurisdiction over civilian task and delivery orders valued in excess of $10 million until September 30, 2016
- Status and implications
Task and Delivery Order Protests Developments

• Of the 2,299 protests filed in FY 2010, 194 were attributable to GAO’s supplemental task order jurisdiction
  – 129 related to DoD orders
  – 65 related to civilian orders

• CBO reports that 50% of these protests have resulted in “some form of relief from the procuring agency.”
Task and Delivery Order Protests
Developments

- More money than ever being committed via task and delivery order awards
- Within past year, at least three protests of task orders with value above $1 billion
Task and Delivery Order Protests
Developments

• Jurisdiction to hear pre-award protests
• Post-award debriefing is required where value of award exceeds $5 million
• Timely filed protest triggers CICA stay
• GAO has jurisdiction to review merits and whether agency followed required process
• $10 million threshold based on expected value to awardee
• Generally, exchanges must comport with FAR Part 15
In-Sourcing

Protest Jurisdiction and Interested Party Status
In-Sourcing
Background

• FY 2008 NDAA Amended 10 U.S.C. § 2463 to require greater consideration of using DoD Civilian Employees

• Apr. 2008 – DoD issued “guidelines and procedures” to implement 10 U.S.C. § 2463

• Mar. 2009 – President Obama directed OMB to issue guidance to assist agencies to identify wasteful and inefficient contracts
In-Sourcing Protests
Background (cont’d)

• Apr. 2009 – DoD issued Resource Management Decision 802 which decreased funding for contract support and increased funding for civilian manpower
• May 2009 – DoD released guidance on standard to employ when considering conversion candidates
• Jan. 2010 – DoD published Directive-Type Memorandum 09-007 establishing rules for estimating and comparing costs of civilian versus contractor
• FY 2011 NDAA requires DoD to use costing methodology in Direct-Type Memo 09-007
In-Sourcing
A Growing Trend?

• Air Force has instructed each major command to identify candidates for in-sourcing

• USAID has targeted for in-sourcing roughly 1/3 of the positions currently filled by contractors in Washington over the next five years.

• DHS Established Balanced Workforce Program Office and plans to review 68 currently outsourced contracts by fall of 2011 (3,500 positions have already been identified for in-sourcing)

• Customs and Border Patrol has begun implementing the in-sourcing of 1200 positions in the Office of Information Technology
In-Sourcing Protests
Subject Matter Jurisdiction

• District Court v. COFC – Where to File?
• No less than 6 cases challenging DoD in-sourcing decisions filed in U.S. District Courts under APA
• Government has moved to dismiss all for lack of subject matter jurisdiction
• With one exception, Article III Courts have held that COFC has exclusive jurisdiction
In-Sourcing Protests
COFC Exclusive Jurisdiction Over DoD In-Sourcing Decisions

• Tucker Act, 28 U.S.C. § 1491(b)(1), confers exclusive jurisdiction to COFC over:
  – challenge to the terms of solicitation
  – protest of proposed award or award of a contract
  – “any alleged violation of statute or regulation in connection with a procurement or a proposed procurement”

• “in connection with a procurement” is broadly construed

• Challenge to DoD in-sourcing decision involves alleged violation of 10 U.S.C. § 2463 in connection with decision not to contract

• COFC confirmed exclusive jurisdiction in Santa Barbara Applied Research, Inc., v. United States
In-Sourcing Protests
Interested Party Status

• Government playing both sides of the fence
  – argues in moving to dismiss district court actions that contractors would have standing at COFC because they would compete for work and have a chance of winning
  – argues before the COFC that contractors lack standing because no competitive interest

• In *SBAR*, COFC held that incumbent contractor had sufficient interest to challenge in-sourcing decision
In-Sourcing Protests
Challenging Civilian Conversions

• Does COFC have jurisdiction?
  – Unlike DoD, no procedures governing civilian in-sourcing

• What about APA jurisdiction?
  – Open question as to whether there has been a waiver of sovereign immunity
Substantive Developments in Case Law
Communications with Offerors

• Meaningful discussions
  – AINS, Inc., B-400760.4, B-400760.5 – concern that project schedule was too short was not meaningfully raised during discussions when agency requested a new schedule
  – Cigna Government Services, B-401062.2; B-401062.3 – upwardly adjusting protester’s proposed costs because the agency believed them to be unrealistic rather than opening discussions was unreasonable
Communications with Offerors

• What constitutes discussions
  – *Highmark Medicare Services*, B-401062.5, *et al.* – exchanges with offeror after receipt of FPRs does not constitute discussions where the agency requested only that the offeror confirm an aspect of its proposal
  – *PMO Partnership Joint Venture*, B-401973.3, B-401973.5 – communications regarding an offeror’s responsibility does not constitute discussions so long as the offeror does not materially modify its proposal
Questions?
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