

Agency Corrective Action Is No Silver Bullet In Bid Protests

By Dietrich Knauth

Law360, New York (March 06, 2013, 8:45 PM ET) -- Federal agencies are moving faster to correct perceived contracting mistakes rather than get bogged down in bid protests, but attorneys say contractors' eagerness to litigate decisions that don't go their way could undermine the government's attempts to sidestep procurement disputes.

Contractors have been filing bid protests with increasing frequency at the U.S. Government Accountability Office, a trend that is driven in part by declining contract spending, which increases competition for the contract opportunities that remain. In 2012, the GAO handled 2,495 bid protests, a 5 percent increase over 2011, continuing an upward trend that has seen protests rise every year since 2006.

Facing their own budget and staffing shortfalls, agencies aren't eager to incur the expense of taking a case through litigation or defending clear errors in the procurement process, according to Amy Laderberg O'Sullivan, a partner in Crowell & Moring LLP's government contracts group.

"Agencies are taking corrective action more quickly and with greater frequency, but with mixed results in terms of speeding up the process or changing the ultimate award decision," O'Sullivan said.

Increased agency responsiveness is usually a win for contractors, because simply having an agency go back and re-evaluate proposals is something that often satisfies a company's concerns that it was treated unfairly.

The GAO includes corrective action in its "success rate" for protests, which includes victories on the merits and other resolutions in which contractors win some form of relief. That rate was 42 percent in 2012, in line with the percentages that the GAO has reported since 2008. Contractors are more likely to gain relief from corrective action than an outright win — of the 570 GAO protests that reached a decision on the merits in 2012, contractors won 18.6 percent of the time, a rate that is also consistent with GAO statistics since 2008.

"The clients are often pleased with corrective action because it gives them the exact opportunity that they would hope for, just in a shorter turnaround time," O'Sullivan said.

Agencies have an incentive to take corrective action quickly because protesters who win their cases are entitled to recover legal fees from the government. In GAO protests, agencies typically are on the hook for potential fees if they don't take corrective action before their 30-day deadline to respond to a protest, according to David Nadler, a partner in Dickstein Shapiro LLP's government contracts group.

“As a result, particularly given budget constraints, we are seeing agencies assess protests and take corrective action quickly, not only so they can get on with business, but also to avoid having to pay the protester’s legal fees if they lose,” Nadler said.

Getting on with business is an important motivator for agencies, as bid protests at the GAO impose an automatic stay on any protested contract action. The GAO has a relatively quick 90-day turnaround time for protests, but agencies often want to start new projects faster.

However, while corrective action can sometimes solve problems with a particular procurement decision, it is no silver bullet against delays and litigation, especially in an environment where contractors are eager to fight for contracts, O'Sullivan said. When an agency takes corrective action, the original winner will be upset if the new decision causes it to lose a contract, and the losing bidder will be upset if the agency doesn't change its mind after re-evaluating its procurement.

"Companies are definitely fighting harder for fewer dollars," O'Sullivan said. "In either case, someone who has just lost their contract is obviously going to be quite frustrated by this scenario, and now they have an opportunity to protest."

In addition to repeat protests at the GAO, contractors also have a chance to protest a GAO decision or agency corrective action to the U.S. Court of Federal Claims, which, unlike the GAO, can issue legally binding decisions.

"There have been several cases in the past few years where the Court of Federal Claims has found the GAO's decision, and thus the corrective action, to be irrational," O'Sullivan said. "It's another way to drag out the process even further."

O'Sullivan completed one such protected protest in August 2012, in defense of Spectrum Healthcare Resources Inc.'s contract to provide health care services to military beneficiaries in Fairfax and Woodbridge, Va. Beginning in 2009, the incumbent contractor, CR Associates, filed seven GAO protests and two Court of Federal Claims challenges. The Army took corrective action after the first three protests were filed, after the fourth GAO protest was filed, and again after the first Court of Federal Claims action was filed, but CR Associates continued to fight the Army's decision.

Still, while repeated protests are more common, not all losing bidders contractors are as persistent as CR Associates, O'Sullivan said.

“These protests can go on repeatedly, but if you see repeated awards to the same companies, there's also some messaging associated with that, and companies may see the writing on the wall and tell themselves, 'No matter what I do, I'm still not going to get this work,'" O'Sullivan said.

--Editing by Elizabeth Bowen and Lindsay Naylor.