

Judge Upholds GAO Stay Of \$675M Army Corps Canal Contract

By Sean McLernon

Law360, New York (May 15, 2012, 5:45 PM ET) -- A federal judge on Monday ruled that a \$675 million U.S. Army Corps of Engineers contract award for canal work in New Orleans remains up for grabs, dismissing a suit which challenged the U.S. Government Accountability Office's decision to stay the contract.

U.S. Court of Federal Claims Judge Victor J. Wolski's memorandum was filed under seal, but in a short judgment statement the judge said that all of the claims brought by plaintiff CBY Design Builders have been dismissed or entered in favor of the government and intervening defendants PCCP Constructors and Bechtel Infrastructure Corp.

According to CBY attorney Amy O'Sullivan of Crowell & Moring LLP, however, the ruling still found that one of the GAO's key findings was irrational, and gave the Army Corps ample discretion in applying corrective action.

"Ultimately, the court did not tell the Corps what it must do, only what it may do," O'Sullivan said. "It appears like our motion was denied, but that's not truly the case. Yes, there's not an injunction imposed on the Corps as we sought, but there are also limited requirements about what it has to do or does not have to do."

The GAO in August sustained bid protests from PCCP and Bechtel over the contract award to CBY, citing a potential conflict of interest, the Army Corps' unreasonable evaluation of CBY's compliance with foundation design requirements, and confusion over whether the budget figure provided by the Army Corps was a requirement or a guideline.

The decision instructed the Army Corps to amend its solicitation and accept revised proposals on a fixed-price, design-build contract for permanent canal closures and pumps protecting three outfall canals in New Orleans from storm surges from Lake Pontchartrain.

The Army Corps began accepting new proposals shortly after the GAO decision, but the process was put on hold when CBY lodged its suit in November. That process should start up again soon, according to PCCP attorney Neil H. O'Donnell of Rogers Joseph O'Donnell.

"The Corps position has always been that this is important work in New Orleans that should move forward," O'Donnell said. "I would be surprised if this didn't happen quickly."

In their bid protests, Bechtel and PCCP argued that the request for proposal did not allow bidders to submit proposals for less than \$700 million. The Army Corps responded by saying the \$700 million figure was not meant to be an iron-clad requirement — which would be a violation of the Competition in Contracting Act — but rather a reinforcement that the agency was placing design over price.

The GAO ruled that the Army Corps never told the bidders that offers made for less than \$700 million would be favorably considered. Judge Wolski, however, ruled on Monday that the GAO's holding that the contractors were misled about the price was irrational, O'Sullivan said.

The CBY attorney said that based on this finding, it is the company's position that the Army Corps should reevaluate the existing proposals, and enter into discussions and accept limited proposal revisions to the extent mandated by the Federal Acquisition Regulation, rather than amending the solicitation to start the entire process over again.

A representative from the Army Corps of Engineers was not immediately available for comment Tuesday.

CBY is represented by Amy O'Sullivan of Crowell & Moring LLP.

PCCP is represented by Neil H. O'Donnell of Rogers Joseph O'Donnell.

Bechtel is represented by Marcia G. Madsen of Mayer Brown LLP.

The case is CBY Design Builders v. USA, case number 1:11-cv-00740 in the U.S. Court of Federal Claims.

--Additional reporting by Greg Ryan. Editing by Sarah Golin.

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