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Federal Contracts

Revolving Door a Major Trend In Bid Protest Cases, Panelists Say

Interacting with current or former government employees presents a risk when filing bid protests, attorneys from Crowell & Moring said during a May 5 panel discussion at the firm's Ounce of Prevention Seminar (OOPS).

Other top risks include hiring an incumbent's team at lower pay and dealing with corporate restructurings, they said.

There is a presumption that a former government official participating on an effort to win a contract will use inside information and place competitors at a disadvantage, Crowell & Moring Partner Tom Humphrey said, citing International Resources Group, GAO, B-409346.2, 12/11/2014, decision released 12/23/14 (102 FCR 742, 12/30/14).

"If you think about it, that makes perfect sense," Humphrey said. "The Government Accountability Office (GAO) can't parse the proposal to see if it was impacted by that person's knowledge."

Attorneys should recognize that interpreting the scope and applicability of revolving door statutes is the province of the Designated Agency Ethics Official (DAEO), Humphrey said. "Proceeding without a DAEO consultation is a major risk," he said.

At the same time, only contracting officers (COs) make procurement integrity determinations, per Federal Acquisition Regulation subpart 9.5, he said.

"Don't just put the DAEO letter on the shelf and assume you are protected to perpetuity," he said.

Rather, inform and ask for guidance from a CO—the sooner the better. A reasonable investigation by a CO is given substantial deference and is "very difficult to challenge successfully," he said.

But Humphrey warned that inadequate investigations may lead to a sustained protest, as in PCCP Constructors, JV et al., GAO, B-405036.6 et al., 8/4/11.

Humphrey summarized his discussion with several practical tips for attorneys:

- obtain a DAEO letter before employment discussions and perform due diligence on the disclosures underlying the DAEO letter;
- if using former government officials during proposal preparation, disclose that fact early in the process to the CO to permit an agency investigation, or wall off the former official from all proposal preparation; and

■ check whether potential competitors have hired former agency officials to ensure you are not placed at a competitive disadvantage.

Cutting Compensation, 'Bait and Switch'. Another problem can occur if an incoming contractor hires incumbent workers at less pay or misrepresents their commitments to the new contract, the firm's attorneys said.

Paying incumbents less is growing more common as the government moves towards more lowest-price, technically acceptable contracting, Crowell & Moring Partner Dan Forman said.

This can lead to a protest based on the awardee's labor rates being unrealistically low, as in Magellan Health Servs., GAO, B-298912, 1/5/07, Crowell & Moring Counsel James Peyster said.

It also may result in rejection of price or downscoring of a proposal, as in Health Net Federal Servs., LLC, GAO, B-401652.3, 11/4/09. Moreover, in Alutiiq Pacific, LLC, GAO, B-409584, 6/18/14, it led to an unrealistic evaluation rating of the awardee's staffing.

"You can do a lot to head this off at the pass," Peyster said. "Look out for this up front, because once it's in your proposal, there's not much you can do about it."

Best practices include:

■ proposing multiple staffing approaches along with hiring incumbents; and

■ not committing to a particular level of hiring incumbents, such as 50 percent of the current workforce.

Another issue raised by hiring incumbents is the "bait and switch," where an awardee knowingly or negligently said it would rely on specific workers it did not expect to furnish, Peyster said.

"In dozens of cases over the past 20 years, GAO has rejected bait and switch claims in which a new contractor attempts to hire incumbent key personnel after naming other key personnel in the proposal," he said.

Contractors should never promise to use an employee who has not made a commitment to the new contract, he said. Firms also should clearly represent that the list of key personnel is ready to perform the work, even if it plans to hire additional incumbents.

Corporate Restructuring. Corporate restructuring is common in the age of sequestration and can create potential contracting issues, Crowell & Moring Associate Rob Sneckenberg said. In particular, it can affect the accuracy and validity of a contract proposal.

For example, in Wyle Laboratories, Inc., GAO, B-408112.2, 12/27/13, the awardee's proposal contained assertions on corporate finances that were rendered obsolete by the mid-procurement split of the contractor (101 FCR 55, 1/21/14).

In addition, a newly-acquired company can create organizational conflicts of interest, Sneckenberg said. Changing the name of an offeror in the middle of a procurement can create questions of privity and acceptance.

Communicating with a CO can resolve many of these concerns, he said. In addition, proposals should be up-

dated and revised in the middle of procurements so inaccurate information is not conveyed.

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