5 Most Important Bid Protest Decisions Of 2019

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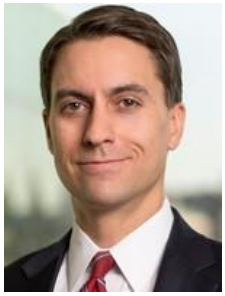

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In 2019, the U.S. Court of Federal Claims and the U.S. Government Accountability Office issued five decisions worthy of particular note:

- NetCentrics Corp. v. U.S.;[1]
- PAE-Parsons Global Logistics Services LLC v. U.S.;[2]
- Space Exploration Technologies Corp. v. U.S.;[3]
- Oracle America Inc. v. U.S.;[4] and
- Blue Origin Florida LLC.[5]

This article provides a brief overview of these five cases and discusses how they might shape the bid protest landscape going forward.

1. NetCentrics

The Facts

In response to allegations made in a GAO bid protest, the U.S. Department of Defense investigated whether the contract awardee had made a material misrepresentation in its proposal about the availability of one of its proposed key personnel. The DOD concluded that the awardee's proposal did misrepresent the availability of one of the awardee's proposed key personnel and that this misrepresentation was material because the DOD relied on it during the evaluation. As a result, the DOD rescinded the award and disqualified the contractor from the competition.

The disqualified contractor then filed its own GAO bid protest, challenging, among other things, that the DOD's determination that its proposal contained a material misrepresentation. The GAO denied the disqualified contractor's protest, concluding that the agency reasonably found that the contractor's proposal contained a material misrepresentation and that the agency acted reasonably in rescinding the award and disqualifying the contractor.

The next day, the disqualified contractor protested at the U.S. Court of Federal Claims, arguing, among other things, that, "to disqualify its proposal on material misrepresentation

grounds, the agency was required to find not only that [the contractor] made false statements upon which the agency relied, but also that [the contractor] did so with the intent to deceive the agency." The contractor argued that "intent to make a false statement is a necessary element of a material misrepresentation."

The COFC, in turn, stated that an intentional material misstatement reflected egregious behavior that threatens the integrity of a procurement, but an intentional misstatement is not necessary in a case like this because an inadvertent material misrepresentation also "undermines the agency's ability to make well-reasoned procurement decisions that serve the public interest." Requiring intentionality, the COFC reasoned, ran the risk of reducing offerors' incentives to exercise due diligence when preparing their proposals.

For these reasons, the COFC concluded that an agency "may reasonably disqualify a proposal on material misrepresentation grounds where — despite the fact that the misrepresentation was inadvertently included in the proposal — the agency relied upon it when making its award decision." The COFC then held that, in this case, the agency reasonably concluded that the disqualified contractor's proposal contained such a misrepresentation and, further, that the misrepresentation was a material one.

The Takeaway

Multiple COFC decisions have required the false statement to be intentional for a material proposal misrepresentation to exist. The NetCentrics decision, however, departs from those prior cases because it removes the need for the proposal misrepresentation to be intentional to be disqualifying.

Notably, the COFC's holding here is generally consistent with the GAO's case law, which holds that a material proposal misrepresentation (or bait and switch) may exist where the offeror either knowingly or negligently made a material misrepresentation in its proposal.[6]

COFC decisions are not binding on other COFC judges,[7] so another case could have a different result. But, NetCentrics has filed an appeal, meaning that the U.S. Court of Appeals for the Federal Circuit might soon have the last word.

2. PAE-Parsons Global Logistics Services

The Facts

In April, the U.S. Army awarded four indefinite-delivery, indefinite-quantity, or IDIQ, contracts, as well as the associated task orders, under its Logistics Civil Augmentation Program, or LOGCAP, V solicitation, decisions that the Army only recently decided to revisit[8] as part of corrective action in response to bid protests.[9]

The solicitation called for the Army to issue at least four IDIQ contracts to cover the six geographic combatant commands, or COCOMs, and Afghanistan, in addition to seven task orders under those IDIQs.

Here, the key fact was that the Army made a single contemporaneous award of the LOGCAP V IDIQ contracts and their associated task orders. Thus, PAE-Parsons received an IDIQ contract and the U.S. Southern Command task order.

Fluor Intercontinental Inc. received another IDIQ contract and the U.S. African Command task order. PAE-Parsons challenged the Army's award of an IDIQ to Fluor.[10] The Army

moved to dismiss the complaint, arguing that the Federal Acquisition Streamlining Act deprived the COFC of jurisdiction because the protest involved the award of a task order.

The Army also argued that PAE-Parsons lacked standing because PAE-Parsons had, in fact, received an IDIQ award, meaning that PAE-Parsons was not a disappointed offeror.

Under FASA, only the GAO has jurisdiction over bid protests of task orders, if certain task-order value thresholds are met.[11] The Army, thus, argued that, because the solicitation related to the award of a task order, FASA stripped the COFC of jurisdiction.

PAE-Parsons responded that FASA did not divest the COFC of jurisdiction because PAE-Parsons was not protesting the award of the African Command task order, but instead, the IDIQ contract award to Fluor. The COFC agreed with PAE-Parsons because the task order was directly based on the offerors' IDIQ contract technical ratings and, thus, the IDIQ award also directly impacted the task orders for which it would then become eligible. The fact that task order awards resulted from the IDIQ awards did not divest the COFC of jurisdiction over the IDIQ contract awards themselves.

The COFC also rejected the Army's argument that PAE-Parsons did not have standing to challenge the IDIQ contract award to Fluor because it had itself won an IDIQ contract. The Army argued that PAE-Parsons was not an interested party because the COFC only had jurisdiction over cases brought by disappointed bidders, and PAE-Parsons, as an IDIQ awardee, was not a disappointed bidder.

The COFC disagreed, finding that PAE-Parsons was an actual bidder with a substantial chance of receiving the contract because it had submitted a bid and was one of the offerors included in the competitive range with respect to the specific IDIQ contract at issue. In addition, PAE-Parsons had an economic interest in stopping the government from making further awards under a multiple-award solicitation.

The Takeaway

Even though the COFC generally lacks task-order protest jurisdiction, it retains jurisdiction over protests relating to IDIQ contracts, bringing protests over task order awards into its jurisdiction when those awards are inextricably linked to the award of an IDIQ contract.

3. Space Exploration Technologies

The Facts

Space Exploration Technologies Corp., or SpaceX, challenged the evaluation and award decisions of the U.S. Air Force for space launch services for national security missions under the statutory authority of the DOD to enter into other transaction agreements, or OTAs.[12] OTAs are not contracts, grants or cooperative agreements, and generally are not subject to federal procurements laws and regulations.

The government filed a motion to dismiss the protest for lack of subject matter jurisdiction. SpaceX filed an opposition and, in the alternative, a motion to transfer venue.

The COFC held that it lacked subject matter jurisdiction because the disputed launch service agreements were not procurement contracts, and the Air Force evaluation and award decisions regarding them were not in connection with a procurement or proposed procurement.

The launch service agreement competition sought certified launch services providers to develop launch system prototypes, while later stages of the Air Force's acquisition plan involved competitive procurements for launch services, making each stage a separate solicitation. The COFC granted the government's motion to dismiss the complaint for lack of subject matter jurisdiction.

Nevertheless, the COFC granted SpaceX's motion to transfer the case to the U.S. District Court for the Central District of California. The COFC concluded that the interest of justice justified the venue transfer because SpaceX had alleged nonfrivolous claims of improper agency action.

The Takeaway

The rising popularity of OTAs has caused concern that agencies, long frustrated with bid-protest procedures, might be misusing OTAs to avoid outside review by the COFC or the GAO of agency procurement decisions. Now, it appears that federal district courts might provide a venue for disappointed OTA participants.

The California court has not yet reviewed its own subject matter jurisdiction — a hearing on the initial briefs is not scheduled until March 2020 — but the jurisdictional aspects of this case will certainly be the subject of continued interest in the months to come.

4. Oracle America

The Facts

A federal procurement story usually only gets mainstream news attention when it is controversial. That is certainly the case here with Oracle's protest of the DOD Joint Enterprise Defense Infrastructure, or JEDI, procurement, a case where political intrigue and a tangled procedural posture make a bid protest more noteworthy than the pure legal issues otherwise would.

With JEDI, the DOD plans to award a single-vendor contract for most of its cloud services, a $10 billion effort over 10 years. That single vendor has turned out to be Microsoft Inc., which won the contract on Oct. 25.

When the DOD issued the solicitation, Amazon Web Services Inc. was considered by some to be the favorite to win the award.[13] The Microsoft award decision is now controversial in its own right because of allegations of undue influence by President Donald Trump in the award decision, and Amazon has protested it separately.[14]

After the solicitation was issued on July 26, 2018, four offerors submitted proposals: Oracle, Amazon, Microsoft, and IBM Corp. Arguing that the DOD's single-award approach was illegal and irrational, Oracle protested the solicitation terms at the GAO.[15]

Oracle amended its GAO protest to include allegations that the JEDI solicitation requirements were "designed around a particular cloud service" and that the contracting officer failed to evaluate properly potential conflicts of interest involving the relationship between Amazon and several people working on the procurement.[16] The GAO denied Oracle's protest, and Oracle then went to the COFC.[17]

In its COFC complaint, Oracle challenged (1) the DOD's decision to make a single award

rather than multiple awards, (2) the reasonableness of the solicitation's pass-or-fail technical "gate criteria," and (3) the reasonableness of the DOD's evaluation of alleged conflicts of interest of personnel involved in the procurement.[18]

The gate criterion key to the COFC decision required at least three existing unclassified commercial cloud data centers in the U.S., rated at the Federal Risk and Authorization Management Program, or FedRAMP,[19] moderate authorized level. Oracle was unable to meet the FedRAMP moderate-authorized requirement at the time of proposal submission.

Oracle argued in part that the solicitation's pass-or-fail gate criteria were crafted to favor Amazon.[20] Oracle also argued that the gate criteria were unreasonable, in part, because their establishment was tainted by the conflicts of interest of those DOD personnel involved with drafting those criteria.

While the COFC considered Oracle's pre-award protest of the terms of the JEDI solicitation, the DOD continued to evaluate proposals, eventually eliminating Oracle from the competition because Oracle's proposal did not meet the FedRAMP moderate-authorized gate criterion.[21]

The COFC determined that the contracting officer reasonably justified her single-award decision consistent with the rules of the Federal Acquisition Regulation, which prefer multiple awards of indefinite-quantity contracts like JEDI,[22] except under certain conditions.

The contracting officer found three reasons why multiple awards would be improper, all of which the COFC found reasonable: (1) more favorable contract terms and conditions, (2) unacceptable administrative burden with multiple contracts, and (3) multiple contracts would not be in the best interests of the United States.

The DOD's single-award decision, however, also rested on a determination and findings signed by the DOD under secretary of defense for acquisition, technology and logistics, which was mandated by a statutory requirement not to award such a large contract to a single vendor unless certain exceptions applied.[23]

The exception picked — that "the contract provides only for firm, fixed price task orders ... for ... services for which prices are established in the contract for the specific tasks to be performed" — was unreasonable because prices were not yet established in the contract for specific services when neither the tasks nor the prices exist yet, making the exception inapplicable. Nevertheless, the court found that Oracle could not demonstrate that the agency's error prejudiced it because Oracle still could not meet the FedRAMP moderate-authorized gate criteria requirement.

Oracle challenged the FedRAMP moderate-authorized requirement of gate criterion 1.2, arguing that the requirement exceeded the DOD's needs. The COFC, however, found that Gate Criteria 1.2 related to the DOD's minimum needs.

Finally, we come to the alleged conflicts of interest, which are the sources of the drama in this case, and which could justify their own article. Indeed, as the COFC itself stated, the "facts on which Oracle rests its conflicts of interest allegations are certainly sufficient to raise eyebrows" because at least two DOD officials were negotiating for Amazon employment while working on this procurement.

The COFC nevertheless found reasonable the contracting officer's determination that the

allegedly conflicted employees were "bit players in the JEDI Cloud project" whose involvement did not "taint the work of many other persons who had the real control of the direction of the JEDI Cloud project."

In the end, because the solicitation contained Gate Criteria 1.2, which required FedRAMP moderate-authorized security, a reasonable requirement untainted by any potential conflict, and because Oracle could not meet that requirement, the COFC held that Oracle could not demonstrate that it was prejudiced by the DOD's actions.

The Takeaway

Oracle has appealed to the Federal Circuit, while Amazon pursues its own COFC protest of the award of the JEDI contract to Microsoft. Thus, Oracle still has the potential to upend the entire procurement, regardless of the outcome of Amazon's case, because Oracle challenges the underlying rules of the procurement.

While everyone's attention is now focused on Amazon's protest, given its allegations of presidential interference in a contracting matter, Oracle's appeal could keep the drama going for months, especially if it is successful in challenging the FedRAMP gate criterion that it was unable to meet.

Such an outcome would require amending the solicitation, seeking revised proposals and then re-evaluating them, likely to be followed by more protests. Moreover, further delay could even force the DOD to rethink its entire approach to Cloud computing, which could make things even more complicated. Stay tuned.

5. Blue Origin Florida

The Facts

At the GAO, Blue Origin — like Amazon, a company owned by Jeff Bezos — protested the terms of another Air Force space launch solicitation, arguing that they were ambiguous, restricted competition, and were inconsistent with customary commercial practice. The GAO denied all the grounds of protest, except one, which it sustained.

The SpaceX case above involved a protest of an earlier phase in this procurement in which Blue Origin was a defendant-intervenor. This case involved phase 2, which contemplated the award of two competitive, fixed-price requirements contracts for launch services to place multiple national security payloads into space from FY 2020 through FY 2024, using commercial item and negotiated acquisition procedures. The best-value offeror would receive approximately 60% of the work, while the second awardee would receive 40%.

Rather than necessarily awarding to the two highest-rated offerors, the Air Force here planned to make the award "to the two offerors that, 'when combined, represent the overall best value to the government.'" The Air Force intended to pair the four expected proposals in all possible permutations and then conduct a tradeoff review of those pairings.

In other words, while the Air Force could make the awards to the two highest rated offerors, it did not have to, especially when doing so would result in a common weakness. Thus, the complementary attributes of the two proposals were what determined best value.

The GAO rejected this approach, finding that "the Air Force's 'when combined' basis for award fails to provide an intelligible basis upon which offerors are expected to compete."

Offerors must understand what the evaluation factors are and the relative weights of those factors in an award decision.

The Air Force's approach did not allow intelligent competition because the awards would depend on "evaluating pairings of proposals using the undefined criterion of whether two individually developed and submitted proposals are the most complementary of one another." In fact, no offeror would be able to compete intelligently short of colluding with other potential offerors.

The GAO, therefore, sustained the protest and recommended that the Air Force amend the solicitation to comply with the requirements of applicable procurement law and regulation.

The Takeaway

The Air Force gets extra points for creativity but not for legal compliance. Absent any further innovative thinking, the Air Force will probably have to select its two awardees based on a standard best-value tradeoff approach.

Conclusion

The decisions discussed in this article are the five most important bid protest decisions of 2019. These cases will have a significant impact for years to come on protests involving allegations of material proposal misrepresentations, the degree to which task order awards are intertwined with the award of the underlying IDIQ contract, the proper venue for challenges to OTA evaluation and award decisions, the potential for a large procurement to derail when large stakeholders are involved, and the risks of overly creative thinking by agency procurement officials.

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[1] NetCentrics Corp. v. United States, 145 Fed. Cl. 158 (2019).

[2] PAE-Parsons Global Logistics Servs. LLC v. United States, 145 Fed. Cl. 194 (2019).

[3] Space Exploration Techs. Corp. v. United States, 144 Fed. Cl. 433 (2019).

[4] Oracle America Inc. v. United States, 144 Fed. Cl. 88 (2019).

[5] Blue Origin Florida LLC, B-417839, 2019 CPD ¶--- (Comp. Gen. Nov. 18, 2019).

[6] See, e.g., Valkyrie Enter. LLC, B-415633.3, 2019 CPD ¶ 255 at 9 (Comp. Gen. July 11, 2019) ("To establish an impermissible bait and switch, a protester must show that a firm either knowingly or negligently represented that it would rely on specific personnel that it did not expect to furnish during contract performance, and that the misrepresentation was relied on by the agency and had a material effect on the evaluation results.") (citation

omitted).

[7] See, e.g., Casa De Cambio Comdiv S.A. De C.V. v. United States, 291 F.3d 1356, 1364 n.1 (Fed. Cir. 2002) (citation omitted).

[8] https://www.law360.com/articles/1226698/army-to-revisit-bids-amid-protests-over-82b-logistics-deal.

[9] Four protests of this solicitation are before COFC, all of which have been briefed on cross-motions for judgment on the administrative records. According to a recent Status Report, the Army intends to re-open the procurement and issue new price reasonableness determinations, a process it expects to take 45 days. Status Rept. at 3, PAE Parsons Global Logistics Servs. LLC v. United States, 19-cv-1205, ECF No. 73 (Fed. Cl. Dec. 9, 2019).

[10] Several disappointed offerors had protested at the GAO, but not all the cases were completed by the time one protester went to the COFC, which divested the GAO of jurisdiction over the remaining protests because the GAO does not, unless asked by a court, decide a case where the matter in dispute is also before a court of competent jurisdiction. 4 C.F.R. § 21.11. Here, however, the COFC requested advisory opinions, so the GAO issued decisions after the COFC cases were filed: AECOM Mgmt. Servs., Inc.–Advisory Opinion, B-417506.12, 2019 CPD ¶342 (Comp. Gen. Sept. 18, 2019), PAE-Parsons Global Logistics Servs. LLC–Advisory Opinion, B-417506.13, 2019 CPD ¶364 (Comp. Gen. Oct. 18, 2019). The GAO issued a third advisory opinion in the same matter, but that still appears to be under seal. See Fluor Intercontinental, Inc. v. United States, 19-cv-1580, ECF No. 35 (Fed. Cl. Nov. 5, 2019).

[11] See 10 U.S.C. § 2304c; see also 41 U.S.C. § 4106(f).

[12] See 10 U.S.C. §§2371(a), 2371b(a).

[13] See Aaron Gregg, Pentagon doubles down on 'single-cloud' strategy for $10 billion contract, The Washington Post (Aug. 5, 2018) ("Amazon Web Services, the cloud-computing unit of Amazon.com, is seen as a front-runner because of its work with the CIA under an earlier, $600 million contract.").

[14] See Aaron Gregg & Jay Greene, Trump used Pentagon budget for personal gain, Amazon alleges, The Washington Post (Dec. 9, 2019) ("President Trump's 'repeated public and behind-the-scenes attacks' against Amazon led the Pentagon to choose a lesser bid from Microsoft for a massive cloud computing contract.").

[15] See Pre-Award Protest of Oracle Am., Inc. at 19-37, https://federalnewsnetwork.com/wp-content/uploads/2018/08/Oracle-Pre-Award-Protest.pdf.

[16] See Oracle Am. Inc., B-416657 et al., 2018 CPD ¶391 at 10, 14-19 (Comp. Gen. Nov. 14, 2018).

[17] Oracle's COFC filing resulted in the summary dismissal by the GAO of its separate pre-award protest there. See 4 C.F.R. §21.11. IBM did not protest further at COFC.

[18] Redacted Compl. ¶¶196-392, Oracle Am., Inc. v. United States, 18-cv-1880, ECF No. 13 (Fed. Cl. Dec. 10, 2018) (Redacted Compl.).

[19] "The Federal Risk and Authorization Management Program (FedRAMP) is a government-wide program that provides a standardized approach to security assessment, authorization, and continuous monitoring for cloud products and services." About Us, FedRAMP, available at https://www.fedramp.gov/about/ (last visited Dec. 15, 2019).

[20] See Redacted Compl. ¶4 (original emphasis omitted).

[21] IBM's proposal was also found unacceptable under one of the Gate Criteria and eliminated from further consideration, leaving only Amazon and Microsoft in the competition.

[22] FAR 16.504(c)(1)(i).

[23] 10 U.S.C. §2304a(d)(3).