The 5 Most Important Bid Protest Decisions Of 2023

By **Aron Beezley, Sarah Osborne and Nathaniel Greeson** (January 16, 2024)

In 2023, the U.S. Court of Federal Claims and the U.S. Government Accountability Office issued five bid protest decisions worthy of note:

Aron Beezley

- CACI Inc.-Federal v. U.S.
- Matter of Guidehouse Inc.
- Matter of Kupono Government Services LLC
- Myriddian LLC v. U.S.
- SH Synergy LLC v. U.S.

This article provides summaries and discusses how these cases might shape future bid protests.

Sarah Osborne

1. CACI

The Facts

In CACI, the protester in the U.S. Court of Federal Claims challenged the agency's findings that its proposal had technical deficiencies. The defendants moved to dismiss the protest for lack of standing as an interested party, arguing that CACI had an organizational conflict of interest, or OCI, that rendered it ineligible for award notwithstanding the technical deficiency issue.

Nathaniel Greeson

CACI argued against a de novo OCI review by the claims court. The court dismissed the protest, holding that CACI lacked standing because the OCI made CACI ineligible. CACI appealed.

In May 2023, the U.S. Court of Appeals for the Federal Circuit held that the Claims Court erred in treating standing as jurisdictional and in making de novo findings about the potential OCI. Because the standing issue involved statutory standing, not Article III standing, the issue of CACI's standing was nonjurisdictional.

The Federal Circuit, thus, overruled prior law treating interested-party status and prejudice as jurisdictional issues, and determined that, because the issue of statutory standing is nonjurisdictional, determining a protester's interested-party status is unnecessary before resolving the protest merits.

Moreover, the Federal Circuit concluded that, in evaluating statutory standing, the court may not make a final merits-based determination of contract entitlement but may only make a preliminary assessment of the protester's chance of receiving the contract.

Where the issues of statutory standing and a resolution on the merits overlap, permitting a de novo standing determination amounts to a de novo merits determination, which is contrary to the court's "arbitrary and capricious" review standard. Thus, the court should remand such issues to the agencies in the first instance.

The Takeaway

The Federal Circuit's decision represents a significant departure from prior law on standing and prejudice. The court may now rely more heavily on merits-based holdings to resolve protests, rather than on holdings based on standing or prejudice.

In turn, protesters may now seek to file protests that would previously have been summarily barred for jurisdictional reasons. Time will tell whether this case will lead to an increase in remands of bid protest cases to agencies, as the court wrestles with the new law.

2. Guidehouse

The Facts

This GAO protest concerned an allegation that the agency's technical evaluation board, or TEB, chair had a potential conflict of interest that the agency failed to investigate or mitigate. The TEB chair was allegedly a senior consultant of the contract awardee.

The TEB chair advised the agency of her previous employment and asked whether that employment precluded her from TEB service. In response, the agency initiated a limited investigation of the matter.

Although the agency represented to the parties and the GAO that it conducted an investigation, in September 2023, the GAO found that the agency provided no "underlying contemporaneous documentation relating to its limited investigation," relying on the doctrine of attorney-client privilege in response to the GAO's document request.

The GAO's decision found that, while the agency had the prerogative to claim the attorney-client privilege, "an agency's efforts to limit document production can frustrate the mandate of the Competition in Contracting Act ... for [the GAO] to fairly resolve bid protests."

The GAO also noted substantive concerns with the agency's purported investigation: (1) There was no evidence of any independent investigation by a contracting officer, (2) there was contradictory information about the TEB chair's financial interest, and (3) the record reflected the TEB chair's participation in the acquisition before seeking an ethics opinion. Thus, the GAO sustained the protest.

The Takeaway

Anecdotally, there has been an increase in agencies' unwillingness to produce basic and directly relevant documents, a practice at cross-purposes with the GAO's legislative mandate to fairly resolve bid protests.[1] Guidehouse, therefore, reminds protest parties of the risk of overly narrow agency document production.

3. Kupono

The Facts

In Kupono, the GAO in June 2023 sustained protests of agency corrective action taken in response to earlier protests.

The protesters had previously challenged the contract award. In response, the agency took

corrective action, advising the GAO that, among other actions, it would evaluate revised cost proposals but did not say that it would allow other proposal revisions.

Kupono initially objected to the proposed corrective action as too narrow, but the GAO nonetheless dismissed the protests as academic.

Kupono then filed a separate GAO protest of the corrective action. The other protester similarly filed a GAO protest of the corrective action.

Kupono supplemented its protest based on the agency's revised proposal revision instructions. Both protesters argued that the agency should allow revisions of cost proposals because the cost and technical proposals were so intertwined that any cost proposal changes would materially affect the technical proposals.

In response, the agency provided vague contracting officer declarations, which the GAO found neither articulated flaws in the procurement process nor provided any substantive explanation for limiting the corrective action to exclude technical proposal revisions.

In response to protester document requests relating to the decision to limit the proposal revision scope, the agency asserted an unidentified privilege objection, but failed to produce a privilege log when the GAO requested one.

While agencies have broad discretion to conduct corrective action, the GAO decision noted that "the corrective action must be appropriate to remedy the concern" that prompted the corrective action. With no record to show what concerns prompted corrective action, the GAO was unable to tell whether the proposed limited corrective action was appropriate.

Further, the GAO found persuasive the protesters' arguments that their cost and technical proposals were intertwined, and the agency did not explain why allowing technical proposal revisions would be inappropriate. Given the lack of any basis to determine whether the proposed corrective action was appropriate, the GAO sustained the protests.

The Takeaway

Although there is broad deference to agency corrective action, this protest decision provides a rare example of and guide to challenging unreasonably narrow corrective actions. Further, the decision underscores that an agency's corrective action decision must be adequately documented.

4. Myriddian

The Facts

The Myriddian protest at the Court of Federal Claims argued that the awardee was ineligible pursuant to Federal Acquisition Regulation 52.204-7 because the awardee's System for Award Management, or SAM, registration had lapsed for a brief period after submission of the offer but before the contract award.

That FAR clause says: "An Offeror is required to be registered in SAM when submitting an offer or quotation, and shall continue to be registered."

The protester further argued that the registration lapse rendered the awardee ineligible under the terms of the solicitation, which stated: "If an Offeror fails to meet the solicitation

requirements, including the submission of applicable contract documentation, the Government will not make an award to that Offeror."

The court found in favor of the protester, noting that it had routinely upheld agency determinations that an offeror is ineligible for award for failing to comply with FAR requirements.

While those cases required a disappointed offeror to recognize that it failed to comply with a requirement with which the awardee complied, the court stated that in "this case the roles are reversed; the U.S. must accept that the awardee failed to satisfy a solicitation requirement."

The Takeaway

SAM registration issues have bedeviled government contractors for years. As this decision makes clear, unless and until the Federal Acquisition Regulatory Council amends FAR 52.204-7 to remove the continuous-registration requirement, offerors must ensure that they are registered in SAM at all stages of the procurement.

This case also reminds agencies that, before a contract award, the agency must make sure that the awardee has also been registered in SAM throughout the procurement, lest a protest on that issue be successful.

5. SH Synergy

The Facts

In this court protest, two U.S. Small Business Administration approved mentor-protégé joint ventures[2] challenged the solicitations terms in a procurement for information technology services, called Polaris, a General Services Administration indefinite-delivery, indefinite-quantity, or IDIQ, governmentwide acquisition contract worth potentially as much as $100 billion.

The protests argued that (1) the GSA improperly excluded mentor-protégé joint ventures with the same mentors from submitting proposals with other protégés, (2) the solicitations improperly made the protégé in a mentor-protégé joint venture meet individually the same evaluation criteria as other offerors generally, and (3) the solicitations improperly failed to include price evaluations at the IDIQ level.

The court denied the first count but ruled for the protesters on the latter two.

Polaris is a total small business set-aside with four unique small business set-aside pools, in which awardees compete for task orders.

The solicitations employ a self-scoring technical evaluation methodology, one of the criteria for which is "Relevant Experience." Price was not an evaluation factor at the IDIQ level but was to be considered for task orders.

The protesters each intended to separately submit proposals to one of the four set-aside pools.

Both protesters had also intended to submit proposals to the small business pool, but the GSA prohibited that because each offeror's mentor had already submitted a proposal via a

different mentor-protégé joint venture with a different protégé, something the solicitations prohibited.

Regarding the first protest allegation, the court agreed with the government that the GSA did not improperly exclude mentor-protégé joint venture offerors with the same mentors from submitting proposals with other protégés via different mentor-protégé joint ventures.

Under the SBA's rules, the court said, a "mentor that has more than one protégé cannot submit competing offers in response to a solicitation for a specific procurement through separate joint ventures with different protégés."[3]

In rejecting the protest argument, the court cited the SBA's rulemaking, which stated that, "in acquiring a second protégé, the mentor 'has already assured' [the] SBA that the two protégés would not be competitors."[4] Thus, the court concluded that "the regulation prevents mentor-protégé [joint ventures] comprised of the same mentor, but different protégés, from submitting competing proposals on a procurement," which was exactly what the protesters wanted the court to allow.

The second allegation was that the GSA had violated the SBA regulations regarding the evaluation of experience. The court agreed with the protesters that the GSA was improperly applying the same evaluation criteria, both to projects submitted by protégés and to projects submitted by offerors generally.

When evaluating the past performance and experience of a joint venture submitting an offer for a contract set aside or reserved for small business, the court found that a "procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract."[5]

The court found that the solicitations violated the SBA rule by applying the same evaluation criteria to assess relevant-experience projects submitted by protégé firms and by offerors generally. The regulation plainly "requires agencies to measure the individual capabilities of protégé members of mentor-protégé joint ventures using alternative evaluation criteria relative to offerors generally."

The solicitations, however, did not do so. The court stated: "Instead, ... GSA intend[ed] to use the same evaluation criteria, or the same evaluation sub-factors and scoring table, to assess every project submitted for consideration, including that of the protégé," which was "precisely the circumstance" that the regulation precluded.

Regarding the third allegation, which was whether the GSA had to evaluate price at the IDIQ level, the court agreed with the protesters that such evaluation was required by statute.

The court stated that the exception to the rule that agencies generally "include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals"[6] is only for "certain indefinite delivery, indefinite quantity multiple-award contracts and certain Federal supply schedule contracts for services acquired on an hourly rate."[7]

The court held that the exception, upon which the GSA relied, did not apply because the solicitations did not adequately feature task orders based on hourly rates.

The court enjoined the GSA from evaluating proposals and awarding IDIQ contracts under the challenged solicitations as then written.

The Takeaway

This case adds more insight to a growing body of law regarding the scope of the evaluation of proposals from mentor-protégé joint ventures.[8] The purpose of the mentor-protégé program implies that the mentor will not undercut its protégé by competing with it. Now, a court's decision specifically says so.

Similarly, because protégés may lack the same type of experience as larger companies, the SBA regulations impose some restrictions on how agencies can evaluate them.

As for price, here, the GSA had wanted to avoid evaluating price at the IDIQ level, arguing that such evaluations are not feasible because it is "too difficult for agencies and offerors to predict or ascertain price when preparing and reviewing proposals at the IDIQ level."

The court disagreed. Accordingly, to the extent that there is a statutory exception to the evaluation of price, that exception is likely to remain narrow.

Aron Beezley is a partner and co-leader of the government contracts practice group at Bradley Arant Boult Cummings LLP.

Sarah Osborne is a partner at the firm.

Nathaniel Greeson is a partner at the firm.

Bradley Arant counsel Patrick Quigley and Lisa Markman, and associate Gabrielle Sprio, contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 31 U.S.C. § 3554(a)(1).

[2] Under the SBA's Mentor-Protégé Program, a small business protégé can joint venture with a large business mentor to obtain business development assistance and to improve the protégé firm's ability to successfully compete for federal contracts. 13C.F.R. §125.9(a). Firms in the program are generally not considered "affiliated" under the small business size rules. §121.103(b)(6), §125.9(d)(4). The program allows the joint venture to compete "as a small business for any government prime contract ... provided the protégé qualifies as small for the procurement or sale," even if the mentor is not a small business. See §125.9(d).

[3] § 125.9(b)(3)(i).

[4] 85 Fed. Reg. 66,146, 66,168 (Oct. 16, 2020).

[5] 13 C.F.R. § 125.8(e).

[6] 41 U.S.C. § 3306(c)(1)(B).

[7] § 3306(c)(3).

[8] See, e.g., AttainX, Inc., B- 421216, et al., 2023 CPD ¶ 45 (Comp. Gen. Jan. 23, 2023) (protest sustained when GAO held that the SBA regulations required the agency to evaluate each joint venture member individually when the joint venture itself does not demonstrate that it has the required experience); see also Computer World Servs. Corp., et al., B-419956.18, et al., 2021 CPD ¶ 368 (Comp. Gen. Nov. 23, 2021) (The "SBA's rules require a small business protégé to have some experience in the type of work to be performed under the contract. However, it is unreasonable to require the protégé concern itself to have the same level of past performance and experience ... as its large business mentor.") (quotation omitted).