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## Challenge Problems in Solicitation Amendments Before Award - A Friendly Reminder from the Federal Circuit

by Daniel S. Herzfeld

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*On December 7, 2012, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) issued its first decision determining that government contractors need to challenge any obvious errors, improprieties, or ambiguities on the face of a solicitation amendment before award (extending its previous rule that such challenges to the initial solicitation generally must be challenged before award). In COMINT Systems Corp. & Eyeit.com, Inc., JV v. United States, the Federal Circuit found that Comint missed an opportunity to challenge an obvious – or patent – error in an amendment to the solicitation. By signing the amendment and waiting until after award to protest the allegedly problematic amendment, the government contractor waived any right to challenge the terms of the amendment to the solicitation.*

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On August 2, 2010, the Department of Defense (“DOD”) had issued the solicitation intending to award multiple indefinite delivery/indefinite quantity contracts for help desk, server, network, and applications support services – Net-Centric Integrated Enterprise Information Technology Services. Initially, the solicitation had requested proposals for the “Basic Contract” and for the first two task orders under the contract. After offerors had submitted their proposals, however, DOD amended the solicitation on January 19, 2011. Instead of evaluating the first two task orders for award, DOD informed offerors that the information and pricing for these two task orders would now be used as “sample tasks” in the evaluation of pricing of the Basic Contract. DOD’s amendment to the solicitation also prominently announced that DOD would “NOT accept any revisions to the proposals.” On January 20, 2011, Comint signed the amendment and returned it to DOD one day after receiving it without complaint.

DOD evaluated Comint’s and the other offerors’ proposals, but eliminated Comint from the competition based in part on Comint’s “incorrect assumption” in pricing sample task 1 (which had previously been a standalone task order prior to the solicitation amendment, but now was part of the price factor for the Basic

Contract award). On April 6, 2011, DOD awarded contracts to several offerors, but not Comint. Comint protested the award to the agency and then at the U.S. Court of Federal Claims (“CFC”), asserting that the solicitation amendment was improper. The CFC dismissed the protest and Comint appealed to the Federal Circuit.

The Federal Circuit concluded that Comint’s challenge to the solicitation was untimely and had to be raised prior to the award of the contract: “Comint had ample time and opportunity to raise its objections to Amendment 5, but chose instead to wait and see whether it would receive award of the contract. . . . Comint failed to preserve its objections to Amendment 5 by not raising them until after the award of the contract.”

The Federal Circuit enumerated several exceptions to the rule that challenges to errors in a solicitation must be raised prior to the award of the contract. For example, the Federal Circuit stated that a protest of the amendment might have been brought after award where “bringing the challenge prior to the award is not practicable,” although the Federal Circuit did not explain exactly what it meant by “not practicable.” Comint had several months to protest and, therefore, had ample time to protest. Also, the Federal Circuit noted that latent errors or ambiguities not apparent on the face of a solicitation amendment could be raised after award; Comint’s complaints all related to obvious – or patent – errors on the face of the solicitation amendment and, therefore, had to be challenged prior to award.

Ultimately, *COMINT* provides a reminder that a government contractor must be vigilant in challenging errors, ambiguities, or improprieties apparent in a solicitation or its amendments prior to award. Failure to raise any concerns in a timely manner, will waive a contractor’s ability to challenge such errors, ambiguities, or improprieties that could adversely impact the contractor.

The following is a quick reminder of the timeliness rules for challenging the terms of a solicitation, which are more stringent for protests to the agency and the Government Accountability Office than to court:

- Agency: “Protests based on alleged apparent improprieties in a solicitation shall be filed *before bid opening or the closing date for receipt of proposals*.” 48 C.F.R. § 33.103(e) (emphasis added).
- GAO: “Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be *filed prior to bid opening or the time set for receipt of initial proposals*. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested *not later than the next closing time for receipt of proposals following the incorporation*.” 4 C.F.R. § 21.2(a)(1) (emphasis added).
- Court: “[A]ssuming that there is adequate time in which to do so, a disappointed bidder must bring a challenge to a solicitation containing a patent error or ambiguity prior to the award of the contract.” *COMINT*.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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