Government Contracts
& Disputes

January 24, 2013

Even Offerors Eliminated Before the Competitive Range May Have Protest Standing

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On January 14, 2013, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") held that an offeror had standing to challenge the exclusion of its proposal from a competition even prior to a competitive range, despite the offeror's submission of an incomplete proposal. In Orion Technology, Inc. v. United States*, the Federal Circuit clarified that a disappointed offeror that has been eliminated from a competition can show that it has standing as an "interested party."*

The Army issued a solicitation for a multiple-award services contract. The solicitation notified offerors that the Army "may" decline to evaluate incomplete proposals. Orion's proposal failed to include required cost information for several of Orion's proposed subcontractors. Orion tried to submit the missing information late, but the Army rejected it. The Army ultimately rejected Orion's incomplete proposal because the Army could not conduct the required price reasonableness and cost realism analyses.

Orion unsuccessfully pursued protests at the agency level and at the Government Accountability Office ("GAO"). Notably, GAO issued a decision on the merits denying Orion's protest, but did not dismiss Orion's protest for lack of standing.

The Army subsequently amended the solicitation, opened discussions, and requested revised proposals from offerors in the competitive range. Orion attempted to submit a new proposal. The Army, however, rejected the proposal because Orion had previously been eliminated from the competition.

Orion again filed an agency protest and a GAO protest, both of which were dismissed because Orion was no longer an "interested party." Orion then protested to the U.S. Court of Federal Claims ("CFC").

The CFC dismissed the protest because Orion, by submitting a non-compliant proposal, was not an interested party. (The CFC alternatively concluded that, even if Orion had standing, it would lose on the merits.) Orion appealed to the Federal Circuit.

The Federal Circuit reiterated that only an "interested party" – defined as "an actual or prospective bidder whose direct economic interest would be affected by the award of the contract" – has standing to protest. The Federal Circuit considered whether to apply the court's more permissive "non-trivial competitive injury" standard (used in some pre-award protests) or its more stringent "substantial chance" standard (used in post-award protests).

The Federal Circuit concluded the "substantial chance" standard should apply because (1) the Army evaluated whether Orion's bid complied with the solicitation's requirements, and (2) Orion's cost/price would have placed it in the subsequently established competitive range. Thus, the CFC could properly evaluate whether Orion would have a "substantial chance" of winning the contract if the protest was sustained.

The Federal Circuit concluded that Orion had standing to challenge the exclusion of its proposal from the competition. First, the Federal Circuit found that neither the solicitation nor applicable regulations required exclusion of Orion's incomplete proposal. Second, the Federal Circuit found that Orion could have addressed the proposal deficiencies during discussions and final proposal revisions.

In determining that Orion had standing, however, the Federal Circuit limited the reach of its decision:

> In arriving at that conclusion, however, we do not hold that the mere timely submission of a proposal, no matter how defective, automatically confers standing under the substantial chance standard. Instead, we only conclude that under the facts of this case, where the Army had discretion to process Orion's competitive proposal, but chose not to, and where Orion's original proposal was within the later-established competitive range, we conclude that Orion had a substantial chance of receiving the contract and therefore had standing to challenge the exclusion of its proposal based on the Army's alleged arbitrary action in refusing to exercise its discretion in Orion's favor.

After concluding Orion had standing, however, the Federal Circuit affirmed the CFC's alternative conclusion that the Army acted rationally in rejecting Orion's proposal on the merits.

Orion Technology establishes that a disappointed offeror excluded from a competition for submitting an incomplete proposal may still be able to protest its exclusion and get back into the competition. While Orion lost on the merits, the Federal Circuit's decision finding Orion to be an "interested party" will allow similarly situated disappointed offerors to pursue their bid protests.

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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