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Awardee Protests: A New Horizon?

In departure from GAO precedents, Court of Federal Claims finds awardee under multiple-award contract has standing to protest award of an additional contract.

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The bid protest long has been the province of the disappointed bidder/offeror—the government contractor that competed for the award of a federal contract and lost. A new decision from the United States Court of Federal Claims opens the door to the possibility of a bid protest by an offeror that competed and **won**.

In *National Air Cargo Group v. United States*, No.16-362C (April 28, 2016),[1] the Court held that an awardee under a multiple-award indefinite delivery, indefinite quantity (IDIQ) contract had standing to protest the award of an additional contract under the IDIQ. The *National Air Cargo* holding contradicts recent protest decisions from the Government Accountability Office (GAO), which have determined that IDIQ awardees *categorically* lack standing to protest other awards under the same IDIQ vehicle.

National Air Cargo involved a solicitation for IDIQ contracts to provide shipping services to the U.S. Transportation Command (TRANSCOM). The solicitation provided that TRANSCOM would award "approximately" four such contracts. Under IDIQ contracts, generally, the actual work is performed upon the government's issuance of task or delivery orders to the contract holder(s). Under multiple-award IDIQ contracts, like the one here, contract holders compete for such task or delivery orders and otherwise are entitled to only a nominal minimum purchase by the government (e.g., $2,500). The solicitation stated that TRANSCOM would award task orders up to a total maximum value of nearly $300 million.

After proposal submission, TRANSCOM initially announced the award of five IDIQ contracts, to the protester (National) and four other offerors. A month later, however, TRANSCOM announced an additional award. National filed a bid protest with GAO, arguing that the five initial awardees constituted the "original pool" and that, under the terms of the solicitation, the pool of awardees could be expanded only through a new competition, upon TRANSCOM's demonstration of a "shortfall" in meeting its requirements with the existing pool.

[1] The Court's decision is available at https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0362-32-0

GAO ultimately[2] dismissed the protest for lack of standing, finding that National was not an "interested party" because its "direct economic interest" would not be adversely affected by the additional award.[3] Relying on longstanding GAO case law, GAO stated that National had not "credibly alleged that its contract would be reduced, increased, or otherwise affected by the agency's decision to award a sixth contract. . . . Under circumstances such as these, and where the solicitation contemplates multiple awards, an existing contract awardee is not an interested party to challenge the agency's decision to award another contract."[4] Essentially, GAO determined that the economic harm presented by having to compete with an additional firm for future task orders categorically represents too remote a harm to establish protest standing. This decision was consistent with the "blanket rule" against protests by IDIQ awardees established in other recent GAO cases[5] and also, arguably, in previous decisions of the Court of Federal Claims.[6] National then raised the same allegations in a complaint before the Court.

The Court expressly rejected the categorical rule that multiple-award IDIQ awardees lack standing to protest, concluding that "National's status as a contract awardee does not by itself deprive this court of bid protest jurisdiction." The Court reasoned instead that National could establish standing if it could establish a "non-trivial competitive injury which can be redressed by judicial relief."[7] Ultimately, the Court determined that National had demonstrated such an injury because it credibly alleged that competition for future task orders "will be significantly increased" by the introduction of an additional awardee.[8] In granting National standing to protest, the Court declined to follow GAO case law and analyzed in detail, but distinguished, previous decisions of the Court of Federal Claims.

National Air Cargo is a significant decision that may give rise to a new category of protest—at least at the Court of Federal Claims. GAO is not bound by the Court's decisions, nor are Court of Federal Claims judges bound by the decisions of their fellow judges. Yet *National Air Cargo* may prove influential on both GAO and other judges at the Court. For the time being, IDIQ awardees have a new possibility of protest when they feel that the government has violated applicable requirements in making award to their prospective competitors for future task orders.

[2] The full procedural history of the protest is not directly relevant here; however, before GAO reached the decision in question, it dismissed an earlier protest by National on other grounds, after which National filed a protest at the Court of Federal Claims. TRANSCOM opted to take corrective action in that protest, and it then reaffirmed the sixth award. The relevant protest ensued.

[3] GAO's decision is available at http://gao.gov/assets/680/675863.pdf.

[4] GAO cited its decision in *Recon Optical Inc.; Lockheed-Martin Corp., Fairchild Sys.,* B-272239, *et al.,* July 17, 1996, 96-2 CPD ¶ 21 at 3-4.

[5] *See Aegis Defense Services LLC*, B-412755, March 25, 2016, 2016 CPD ¶ 98 at 2. ("[A] protester's status as an awardee precludes its interested party status irrespective of any alleged economic interest.")

[6] *See, e.g., Trailboss Enters. Inc. v. United States,* 111 Fed. Cl. 338, 340 (2013). ("Where the plaintiff is the awardee of the contract, however, it no longer has standing . . . as an interested party for the purpose of challenging the terms of the award.") *Automation Technologies Inc. v. United States,* 73 Fed. Cl. 617 (2006). (Awardee under a multiple-award contract failed to establish it had a direct economic interest in challenging an additional award under the contract, and therefore lacked standing to protest.)

[7] The Court held that this test, established by *Weeks Marine Inc. v. United States,* 575 F.3d 1352, 1361-62 (Fed. Cir. 2009) in the context of a *pre-award* bid protest, was appropriate in this case to determine the existence of a direct economic interest.

[8] Despite granting National standing, the Court declined to issue a preliminary injunction in the case because it found that National was not likely to succeed on the merits of its allegations.

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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