GAME CHANGER

A recent Claims Court decision has significant implications for evaluating mentor-protégé joint ventures and pricing for indefinite delivery and quantity contracts.

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In the January 2023 issue of *Contract Management*, this column explored the growing importance of mentor-protégé joint ventures (MP-JVs) to small business set-aside competitions. The column noted the extraordinary benefits offered by the MP-JV structure. It also highlighted many of the underappreciated risks associated with this teaming approach.

A key advantage of the MP-JV structure is that it allows the protégé to leverage the mentor's capabilities and experience in way that may not be permissible for a typical prime-subcontractor team.

The Small Business Administration (SBA) codified this advantage under 13 C.F.R. § 125.8(e), which states, in part: "[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."[1]

In *SH Synergy, LLC et al. v. United States*, the U.S. Court of Federal Claims interpreted this regulation in a protest involving solicitations issued by the General Services Administration (GSA) under the Polaris Program.[2]

The court parsed the plain language of Section 125.8(e) and held that it prohibits agencies from requiring protégé firms to individually meet the same evaluation criteria as other offerors. The court's decision is likely to have a profound impact on set-aside competitions. This is because it requires agencies to evaluate protégé firms on a lower curve as compared to the other "independent" small businesses vying for the award.

The court also ruled that the Polaris solicitations violated a statutory requirement to consider cost or price as an evaluation factor. This decision narrows the circumstances in which agencies may appropriately omit cost or price as an evaluation factor when awarding indefinite delivery, indefinite quantity (IDIQ) contracts.

Ultimately, the court's ruling will constrain the ability of agencies to defer the evaluation of cost or price to the task order competition stage. It may also increase the cost and complexity of preparing and evaluating proposals for IDIQ contracts.

The Polaris Solicitations

Polaris is a small business set-aside procurement intended to deliver customized information technology (IT) services and IT-services based solutions to qualifying federal agencies. GSA anticipates spending approximately $60 billion to $100 billion over the life of the Polaris Program.

GSA issued multiple solicitations to establish "pools" of contractors for different set-aside categories, e.g., Small Businesses, Woman-Owned Small Businesses (WOSBs), Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), etc.

The solicitations followed a similar structure that included four primary self-scored evaluation factors:

1. Relevant experience
2. Past performance
3. Systems, certifications, and clearances
4. Risk assessment

GSA intended to award multiple contracts to the highest technically rated qualifying offerors in each pool.

The solicitations did not include cost or price as an evaluation factor.

Rather, GSA planned to evaluate cost or price at the task order level instead of the IDIQ level pursuant to 41 U.S.C. § 3306(c)(3).

That statutory provision contains an exception to the normal rule that requires agencies to evaluate cost or price and permits the agency to conduct that evaluation at the task order level instead.[3] The exception applies if the IDIQ contract "will feature individually competed task or delivery orders based on hourly rates."[4]

The solicitations permitted agencies to form various types of task order contracts including firm-fixed price, cost-reimbursement, incentive, time-and-materials, and labor-hour contracts.

The protesters included two MP-JVs seeking awards in the WOSB pool, the SDVOSB pool and the Small Business pool. The protesters sought an order enjoining the GSA from evaluating proposals under the allegedly defective solicitations. Although the protesters raised a number of allegations challenging the terms of the solicitations, the court sustained the protest on two primary grounds.

The Solicitations Violated 13 C.F.R. § 125.8(e)

The court determined that the solicitations violated 13 C.F.R. § 125.8(e)'s prohibition on requiring "the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally."

The court agreed that the solicitations ran afoul of the SBA regulation. Its judgment was GSA used the same evaluation factors and point scoring methodology to evaluate protégé firms and the other offerors.

This defect was most notably present in the criteria used to score the offerors' relevant experience, which included two subcategories: primary relevant experience projects and emerging technology relevant experience projects.

Under the GSA scoring rubric, offerors could earn points if the projects they submitted satisfied certain specialized criteria. For example, GSA assigned points based on

the contract value, type, or nature of the work involved for each project.

The solicitations included special instructions that applied to offers submitted by MP-JVs. Specifically, the protégé or the MP-JV itself was required to submit a minimum of one primary relevant experience project or emerging technology relevant experience project. Moreover, an offer submitted by an MP-JV could not include more than three primary relevant experience projects from the mentor.

The protesters complained that GSA intended to evaluate projects submitted by the protégé against the same criteria used to evaluate projects submitted by other offerors. For example, protégé firms and other offerors were subject to the same $10 million threshold GSA used to assign additional points to projects based on the contract's value.

The court concluded that the solicitations violated Section 125.8(e) because they failed to "incorporate distinct evaluation criteria that offerors and GSA should use to evaluate the protégé firm's individual project."[5] As the court explained, "GSA intends 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."[6] In the court's view, "[t]his is precisely the circumstance that Section 125.8(e) precludes."[7]

The court rejected the government's argument that protégé firms were not subject to the same evaluation criteria because they were only required to submit one relevant experience project. GSA violated Section 125.8(e) because each *project* would "be evaluated in precisely the same manner, and based on precisely the same criteria, as all other projects submitted."[8] The court held that GSA "cannot avoid violating Section 125.8(e) simply by reducing the minimum number of projects the protégé firm must submit."[9]

Although the court did not dictate precisely how GSA could comply with Section 125.8(e), the court ruled that GSA "must adjust the evaluation criteria it applies to assess a protégé firm's relevant experience project."[10] The court suggested, for example, that GSA could allow protégés to submit smaller experience projects or assign a "premium" to protégé projects under a revised scoring rubric.[11]

The Solicitations Violated 41 U.S.C. § 3306(c)(3)

The court also agreed with the protesters' argument that the solicitations violated the requirement to consider cost or price in the evaluation of proposals. The court concluded that, contrary to GSA's assertion, the solicitations did not qualify for an exception to that requirement under 41 U.S.C. § 3306(c)(3).

The court's analysis focused on whether the solicitations would "feature individually competed task or delivery orders based on hourly rates" within the meaning of that exception. Relying on the plain language of the statutory text, the court agreed with the protesters' interpretation that "orders based on hourly rates" refers to time-and-materials and labor-hour contracts.[12]

Although the solicitation allowed for those types of orders, it also permitted other contract types including FFP and cost-reimbursement task orders. GSA could not invoke Section 3306(c)(3) where it provided "little clarity on the degree to which the agency intends to favor time-and-materials or labor-hour task orders over the use of other types that are not 'based on hourly rates.'"[13]

Indeed, the available evidence indicated that GSA preferred the use of firm-fixed price task orders. According to the court, an IDIQ solicitation is not exempt from the requirement to evaluate cost or price under Section 3306(c)(3) unless time-and-material and labor-hour orders will "make up a featured, or predominant, portion of the task orders issued under the contract."[14]

Conclusion

The court's ruling has the potential to alter the competitive landscape for many types of procurements, particularly large IDIQ contracts with pools set-aside for small businesses. If agencies begin to implement the court's interpretation of Section 125.8(e), MP-JVs will gain a competitive edge against non-MP-JV small businesses. Less stringent evaluation standards will be applied to the capabilities, experience and past performance examples submitted by protégé firms.

The court's decision leaves open the extent to which agencies must or may establish lower evaluation standards for protégés. If all offerors must satisfy a $10 million threshold for experience projects, could the agency comply with Section 125.8(e) by establishing a $9 million threshold for protégé firms?

In general, the court and the Government Accountability Office

are likely to defer to the standards developed by agencies that are within reason. We should expect, however, that these issues will continue to be scrutinized and litigated.

The court's decision also is likely to complicate and slow down large IDIQ procurements that will require cost or price evaluations unless "orders based on hourly rates" are predominant. By invoking 41 U.S.C. § 3306(c)(3), GSA was clearly hoping to avoid complex price evaluations with hundreds of offerors at the IDIQ level. But GSA and other agencies will now have to complete those evaluations in procurements that typically favor orders that are not based on hourly rates.

Moreover, the offerors competing for large IDIQ contracts will have to incur the time and expense necessary to prepare price proposals before there is a concrete task order opportunity available. The potential increase in cost and complexity of proposal preparation may ultimately reduce the number of offerors that are willing to compete for these large IDIQ contract vehicles. CM

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ENDNOTES

1 13 C.F.R. § 125.8(e).
2 SH Synergy, LLC, et al. v. United States, --- Fed. Cl. ---, 2023 WL 3144150 (Apr. 21, 2023).
3 The normal rule is codified at 41 U.S.C. § 3306(c)(1)(B) and FAR 15.304(c)(1)(i).
4 41 U.S.C. § 3306(c)(3).
5 SH Synergy, 2023 WL 3144150, *19.
6 Id.
7 Id.
8 Id. at *20.
9 Id.
10 Id. at 21.
11 Id.
12 Id. at *27.
13 Id. at *29.
14 Id. at *28.