NEGLIGENT NEGOTIATIONS

The ASBCA recognized a new claim theory based on an agency's pre-award obligation to conduct "meaningful discussions" with offerors.

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In a negotiated procurement under FAR Part 15, an agency may engage in "discussions" with offerors in the competitive range.[1] Any such discussions must be "meaningful," giving offerors an opportunity to address any proposal deficiencies, significant weaknesses, or adverse past performance information identified by the agency.[2]

There are dozens of bid protests every year that challenge whether agencies have fulfilled their obligation to comply with this requirement under FAR 15.306. But the requirement to conduct "meaningful discussions" has not historically been adjudicated in the context of a post-award claim under the Contract Disputes Act (CDA).

The *Appeal of Chugach Federal Solutions, Inc.* before the Armed Services Board of Contract Appeals (ASBCA) is the first of case of its kind to recognize the viability of a claim for "negligent negotiations" based on a violation of FAR 15.306.[3] Although the ASBCA ultimately denied Chugach's claim on the merits, this case has significant ramifications for contractors and agencies that engage in pre-award discussions.

Notably, the ASBCA's ruling creates the possibility that agencies may be liable for damages caused by a failure to identify significant weaknesses or deficiencies in a contractor's proposal. Thus, while an agency's failure to comply with FAR 15.306 has been fodder for bid protests, it is now a potentially viable basis to obtain post-award monetary relief under the CDA.

Background

This case involved a firm-fixed-price indefinite delivery, indefinite quantity contract to provide a variety of base operations support services at Navy facilities in the area of Puget Sound, Washington. Under the incumbent contract, the Navy procured a set number of unscheduled "trouble calls" to perform maintenance activities such as fixing air conditioning units, unclogging drains, and replacing light bulbs.

Under the new solicitation, however, the Navy made the contractor responsible for an unlimited number of trouble calls. The new solicitation also increased the contractor's maximum liability for trouble calls. The Navy prepared an independent government estimate (IGE) that considered the incumbent contract's historical workload data and the projected impact of the changes the Navy made to its requirements.

A key aspect of proposal preparation was determining the number of labor hours necessary to perform the contract. Chugach understood that the Navy's new requirements,

including unlimited trouble calls and higher liability limits, made the contract riskier to perform.

Chugach's first proposal revision evaluated by the Navy assumed a staffing level of 329 full-time equivalents (FTEs). The Navy's technical evaluators assigned a "significant weakness" to Chugach and seven other offerors that proposed FTEs well below the 395 FTEs estimated by the Navy.

The Navy proceeded to open discussions with offerors. During the negotiations, the Navy specifically directed Chugach to, among other things, ensure that its "estimates and FTE staffing ... adequately address the no limitation to trouble call quantities."[4]

Chugach's next proposal revision lowered its number of FTEs from 329 to 318. The Navy's technical evaluators found that Chugach's FTE level remained below the IGE and did not remove the significant weakness assigned to Chugach's proposal.

But the Source Selection Advisory Council (SSAC) subsequently determined that the "significant weakness" was not appropriate. The SSAC concluded that the IGE was a conservative estimate and, therefore, it could not be used to determine the minimum number of FTEs required to perform the contract. Although the Navy did not assign a significant weakness to Chugach's staffing, the Navy told Chugach in a subsequent evaluation notice that its FTEs "appear low" and that it should "amend or confirm your FTEs ... as required."[5]

The Navy ultimately made an award to Chugach based on a final proposal revision that assumed 311 FTEs. The Navy determined that this staffing level was reasonable based on a comparison of the offerors to each other. In response to a post-award protest, the Navy and Chugach defended the Navy's approach to evaluating the offerors' staffing levels and the Government Accountability Office agreed that it was reasonable.

After award, Chugach quickly realized that it had significantly underestimated the required number of FTEs due to flaws in its bid strategy. Chugach eventually needed 425 FTEs to meet the contract's performance standards.

In an effort to recover its losses, Chugach submitted a claim for more than $36 million. The Navy's contracting officer denied the claim and Chugach appealed that decision to the ASBCA. Chugach's complaint asserted various theories of recovery including a novel "negligent negotiations" claim based on the Navy's alleged violation of FAR 15.306(d).

'Negligent Negotiations' Ruled a Viable Claim

The Navy filed a motion to dismiss Chugach's negligent negotiations claim on the basis that it is not a cognizable claim under the CDA.[6] Specifically, the Navy argued that Chugach's claim was akin to a bid protest and, thus, not within the ASBCA's jurisdiction.

The ASBCA concluded that it could decide Chugach's claim based on the government's pre-award violation of FAR 15.306(d). According to the ASBCA, Chugach's allegation stated a viable claim because that regulation exists for the benefit of the contractor. The ASBCA therefore denied the Navy's motion to dismiss.

Following discovery, the ASBCA also denied the Navy's motion for summary judgment as to the negligent negotiations claim.[7] The Navy contended that Chugach could not prove a violation of FAR 15.306(d) because the Navy's source selection team did not find a "significant weakness" in its final proposal revision. But the ASBCA denied the Navy's motion because whether Chugach was properly informed of a significant weakness was a material factual dispute that could not be decided on summary judgment.

Navy Did Not Fail to Discuss Weakness

At the request of the parties, the ASBCA decided the appeal based on the evidentiary record without a hearing. After reviewing the evidence submitted, the ASBCA denied Chugach's negligent negotiations claim on the merits.

Chugach asserted that "the Navy violated FAR 15.306(d) when it did not meaningfully discuss its concerns that Chugach had underrepresented the necessary staffing."[8] As support for its position, Chugach cited bid protest decisions that require agencies to identify significant weaknesses in a proposal to fulfill their obligation to conduct "meaningful discussions" under FAR 15.306(d). In response, the Navy argued that "it did comply with FAR 15.306 by directing Chugach to the areas of concern in its proposal."[9]

The ASBCA agreed with the Navy. In the ASBCA's view, the

Navy's discussions with Chugach appropriately directed its attention to the areas of concern related to its low staffing levels. Indeed, the ASBCA found that there were at least two rounds of discussion questions that "directed Chugach to the areas of concern, consistent with the requirements of FAR 15.306(d)."[10] The ASBCA also concluded that the Navy's decision to compare the FTE levels proposed by the offerors to each other, as opposed to the conservative IGE, was reasonable.

In addition to denying Chugach's negligent negotiations claim, the ASBCA also denied Chugach's related claims based on the superior knowledge and mutual mistake doctrines. Chugach could not prove that the Navy violated its obligation to disclose "superior knowledge" in part because the IGE reflected the Navy's technical judgment or prediction, not a "vital fact" that affects performance costs or duration.

Similarly, the ASBCA denied Chugach's mutual mistake claim because the ASBCA concluded that "Chugach's theory of recovery asserts a mistake of judgment and not a fact in existence" at the time of contract formation.[11]

Contract Winners Could Bring Claims

It is not uncommon for an offeror to underestimate the staffing required to meet a contract's performance requirements. Moreover, offerors are permitted to "buy in" to a fixed-price contract by proposing a low "price to win" so long as the solicitation does not include a requirement to evaluate price realism.

The *Chugach* decision is remarkable because it suggests that an agency may be liable to a contractor if the agency failed to properly identify a significant weakness or deficiency in the contractor's proposal at the time of contract formation.

In a bid protest, an agency's compliance with FAR 15.306 turns on whether the offeror was properly informed of deficiencies or significant weaknesses that were actually assigned by the agency's evaluators. The ASBCA's decision in *Chugach*, however, examined whether the Navy properly informed the contractor of a concern regarding staffing levels that was not identified as a significant weakness in the Navy's final analysis of Chugach's proposal.

Although Chugach's claim was ultimately denied on the merits, the ASBCA's decision raises a question as to whether a contractor may recover damages for an agency's failure to identify a significant weakness that was not assigned to the contractor's proposal during the evaluation stage. If that is indeed a possibility, agencies could be held responsible for shortcomings in a contractor's technical proposal that arguably should have been identified by the agency during "discussions" under FAR 15.306.

The Civilian Board of Contract Appeals has expressed some skepticism regarding *Chugach*'s rationale without rejecting its holding.[12] To date, the U.S. Court of Appeals for the Federal Circuit has yet to opine on whether a "negligent negotiations" claim is a viable theory of recovery under the CDA. Thus, it is not clear whether and to what extent the "negligent negotiations" theory will remain viable going forward.

For now, contractors and agencies should understand that an alleged violation of FAR 15.306 may not be strictly a bid protest issue raised by an unsuccessful offeror. At least according to the ASBCA, an agency's failure to comply with FAR 15.306 may also form the basis for a CDA claim brought by a successful offeror that won the contract. CM

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ENDNOTES

1 FAR 15.306(d).
2 FAR 15.306(d)(3).
3 Chugach Federal Solutions, Inc., ASBCA No. 61320, 2023 WL 4312113 (Jun. 8, 2023).
4 Chugach, 2023 WL 4312113, Slip. Op. at 22.
5 Id. at 27.
6 Chugach Federal Solutions, Inc.., ASBCA No. 61320, 19-1 BCA ¶ 37,380.
7 Chugach Federal Solutions, Inc.., ASBCA No. 61320, 20-1 BCA ¶ 37,617.
8 Chugach, 2023 WL 4312113, Slip. Op. at 56.
9 Id.
10 Id. at 58.
11 Id. at 60.
12 Hanstra Chico LLC v. Department of Veterans Affairs, CBCA No. 6669, 20-1 BCA ¶ 37,654.