Failure to Plan

Bid protest decisions highlight risks for agencies that fail to engage in advanced acquisition planning.

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The Competition in Contracting Act (CICA) codifies the bedrock principle that contracts must generally be awarded through the use of full and open competition. To fulfill this mandate, CICA expressly recognizes that agencies must engage in advanced acquisition planning to promote competition.

Procurement laws and regulations are often overlooked when agencies do not engage in thoughtful planning. When agencies do not properly plan, competition may be unnecessarily restricted and compliance with important legal requirements and preferences may be neglected.

Ultimately, a failure to plan increases bid protest litigation risk for agencies and leads to procurement outcomes that may not be optimal. In short, successful acquisition planning is essential to achieving procurement outcomes that are consistent with applicable law, regulation, and policy.

This article spotlights several areas where advanced planning plays a pivotal role in determining whether agencies are able to meet legal requirements. The cases discussed below exemplify how inadequate planning at the outset of a procurement can eventually lead to a sustained bid protest.

Sole Source Procurements

CICA includes various exceptions to the general mandate for full and open competition that allow agencies to enter into sole-source contracts.[1] The law is clear, however, that noncompetitive procedures may not be used due to a lack of advanced planning by contracting officials.[2]

The Government Accountability Office (GAO) has recognized that "the requirement for advance planning is not a requirement that such planning be successful or error-free."[3] Nevertheless, the agency's "advance planning must be reasonable" to survive GAO's scrutiny.[4] This includes taking affirmative steps "to obtain and safeguard competition" because agencies "cannot take a passive approach and remain in a noncompetitive position where they could reasonable take steps to enhance competition."[5]

In the protest of eFedBudget Corp., for example, GAO concluded that the agency did not satisfy its obligation to engage in reasonable advance planning to promote competition. In that case, the Department of State planned to enter into a five-year sole-source contract with an incumbent firm for the continued implementation, maintenance, enhancement and support for the agency's worldwide budget and planning software systems.

The agency justified the intended sole-source award on the basis that only the incumbent could do the work because the agency had limited rights to the incumbent's proprietary software. GAO concluded that the agency reasonably justified its intended sole-source award because the protester's alternative proposal would result in a violation of the agency's existing license agreement with the incumbent.

However, GAO sustained the protest because the agency failed to take

active steps to obtain competition for its requirement. GAO was critical of the agency's failure to document "any steps that it has taken to end its reliance on the services of the incumbent to maintain the existing software systems."[6]

For instance, the agency did not consider whether it could purchase additional rights to the proprietary software that would allow other firms to compete. GAO found that the agency violated its obligation to engage in advance planning by failing to determine whether the cost of pursuing this option, "or some other alternative, outweigh[ed] the anticipated benefits of competition."[7]

This case and other similar decisions underscore the need for agencies to take affirmative steps to enable competition. GAO may sustain a challenge to a sole source procurement where the record shows that reasonable steps were not taken to at least examine alternatives that may have avoided the need for a non-competitive procurement.

Commercial Item Procurements

The Federal Acquisition Streamlining Act of 1994 (FASA) established a preference for acquiring commercial items. Specifically, FASA states that agencies shall, "to the maximum extent practicable," procure commercial products and services to meet their needs.[8]

This statutory preference is achieved "in part through preliminary market research . . . concerning the availability of commercial items."[9] FASA requires agencies to "use the results of market research to determine whether there are commercial services or commercial products" that can be procured.[10]

In 2018, the U.S. Court of Appeals for the Federal Circuit addressed this requirement of FASA in its landmark decision in *Palantir USG, Inc. v. United States*. The Court held that the Army violated its obligations under FASA to use the results of market research to determine whether Palantir's commercial software met or could be modified to meet the Army's needs for a system used to process and disseminate multi-sensor intelligence and weather information. The *Palantir* decision shows that proper collection and analysis of market research regarding commercial alternatives is critical to complying with FASA.

When agencies decide to procure commercial items, they must also conduct market research to determine the customary practices used to provide those items.[11] FASA and its implementing regulations under FAR Part 12 specifically require commercial item contracts to include only those clauses that are consistent with standard commercial practice.[12]

An agency's failure to conduct adequate market research may result in a solicitation that violates customary commercial practice. For example, GAO sustained the protest of Orlans PC challenging the terms of a solicitation for default management services that contained pricing and payment terms that were inconsistent with customary commercial practice.[13]

The protester submitted a sworn declaration to describe standard industry practices that differed from the solicitation's terms. The agency argued that there was no established "customary commercial practice" because it received "mixed" feedback from industry in response to a market research Request for Information (RFI).

GAO rejected the agency's contention because the RFI did not specifically request information regarding the relevant customary commercial practices. Instead, the RFI asked potential offerors to provide recommended terms. GAO concluded that the agency's market research was inadequate because it did "not demonstrate either what customary commercial practices are or that no customary commercial practices exist."[14]

Agencies generally have broad discretion to define their requirements. But, when agencies procure commercial items, they must engage in sufficient market research and advance planning prior to releasing the solicitation to ensure that the terms do not deviate from customary commercial practices.

Small Business Set-Asides

Agencies must also engage in advance planning and market research to comply with legal preferences for contracting with small business. Under the so-called "Rule of Two," contracting officers are required to set aside procurements that exceed the simplified acquisition threshold for small businesses if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns.[15]

An agency's Rule of Two determination is generally "a matter of business judgment within the contracting officer's discretion" and

GAO will not disturb it "absent a clear showing that it was unreasonable."[16]

Contracting officers may use various methods to assess the availability of small businesses including "measures such as prior procurement history, market surveys and/or advice from the agency's small business specialist and technical personnel."[17] However, a Rule of Two determination cannot be "based upon outdated or incomplete information" and "the assessment must be based on sufficient facts so as to establish its reasonableness."[18]

GAO's decision in the protest of DNO Inc. provides a stark example of an agency's failure to reasonably plan for consideration of small businesses.[19] That case involved the Department of Agriculture's procurement of fresh produce for school systems in Michigan and Florida as part of a pilot program for domestic food nutrition assistance that would later expand nationally. The agency issued an unrestricted solicitation for the award of multiple indefinite-delivery, indefinite-quantity contracts.

The protester alleged that the agency "failed to seek information regarding the number of small businesses capable of performing the contract" and "ignored data in its possession showing the existence of at least six qualified small businesses."[20] The agency responded that large businesses provided the majority of fresh produce for the school lunch program and it did not believe small businesses were capable of fulfilling the requirements for entire school systems nationwide.

GAO agreed with the protester that "the agency did not reasonably consider whether the procurement should be set aside, either exclusively or partially, for small business participation."[21] The agency did conduct meetings and conferences calls with interested stakeholders, but the record showed that "little, if any of the agency's acquisition planning related to consideration of small business participation."[22]

The record lacked any analysis or market research to support the agency's belief that small businesses were not capable of performing the requirements. GAO sustained the protest because the agency's Rule of Two determination was "based on assumptions, rather than reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the work."[23]

This decision illustrates that although deference is afforded to the contracting officer's Rule of Two determination, a failure to conduct proper planning and market research in support of that determination can leave the agency vulnerable to a protest.

Conclusion

Agencies generally have wide latitude to conduct acquisition planning, but they may face scrutiny if their actions are unreasonable or inadequate to meet legal requirements. In certain circumstances, reasonable acquisition planning and market research are necessary prerequisites to satisfying legal requirements.

Agencies should be mindful of the circumstances where a failure to plan may violate procurement laws or regulations. Contractors should also understand that an agency's inadequate planning may provide grounds to challenge unfavorable procurement decisions that may impact their ability to compete. CM

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ENDNOTES

1 See 10 U.S.C. § 3204(a); 41 U.S.C. § 3304.
2 See 10 U.S.C. § 3204(e)(5)(A)(i); 41 U.S.C. § 3304(e)(5)(A)(i).
3 eFedBudget Corp., B-298627, Nov. 15, 2006, 2006 CPD ¶ 159 at 7.
4 Id.
5 Id
6 Id. at 8.
7 Id.
8 41 U.S.C. § 3307(b).
9 Palantir USG, Inc. v. United States, 904 F.3d 980, 984 (Fed. Cir. 2018).
10 10 U.S.C. § 3453(c)(2).
11 FAR 10.002(b).
12 41 U.S.C. § 3307(e)(2)(B); FAR 12.301(a); FAR 12.302(c).
13 Orlans PC, B-420905, Oct. 25, 2022, 2022 CPD ¶ 269.
14 Id. at 6.
15 FAR 19.502-2(b).
16 AeroSage, LLC, B-416381, Aug. 23, 2018, 2018 CPD ¶ 288 at 8.
17 Id.
18 Id.
19 DNO Inc., B-406256; B-406256.2, Mar. 22, 2012, 2012 CPD ¶ 136 at 3.
20 Id.
21 Id. at 5.
22 Id.
23 Id.