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This edition includes Recent Developments, Recent Decisions, and a Feature Article titled "Consolidation of Boards of Contract Appeals: New Civilian Board Up and Running."

Recent Developments

False Claims Act: The U.S. Department of Justice (DOJ) recently announced that, for fiscal year 2006, it recovered a record $3.1 billion in settlements and judgments in cases involving allegations of fraud against the Government. Government-initiated claims accounted for $1.8 billion, while suits brought by whistleblowers under the False Claims Act's qui tam provisions accounted for the remaining $1.3 billion. $2.2 billion (72 percent) of the recoveries were in the health care industry, including a $920 million settlement with Tenet Healthcare Corporation, the nation's second largest hospital chain. $609 million (20 percent) of the recoveries were in the defense industry; most of that amount, however, was for a $565 million settlement with The Boeing Company to resolve allegations that the company improperly used competitors' information to procure contracts for launch services from the Air Force and the National Aeronautics and Space Administration. The DOJ's press release is available at http://www.usdoj.gov/opa/pr/2006/November/06_civ_783.html.

Bid Protest Statistics: The U.S. Government Accountability Office (GAO) recently released its bid protest statistics for fiscal year 2006. Of 249 decisions on the merits, the GAO sustained 72 protests. This represents a sustain rate of 29 percent, up 6 percent from the 23 percent sustain rate in fiscal year 2005, and up 13 percent from the 16 percent sustain rate in fiscal year 2002. The number of protests filed decreased slightly to 1,327 cases, down from 1,356 cases in fiscal year 2005. The GAO also reported that there was no instance in which a federal agency did not fully implement a recommendation made by the GAO in connection with a bid protest decided during fiscal year 2006. The statistics are available at http://www.gao.gov/special.pubs/bidpro06.pdf.

Acquisition Advisory Panel: In late December, following 18 months of work, the Acquisition Advisory Panel issued a final draft report containing numerous findings and recommendations regarding federal contracting laws, regulations, and policies. The report ultimately will be issued to the Office of Federal Procurement Policy and Congress. The lengthy draft report is divided into seven chapters, including chapters

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addressing commercial practices, improving implementation of performance-based service acquisition, interagency contracting, small business, the federal acquisition workforce, the appropriate role of contractors supporting the Government, and reporting federal procurement data. Among its numerous recommendations, the Panel's report proposes that the statutory restriction on bid protests regarding orders under multiple award contracts should not apply to orders valued at over $5 million. The report also recommends legislation to ensure that contractors receive the benefit of the same legal presumptions regarding good faith and regularity that the Government currently enjoys in connection with the performance of Government contracts. The draft report is available at http://www.acquisition.gov/comp/aap/draftfinalreport.html.

Prompt Payment Interest Rate: The Department of the Treasury announced that, for the six month period of January 1, 2007 to June 30, 2007, the interest rate applicable to the Prompt Payment Act and claims under the Contract Disputes Act is 5 1/4 percent per year. 71 Federal Register (Fed. Reg.) 78513 (Dec. 29, 2006). The interest rate for the six-month period ending on December 31, 2006 was 5 3/4 percent per year.

OMB Circular A-76 Cost Factors: The Office of Management and Budget (OMB) updated the fringe benefits cost factor used to estimate the cost of Government performance in public-private competitions conducted under OMB Circular A-76. 71 Fed. Reg. 64320 (Nov. 1, 2006). The fringe benefits cost factor, which is used for civilian positions, is comprised of four separate elements: (1) insurance and health benefits; (2) standard civilian retirement benefits; (3) Medicare benefits; and (4) miscellaneous fringe benefits. The OMB adjusted this factor upward from 32.85 percent to 36.45 percent to account for increases in insurance and health benefits as well as civilian retirement benefits. The OMB also updated the annual federal pay raise assumptions, inflation cost factors, and tax rate tables used in OMB Circular A-76 competitions. All changes took effect on November 1, 2006.

Contractors Supporting Deployed Forces: The GAO issued a report addressing long-standing problems faced by the Department of Defense (DOD) that continue to hinder the DOD's management and oversight of contractors at deployed locations. Military Operations: High-Level DOD Action Needed to Address Long-Standing Problems with Management and Oversight of Contractors Supporting Deployed Forces (GAO-07-145, Dec. 18, 2006). Among other things, the GAO concluded that the DOD continues to have limited visibility over contractors at deployed locations and, as a result, senior leaders and military commanders cannot develop a complete picture of the extent to which they rely on contractors to support their operations. The GAO also determined that the DOD continues to lack adequate contractor oversight personnel at deployed locations, which precludes the DOD's ability to obtain reasonable assurance that contractors are meeting contract requirements efficiently and effectively. The GAO recommended that the Secretary of Defense appoint a focal point within the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics that is dedicated to improving contract management and oversight at deployed locations.

Applicability of the UCMJ to Contractors: Increasing attention is now being paid to a change to the Uniform Code of Military Justice (UCMJ) that Congress included in the Fiscal Year 2007 National Defense Authorization Act, signed into law by President Bush on October 17, 2006. Prior to the change, the UCMJ was applicable to several categories of persons, including "[i]n time of war, persons serving with or accompanying

an armed force in the field." See 10 U.S.C. Sec. 802(a)(10). Section 552 of the Act changed this provision to state "in time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field." On its face, this broad amendment would apply to military contractors serving in Iraq or Afghanistan. It is not clear, however, how far this provision may reach or whether Congress has the power to apply the UCMJ to contractors in the circumstances it has specified. Earlier efforts to extend the UCMJ beyond persons in the armed forces have been the subject of much litigation. The U.S. Supreme Court has found the application of the UCMJ to civilians unconstitutional in several cases.

Recent Decisions

Improper Sole Source Awards: The GAO sustained a bid protest challenging the Air Force's sole source award of an engine parts repair contract because, in determining that only one source was available, the Air Force failed to consider the protester as a potential second source, even though the company had expressed an interest in response to the presolicitation notice and had made significant progress towards becoming an approved source. Barnes Aerospace Group, Comp. Gen. Dec. B-298864 et al., Dec. 26, 2006. The GAO also sustained the protest because it appeared that the awardee's status as a qualified source had lapsed under the Air Force's qualification requirements, thus evidencing the agency's unequal treatment of the two potential offerors. In addition, the GAO sustained a protest regarding the proposed sole source award of a Department of State (DOS) contract for software systems implementation and support because the agency did not satisfy its obligation to engage in reasonable advance planning and to promote competition. eFedBudget Corp., Comp. Gen. Dec. B-298627, Nov. 15, 2006. Although the DOS was constrained by its current software licensing agreement with the incumbent, the GAO stated that the agency was required, but failed, to consider whether the costs associated with a purchase of additional rights to the proprietary software, or some other means, outweigh the anticipated benefits of competition.

Small Business Set Asides: The GAO determined that the Army should terminate a contract awarded in a procurement for engineering and technical support services where the procurement was set aside for small business concerns, the Small Business Administration (SBA) determined that the awardee did not qualify as a small business, and there was a suspension of contract performance because of a bid protest filed with the GAO, during which the SBA Office of Hearing and Appeals affirmed the determination that the awardee was not small. ALATEC Inc., Comp. Gen. Dec. B-298730, Dec. 4, 2006. Although the intended awardee's size status was challenged prior to award, the Army had proceeded to award the contract before receiving the SBA's decision because the SBA did not issue its size determination within 10 business days after receiving the size protest. Federal Acquisition Regulation 19.302(h)(1) authorizes Contracting Officers to proceed with contract award despite a pending size protest when the SBA's decision is not issued within 10 business days.

Conflicts of Interest: The GAO sustained a bid protest challenging the decision by the Department of Health and Human Services (HHS) not to fund the protester's phase I proposal under the Small Business Innovation Research program because the agency failed to determine whether the proposal evaluators had conflicts of interest impairing their objectivity. Celadon Laboratories, Inc., Comp. Gen. Dec. B-298533, Nov. 1, 2006. When the protester learned that all four of the evaluators, who were members of an independent peer review panel, worked for or were associated with a segment of industry that relies upon a competing type of

technology, the protester informed HHS of the company's concern regarding a conflict of interest. After the evaluators subsequently concluded that the protester's proposal was technically unacceptable, HHS addressed the alleged conflict of interest by verifying that each evaluator had certified that he or she had no conflict of interest and by reviewing the evaluation record and finding no evidence of bias. However, the GAO concluded that, under the circumstances here, HHS was required to do more. HHS was required to determine specifically whether the evaluators had real conflicts of interests under the applicable regulations. In that regard, the GAO noted that the strict limitations on both actual and potential conflicts of interest reflect the reality that the potential harm flowing from such situations is, by its nature, frequently not susceptible to demonstrable proof of bias or prejudice.

Responsibility Determinations: Where the Federal Highway Administration (FHA) determined that a company could not perform a contract for bridge-related repairs within the period specified in the offeror's bid, the GAO concluded that the FHA's rejection of the bid constituted a finding of nonresponsibility rather than one of nonresponsiveness. Because the rejected offeror was a small business, the FHA was required to refer the matter to the SBA for a certificate of competency review. The GAO therefore sustained the rejected offeror's bid protest. Tessa Structures, LLC, Comp. Gen. Dec. B-298835, Dec. 14, 2006. Although the FHA argued that its determination concerned responsiveness, not responsibility, a bid is nonresponsive where it takes exception, or fails to conform, to the requirements of the solicitation. Bidder responsibility, in contrast, concerns whether a bidder can perform as promised in its bid. Here, the FHA was concerned that the offeror could not perform the work within 120 days as specified in its bid. The solicitation stated that the performance period could not exceed 305 days, but it did not specify a minimum number of days. Thus, the rejected offeror's bid did not take exception, or fail to conform, to the solicitation's requirements.

Cost Realism Analyses: The GAO sustained a bid protest challenging the award of three Navy contracts for global contingency construction because, in performing its cost realism analysis, the agency reclassified an awardee's indirect Program Management Office costs as direct costs to be consistent with other offerors. Kellogg Brown & Root Services, Inc., Comp. Gen. Dec. B-298694 et al., Nov. 16, 2006. The GAO determined that this did not result in a reasonable assessment of the awardee's probable cost because the adjustment was inconsistent with the Cost Accounting Standards and the company's cost accounting practices, to which it was obligated to adhere in performing the contract. Moreover, had the Navy not made this adjustment, the protester's evaluated cost would have been lower than this awardee's evaluated cost. The GAO also sustained the protest because the record did not support the Navy's evaluation of the protester's contingency response plan, and the Navy otherwise failed to explain why its evaluation of the plan was reasonable in light of detailed arguments presented by the protester.

Federal Supply Schedule Task Orders: The U.S. Court of Federal Claims (COFC) concluded that the Department of Defense Education Activity (DODEA) improperly awarded a Federal Supply Schedule (FSS) task order for a remote location home school program because the awardee, which held an FSS contract but did not have the capability to meet the agency's requirements, teamed with a subcontractor that did not hold an FSS contract. IDEA International, Inc. v. United States, No. 06-652C et al. (Fed. Cl. Dec. 1, 2006). The COFC stated that, where a procuring agency limits a solicitation to holders of an FSS contract, and an offeror submits a

proposal that is based upon a teaming arrangement, all team members must hold FSS contracts. The COFC also expressed concerns with the DODEA's failure to weigh the technical advantages of the protester's proposal against the awardee's slightly lower price, as well as the agency's modification of the task order's payment terms shortly after award. However, because the awardee had already performed three months of the one year task order, and because terminating the order would be disruptive to the educational program and the needs of military families, the COFC refused to require a change in contractors, and instead granted the protester recovery of its proposal preparation costs.

Cost/Technical Tradeoffs: The GAO sustained a bid protest regarding the award of a General Services Administration (GSA) contract for commercial handtools because the record did not contain a meaningful comparative analysis of proposals or any explanation of why the GSA selected the awardee's lower technically rated, lower priced proposal for award over the protester's higher technically rated, higher priced proposal. Midland Supply, Inc., Comp. Gen. Dec. B-298720 et al., Nov. 29, 2006. Although the solicitation provided that past performance and delivery, when combined, would be considered significantly more important than price, the GSA relied on a mechanical comparison of the total point scores assigned for the three evaluation factors, including price, without any qualitative assessment of the technical differences between the proposals.

Lapses in Corporate Status: The COFC concluded that a plaintiff lacked standing to file a bid protest challenging the award of a Department of Veterans Affairs (VA) outpatient clinic contract because, three weeks prior to award, the plaintiff, a Mississippi corporation, was involuntarily dissolved under state law for failure to file its annual reports or failure to pay franchise taxes. Galen Medical Assocs., Inc. v. United States, No. 05-755C (Fed. Cl. Nov. 20, 2006). Although the plaintiff several months later obtained reinstatement of its corporate status, the COFC concluded that any retroactive effect of the reinstatement did not alter the fact that, as of contract award, the plaintiff was not in a status in which it could contract to provide the services sought by the VA. The plaintiff therefore did not qualify as an interested party eligible to protest the award to another offeror, and the COFC dismissed its complaint.

Contracting Officer Independence: The COFC found that the Federal Labor Relations Authority (FLRA) did not comply with the requirement of the Contract Disputes Act that contracting officers act independently when adjudicating disputes. Phillip J. Lavezzo d/b/a DKO Technologies v. United States, No. 05-575C (Fed. Cl. Dec. 7, 2006). The plaintiff contractor received conflicting final decisions issued in response to its claims under a FLRA contract to staff a computer help desk and a FLRA contract for database programming services. One decision, issued by a FLRA contracting officer, granted most of the amounts claimed by the contractor, but also was filled with personal attacks on the contracting officer's supervisor, who had instructed the contracting officer not to take action in response to the contractor's claims. Another set of final decisions, which addressed the same claims dealt with in the FLRA contracting officer's decision, was issued by a contracting officer in a different agency – the Department of Treasury – to whom the FLRA contracting officer's supervisor had reassigned the contractor's claims pursuant to an interagency Reimbursable Services Agreement for contract administration services. According to the COFC, the Department of Treasury contracting officer's final decisions were simply "a set of rubber-stamp claim denials." Regarding the FLRA contracting officer's final decision, the COFC concluded that the considerable discord between the contracting officer and his supervisor

had a direct effect on the handling of the contractor's claims, and the court chastised the supervisor because she was not a contracting officer and improperly "meddled" in the claims process. The COFC stated that the FLRA contracting officer appeared to have been so angered by his supervisor's interference that he was "focused more on winning an office battle before his retirement than on the merits of the Plaintiff's claims." Regarding the Department of Treasury contracting officer's final decisions, the COFC stated that an appearance of impropriety arose when the claims were transferred from the FLRA contracting officer, the logical decision maker, to another contracting officer outside the agency. The COFC further stated that the Department of Treasury's final decisions reflected such a "slipshod end product" that the FLRA's payments for the work under the Reimbursable Services Agreement "might be regarded as compensation for the desired outcome rather than for the effort expended." The COFC remanded the matter to the FLRA and directed the agency to assign a new contracting officer to decide the claims and issue a proper final decision.

Feature Article

Consolidation of Boards of Contract Appeals: New Civilian Board Up and Running

Effective January 6, 2007, most boards of contract appeals in the civilian agencies were consolidated into a single, new Civilian Board of Contract Appeals (CBCA). 71 Fed. Reg. 65825 (Nov. 9, 2006). This consolidation occurred pursuant to the National Defense Authorization Act for Fiscal Year 2006.

The CBCA is authorized to hear and decide contract disputes involving executive agencies (other than the Department of Defense, the Departments of the Army, Navy, and Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority) under the provisions of the Contract Disputes Act. The CBCA also will conduct other proceedings as required or permitted under certain statutes or regulations. For example, the new board will resolve disputes involving grants and contracts under the Indian Self-Determination and Education Assistance Act, certain disputes between insurance companies and the Department of Agriculture's Risk Management Agency, and several types of cases previously heard by the General Services Board of Contract Appeals by delegation from the Administrator of General Services.

As a result of this consolidation, the boards of contract appeals at the General Services Administration and the Departments of Agriculture, Energy, Housing and Urban Development, Interior, Labor, Transportation, and Veterans Affairs have been terminated. All cases, judges, and other personnel at these terminated boards have been transferred to the CBCA. Contracting officers from agencies impacted by the consolidation have been asked, when issuing final decisions in response to contractor claims, to alert contractors that appeals should now be sent to the CBCA, even if the agencies' regulations have not yet been updated to reflect this change.

The mailing address of the CBCA is 1800 F Street, NW, Washington, DC 20405. The Office of the Clerk of the CBCA may be contacted at (202) 606-8800. The new board's website will be located at http://www.cbca.gsa.gov, though it may currently be found at http://www.gsbca.gsa.gov. Although the CBCA's rules of procedures have not yet been promulgated, interim rules are expected to be published in the Federal Register soon.

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