



HUSCH BLACKWELL

Federal Case Law Update

End of Year NCMA-WPI Federal Contractor Update
January 17, 2018

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Lockheed Martin Integrated Sys., Inc., ASBCA Nos. 59508, 59509

- DCAA sought claim of more than \$100 million for alleged breach of obligation to manage subcontracts.
- ASBCA dismissed the claim on the grounds that it was based on vague, conclusory allegations and that the Government's legal theory was "plainly invalid."

Starry Associates, Inc. v. The United States and Intellizant, LLC, No. 16-44C

- Starry protested the agency's award decision. After the GAO sustained the protest in part, the agency cancelled the solicitation. Starry then filed a protest at the Court of Federal Claims (COFC).
- In 2016, the COFC sustained Starry's protest. In its decision about attorney's fees, the COFC noted that “[W]hat the agency did here constitutes an egregious example of intransigence and deception, not just with regard to the bidder, but to the GAO and to the court. It is fortunate, but relevant, that this was anomalous conduct.”

Size Appeal of Olgoonik Diversified Services, LLC

- Department of State issued a solicitation for design-build construction services in Baghdad. The Solicitation was issued as a small business set aside.
- After Olgoonik was identified as the successful offeror, a competitor filed a size protest. The Area Office agreed with the protestor and found that Olgoonik was not a small business concern.
- OHA granted the appeal and reversed the Area Office's size determination.

McCann-Erickson USA, Inc., B-414787

- McCann-Erickson's (ME) proposal was eliminated from consideration for a \$4B Department of the Army marketing contract.
- ME protested its elimination from consideration to the GAO.
- GAO sustained the protest, finding that “[t]he record shows that the agency performed only a superficial, perfunctory review of the ME proposal to identify instances where ME allegedly did not fully comply with instructions for proposal preparation. However, the agency did not meaningfully evaluate the substance of the ME proposal, as required by the solicitation’s evaluation criteria.”

Matter of Redhorse Corp.

SBA No. VET-261

- GSA issued an RFQ as an SDVOSB set aside; Redhorse Corporation was identified as the apparent awardee.
- A competitor filed an SDVOSB status protest, which the SBA Director of Government Contracting sustained. Redhorse appealed to OHA.
- OHA concluded that the SDVOSB status protest should have been dismissed, granted the appeal and vacated the SBA's decision.
- Under the current regulations, an SDVOSB that qualifies at the time of its initial offer on an underlying multiple-award contract will generally be eligible for orders issued under that contract unless a Contracting Officer requires recertification of SDVOSB status in connection with an order.
- Note that this decision was under the SBA's self-certification SDVOSB program, the decision does not apply to VA SDVOSB procurements.

Dell Federal Systems, L.P. and Blue Tech, Inc., Nos. 17-465C, 17-473C

- In a \$5B Army Desktop Mobile and Computing Procurement, only 9 out of the 58 bidders were considered technically acceptable.
- Unsuccessful bidders filed GAO protests. In response to the protests, Army indicated that it would voluntarily undertake corrective action including reopening bids, conducting discussions, and allowing resubmission of proposals,.
- Several winning bidders attempted to block the proposed corrective action. The COFC sustained the protests, finding that the proposed corrective action was a “blunderbuss approach to corrective action that neither the record nor the law supports.”

Matter of Verdi Consulting, Inc. B-414103.2

- HUD solicitation issued as an 8(a) set aside
- Verdi was the incumbent contractor and received evaluations of unacceptable for two of the evaluation factors. Another offeror was selected for the award and Verdi protested.
- GAO sustained the protest, finding among other things that:
 - Verdi was an interested party
 - HUD waived various objections at the GAO
 - Verdi's proposal was improperly downgraded
 - The evaluation was not sufficiently documented
 - Agency failed to evaluate option year pricing

Agility Defense & Government Services, Inc. v. United States, No. 2016-1068

- Agility submitted two certified claims to the Contracting Officer (CO) for \$4,359,071 and \$1,602,148, respectively.
- The CO found that Agility was entitled to \$263,363 on the first claim and \$0 on the second claim. Agility appealed these decisions.
- Following a 3 day trial, the COFC found that the agency's estimates were based on accurate historical data and thus were not negligent. As a result, Agility was not entitled to any damages.
- The Court of Appeals for the Federal Circuit reversed.

Size Appeal of Automation Precision Technology, LLC, SBA No. SIZ-5850

- Automation Precision Technology (ATS) teamed with Serco, the incumbent contractor for a Navy Contract.
- Nearly all of the contract employees were former Serco employees, including the Program Manager and other key personnel.
- The Area Office found that ATS was ineligible for the contract award based on the ostensible subcontractor rule; ATS appealed to OHA.
- OHA denied the appeal and found that ATS was unusually reliant on Serco.

Other Cases

- United States ex. Rel. Ameliorate Partners, LLP v. ADS Tactical, Inc.
 - Government and ADS settle fraud claims relating to certification of small business size and status.
- United States ex. rel. Harman v. Trinity Industries, Inc.
 - 5th Circuit overturns jury's \$663 million fraud verdict regarding highway guardrail systems.
- Veterans Contracting Group v. U.S.
 - COFC defers to SBA disqualification of firm based on its interpretation of the “unconditional ownership requirement.”

Questions?