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Bad Faith

Whether and How a Bid Protest Should Allege Bias: Court of Federal Claims Opinion Answers Some Questions, Raises Others

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If a bid protester is weighing whether to accuse an agency of bias, there usually are two separate, potentially cross-cutting concerns: (1) whether, and to what extent, the allegation might affect customer relations; and (2) whether the allegation is likely to gain traction during the protest. A recent opinion from the Court of Federal Claims (''Court'') offers some perspective on the latter, while also raising at least four significant and related questions.

The opinion at issue is *InfoReliance Corp. v. United States*, No. 14-780C, — Fed. Cl. — (Oct. 23, 2014) (Dkt. No. 45). The Court granted a motion filed by InfoReliance, the protester, to pursue limited discovery and to supplement the administrative record based on allegations that a contract award by the U.S. Marine Corps (''USMC'') was tainted by the bias of an agency official involved with the procurement, the Management Evaluation Review Panel chairperson (''MERP Chair''). According to the Source Selection Plan, the official role of the MERP Chair was to give a best value recommendation to the USMC's Source Selection Authority (''SSA''). But based on InfoReliance's allegations, the MERP Chair ''went out of her way'' to steer the contract to an InfoReliance competitor, leading others in the USMC to conclude that ''the process was manipulated,'' and that ''bias had infected the process.'' As support, InfoReliance filed, under seal, a declaration from a ''Mr. Perry''—presumably, an InfoReliance employee. We understand from the Court's redacted opinion that the Perry declaration recounted statements ''allegedly made to an InfoReliance officer by two procurement officials who were with the USMC at the time of the procurement.'' These officials apparently suggested that the MERP Chair improperly influenced the award. Notably, the MERP Chair also was the Contracting Officer Representative (''COR'') on a related contract held by the InfoReliance competitor.

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Apart from an interesting set of allegations, the Court's opinion is worth reading because it touches on a number of important issues, which we discuss below in a Q&A format.

■ ***Question 1. What facts must be shown to prevail on a claim of bias?***

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InfoReliance was seeking discovery and supplementation of the administrative record, so the Court did not require that InfoReliance ''meet the same burden of proof that it ultimately must carry on the merits.'' Nonetheless, the opinion provides contractors with some important guidance. InfoReliance met the less-stringent (but still significant) standards for discovery and supplementation during a bid protest at the Court, having shown that (a) this was ''one of those rare cases'' in which ''extra-record material'' would go towards establishing bias; and (b) there were ''sufficient well-grounded allegations'' of bias. It is unclear, however, whether InfoReliance will be able to satisfy the more exacting inquiry for success on the merits: in effect, to have ''irrefragable proof'' of bias that can ''overcome the presumption of regularity and good faith'' that is given to government officials. As the Court notes, ''[i]t would not be remarkable for an evaluator, once convinced that a particular proposal possessed superior merit, to attempt to persuade others to agree with her opinion.'' Considering the Perry declaration, it seems that second-hand statements of agency officials may be compelling enough to justify discovery and supplementation, but not ''irrefragable'' enough for the Court to enter a judgment for the protester. The Court allowed InfoReliance to conduct limited discovery and to supplement the record only insofar as InfoReliance still must test ''the merits of its claim [] on a complete record.''

■ ***Question 2. Can a protester prevail on the merits if it has ''irrefragable'' evidence that one of the agency's evaluators was biased?***

Not necessarily. On the merits, a protester still must show that the biased evaluator tainted the agency's award decision—or, to put it another way, that the protester was prejudiced by the evaluator's bias. To illustrate, consider that InfoReliance, according to the Court, has asserted ''well-grounded allegations'' of bias. The Court even observes that the MERP Chair's conduct would be ''hard to explain absent bias.'' Despite that, InfoReliance still must show—after conducting discovery and supplementing the record—that it was prejudiced. The Court describes this burden as follows: ''Whether, if [the MERP Chair] is proven to have been biased, she wielded sufficient influence to taint the award is a question of fact best left to the merits determination.'' In the end, the MERP Chair's proximity to the SSA and the award decision under protest might allow InfoReliance to carry this burden. As the Court notes, the MERP Chair ''chaired one of the evaluation panels, holding a position the very point of which was to influence the award decision.'' By extension, though, a protester that alleges bias on the part of an evaluator who is further removed from the final award decision—*e.g.*, a single member of a technical evaluation team—might find it more difficult to carry its burden of showing prejudice on the merits.

■ ***Question 3. Wasn't it illegal or improper—or proof of bias, at least—for the MERP Chair to have been a COR on a separate contract held by the awardee, InfoReliance's competitor?***

It is neither illegal nor improper for an agency to staff its evaluation teams with individuals who have administered or evaluated a separate contract performed by one of the offerors. Nor, for that matter, does such ''dual-hatting'' necessarily suggest bias. The composition of an evaluation team is left to the discretion of the contracting agency. Generally speaking, a protester can only challenge such discretion with proof of fraud, a conflict of interest, or bias. Indeed, an agency might feel compelled to include such individuals on an evaluation team because Federal Acquisition Regulation (''FAR'') 15.303(b) requires that an evaluation team have ''appropriate contracting, legal, logistics, technical, and other expertise to ensure a comprehensive evaluation of offers.'' If an agency has few such subject-matter experts available, it might have little choice but to staff an evaluation team with a contracting officer or COR on a contract performed by one of the offerors. In any event, the agency should at least be guided by FAR 3.101-1, which generally requires government conduct to be ''above reproach,'' with ''complete impartiality''; FAR 3.104-2, which identifies statutes and regulations covering certain prohibited conduct; and FAR 2.101, which defines an ''organizational conflict of interest'' to include a situation where a person is unable to render impartial advice. Employees of the Department of Defense (''DOD'') also must comply with DOD's Joint Ethics Regulation, which requires that DOD employees ''perform[] duties with impartiality [] to maintain integrity and avoid conflicts of interest and hypocrisy.'' Still, an allegation of bias is likely to fail if it is based on nothing more than a ''dual-hatted'' evaluator.

■ ***Question 4. If a contractor has ''inside information'' of bias from an agency source, can it at least obtain discovery and supplement the record in a protest before the Court?***

Perhaps, but proceed here with extreme caution. Not mentioned by the Court in its recent *InfoReliance* opinion is how the Procurement Integrity Act, 41 U.S.C. Chapter 21 (''PIA''), might be implicated by the disclosure, receipt, and/or use of evidence concerning how an agency evaluator could have influenced an award decision. The PIA generally prohibits improperly disclosing or obtaining certain procurement-related information that constitutes ''source selection information'' or ''contractor bid or proposal information.'' Of particular note here, the PIA broadly defines ''source selection information'' as information ''prepared for use by an agency for the purpose of evaluating a bid or proposal . . . , if that information has not been previously made available to the public or disclosed publicly.''

Concerning *InfoReliance*, ''source selection information'' could be said to include information comparable to what might have changed hands between agency officials and contractor employees, regardless of whether it substantiates allegations of bias. For example, the PIA prohibits disclosing ''source selection information before the award of a Federal agency procurement contract to which the information relates.'' The PIA draws no distinction between ''source selection information'' that reflects proper or improper conduct by the agency, and thus creates no safe harbor for a contractor investigating suspicions of bias. Hence, this prohibition could be violated where an agency official discloses evidence of bias from within the agency; it also could be violated if a contractor subsequently discloses that evidence in a bid protest filing. Further, the PIA prohibits ''knowingly obtain[ing]'' source selection information ''before the award of a Federal agency procurement contract to which the information relates.'' Arguably, a contractor that successfully solicits agency officials for evidence of bias could be accused of violating this prohibition.

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Of course, PIA violations only occur when source selection information is improperly disclosed or obtained ''before the award of a Federal agency procurement contract,'' so any alleged PIA violation is most likely to arise in the event that information from within an agency is disclosed or obtained before the agency's initial award decision. From what we can tell, this did not occur in *InfoReliance*. Even so, contractors and their counsel should still proceed with caution when investigating suspicions of agency bias. In addition, they should be aware of the PIA-related implications of using any such evidence received from within the agency, whether in a pre-award or a post-award bid protest. The act of uncovering prejudicial agency bias may not be worth the trouble of triggering, as FAR 3.104-7 outlines, the chain of events and consequences that can follow violations or possible violations of the PIA.

Conclusion. All in all, the Court's recent *InfoReliance* opinion affirms that bias allegations in bid protests are not to be taken lightly, particularly where such allegations attack the conduct of a single agency official. Even where allegations are ''well-grounded'' and an official's conduct is ''hard to explain absent bias,'' a protester still must have ''irrefragable'' proof of bias to succeed on the merits. A protester also must show prejudice, which can be a difficult burden if an official's influence on the award decision may have been attenuated or indirect. In that regard, the mere fact that an official administered a separate contract performed by one of the offerors is not, on its own, evidence of bias or prejudice. Further, because of how the PIA might apply, contractors and counsel should be wary of soliciting information from officials within the agency, even though such sources may be the only viable avenue for substantiating a suspicion of bias.