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Recent decisions by the Court of Federal Claims and the Government Accountability Office have complicated the question of how government contractors manage a pipeline of pending proposals for new prime contracts in the face of a merger or acquisition. The COFC and GAO have not revealed what, if anything, a contractor realistically can do to preserve the viability of its proposals in the lead-up to a corporate transaction. But awareness of the status of pending proposals — and potential vulnerabilities created by these recent COFC and GAO decisions — is critical in any corporate transaction, particularly one that involves the carve-out or divestiture of a contractor from a larger organization.

BNA INSIGHTS: Another Trap for Pending Proposals in Contractor M&A

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The Court of Federal Claims (COFC) recently added another wrinkle to the complicated question of how to manage a government contractor's pipeline of pending proposals for new prime contracts in the face of an M&A deal or other corporate transaction. In *Universal Protection Service, LP v. United States*, No. 16-126C (Apr. 7, 2016), the court found that a would-be protester (Universal) lacked standing to pursue a post-award bid protest because it was not a successor-in-interest to the original offeror (ABM Security), which the protester had acquired in an asset purchase.

These concerns are not unique to disappointed offerors attempting to challenge an agency's decision to award a contract to another offeror. The converse is also true: Under a recent line of Government Accountability Office (GAO) precedent, awardees are vulnerable to protest from competitors if they undergo a sale or other corporate transaction while their proposals are pending. Despite these decisions, neither the COFC nor the GAO has revealed what, if anything, a contractor realistically can do to preserve the viability of its proposals in the lead-up to a corporate transaction. But awareness of the status of pending proposals — and potential vulnerabilities created by these recent COFC and GAO decisions — is critical in any corporate transaction, especially when a company or business unit is carved out from a larger entity.

Contract Awards at Risk

In two recent decisions, the GAO sustained protests of awards to contractors in the midst of corporate transactions because the procuring agencies did not evaluate

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how the transactions would affect the awardees' proposals and performance. *See FCi Fed., Inc.*, B-408558.7, 2015 CPD ¶ 245 (Comp. Gen. Aug. 5, 2015); *Wyle Labs., Inc.*, B-408112.2, 2014 CPD ¶ 16 (Comp. Gen. Dec. 27, 2013), *recons. denied sub nom. NASA—Recons.*, B-408112.3, 2014 CPD ¶ 155 (Comp. Gen. May 14, 2014).

In *Wyle*, the awardee was spun off from a larger company while its proposal was pending, and had informed the procuring agency of the spinoff and the need for a novation if it was awarded the contract. Nevertheless, the GAO sustained the protest, concluding that the agency had not considered how that transaction would affect the awardee's performance and price.

And in *FCi Federal*, the awardee was acquired by another contractor after award was made and while the agency was engaged in limited corrective action on an unrelated question. The GAO sustained a protest filed after the transaction closed, reasoning that the acquisition necessarily would have affected the awardee's proposal, performance and price, and concluding that the procuring agency needed to re-evaluate the awardee.

Protest Right Foreclosed

The COFC recently jumped into the fray, coming at this issue from the opposite direction as *Wyle* and *FCi Federal*: what to do when a protester undergoes a corporate transaction between the time of proposal submission and protest.

In *Universal Protection*, the COFC found that Universal lacked standing to pursue its protest because it was not a successor-in-interest to ABM Security, the original offeror. Following proposal submission and multiple rounds of protests and corrective action, Universal acquired the ABM Security business in an asset purchase. In concluding that Universal lacked standing, the court focused not on how the transaction was structured or whether all of ABM Security's assets were transferred to Universal, but rather on how the proposal was written. Specifically, the court examined whether ''Universal can offer an identical proposal and all of the assets and services promised in the proposal by ABM Security Services.'' The court found that Universal could not because portions of ABM Security's proposal pointed — with varying levels of directness — to information about and resources of ABM Security's former parent company, ABM Industries.

Universal Protection is ostensibly a continuation of existing case law under the ''successor-in-interest'' doctrine. As *Universal Protection* explained it, ''even if a bidder did not submit a proposal, if it is the complete successor-in-interest to the actual offeror, the bidder may stand in [its] shoes and have standing to bring a protest.'' The complication lies in the application of that doctrine, however. *Universal Protection* leaves contractors wondering whether it is possible to qualify as a successor-in-interest if the original offeror's proposal mentions a parent company, subsidiary or other affiliate that stayed behind during the deal — and, if so, how much reference to that former affiliate is sufficient to tip the scales to *non*-successor-in-interest status.

Challenge for Contractors

When read together, *Wyle*, *FCi Federal* and *Universal Protection* impose an increasingly narrow path for contractors that are undergoing corporate transactions. Where a contractor is fortunate and wins the award in the first instance, *Wyle* and *FCi Federal* could make the award vulnerable to protest. The GAO expects the procuring agency to evaluate how the transaction would affect the contractor's proposal and performance — a particularly difficult task given what is usually a limited opportunity for the contractor to communicate with the agency about the transaction.

On the one hand, the confidentiality and sensitivity of the deal may prevent the contractor from communicating with any third parties about the deal until it is nearly (or actually) completed. On the other hand, when the contractor is finally at liberty to share the relevant information with the agency, there may be no avenue by which to do so, short of a(nother) round of proposal revisions. The GAO has made clear that simply notifying the procuring agency of the transaction is not enough; it expects the agency to evaluate how the substance of the contractor's proposal would be altered by the transaction.

By contrast, if the contractor is unfortunate and loses the award in the first instance, *Universal Protection* may mean that the contractor forfeits the ability to protest if it has undergone a corporate transaction in the interim. But there are several important considerations that may help avoid this possibility.

Path Forward

As an initial matter, contractors must be aware that even if an entire business or entire corporate entity is being purchased, that does not guarantee successor-in-interest status for purposes of pending proposals if those pending proposals invoke a parent or related company. And subtle references to a corporate affiliate may be enough to undermine successor-in-interest status: The COFC found relevant that ABM Security's proposal, among other things, referenced statistics about and the business ethics of ABM Industries; provided financial data for ABM Industries; and committed the use of certain software whose licenses were carved out of the sale to Universal, notwithstanding the fact that the licenses were commercially available.

As a result, in advance of a transaction, government contractors should ensure that business development functions are aligned with corporate strategy, and that both constituencies understand how major proposals are structured and implicate capabilities outside of the immediate entity or business unit. While the business development team will be inclined to fortify proposals with discussion of the strengths and assets of the entire corporate family — and understandably so — that may backfire if the proposal is then part of a sale, and some of those familial strengths and assets remain behind.

Buyers should be equally aware of this tension. An objective in just about every acquisition in the government contracts industry is to capture the target's pipeline of likely awards. A slate of orphaned proposals would put at risk the financial model underlying most deals. Drilling down on the content and detail of proposals during the diligence process would inform the risk profile. But that may be easier said than done. Buyers often do not receive access to pending proposals during diligence, and sometimes are prohibited from such access to avoid running afoul of antitrust rules. Even then, buyers should still be addressing this risk

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during diligence, seeking to understand from the acquisition target the steps that it has taken in the lead-up to a transaction to protect its pipeline of new prime contract opportunities.

Conclusion

Wyle, *FCi Federal* and *Universal Protection* signify a divergence between bid protest case law and the realities of modern business for government contractors. Contractors cannot — and should not — be expected to structure deals to preserve their ability to protest or buttress their defense against potential protests. But this line of cases from the COFC and GAO creates an expectation gap: To survive a protest — or be able to protest — contractors are expected to convey information and make assurances that, in reality, they have no ability or mechanism to do. Until this gap in the law is resolved, contractors are well-served to approach corporate transactions with a critical eye toward pending and impending proposals.