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COFC Endorses CDA Claim For Breach Of "Fair Opportunity To Be Considered"

The Federal Acquisition Streamlining Act's bid protest bar precluded contractors from challenging the award of a task or delivery order, subject to several limited exceptions -- *i.e.*, if the task or delivery order increased the scope, period or maximum value of the underlying IDIQ contract. Recent amendments to the Act expanded GAO's bid protest jurisdiction to include challenges to task or delivery order awards valued at over $10 million. These amendments also provided for enhanced competition procedures for task or delivery order awards valued in excess of $5 million, but did not vest GAO or the Court of Federal Claims with jurisdiction to entertain bid protests based on alleged violations of those procedures. Thus, contractors seeking redress for agency errors in connection with the award of task or delivery orders valued at under $10 million were for the most part "out of luck."

Efforts to directly break-through FASA's bid protest bar proved largely unsuccessful. Rather than continue to confront the prohibition head-on, contractors sought a way to by-pass the Act. Contractors found this passageway by asserting a CDA claim in lieu of filing a bid protest. Specifically, contractors alleged that agency errors during the acquisition process breached the underlying contract's or the FAR's "fair opportunity to be considered" provisions. In a series of cases, the Boards of Contract Appeals thoughtfully considered these CDA-based arguments and concluded that such causes of action were not foreclosed by FASA. *See Burke Court Reporting Co.*, DOT BCA No. 2058, Sept. 11, 1997, 97-2 BCA ¶ 29,323; *Community Consulting Int'l*, ASBCA No. 53489, Aug. 2, 2002, 02-2 BCA ¶ 31,940; *L-3 Communications Corp.*, ASBCA No. 54920, 06-2 BCA ¶ 33,374.

As we pointed-out in an earlier blog article, the Court of Federal Claims was not as receptive to this type of CDA claim. The Court indicated, albeit in *dicta*, that it "does not agree with the theory that actions, that are in essence bid protests of task order awards, can be re-characterized as contract disputes in order to create jurisdiction in this court or in an agency board of contract appeals." *A&D Fire Protection, Inc. v. United States*, 72 Fed. Cl. 126, 135 (2006). Although we believed that the facts in *A&D Fire Protection* did not lend themselves to COFC jurisdiction, we also felt that the Court would reach a different conclusion if confronted with the right set of circumstances. Specifically, in our Public Contract Law Journal article, we explained that "[i]t remains to be seen … whether the court will reach a similar conclusion when presented with a factual scenario where the contractor bases its cause of action on the CDA and seeks only

monetary damages, as opposed to injunctive relief."

The Court of Federal Claims recently encountered such a factual scenario and sided with the Boards in accepting jurisdiction over the matter. *Digital Techs., Inc. v. United States*, No. 08-604C, 2009 WL 4785451 (Fed. Cl. Dec. 9, 2009) ("*DTI*"). Contractors now will have at their disposal favorable precedent from the Boards and the COFC to support their CDA breach claims. Contractors must be certain, however, not to blur the line between a CDA claim and a bid protest. The Government will seize on any indicia that the contractor is prosecuting a bid protest under the guise of a breach claim to argue that the contractor's complaint is barred by FASA's bid protest prohibition. Fortunately, the Court of Federal Claims in *DTI* provided a list of key factors it will consider in determining whether a Complaint is a breach of contract claim or a task order or delivery order protest. Contractors asserting a breach of a "fair opportunity to be considered" should undertake the following steps to protect their CDA claims against a FASA-based dismissal:

- Identify the "fair opportunity" provisions that have been breached;
- File a written claim with the agency contracting officer demanding a sum certain;
- Certify any claim exceeding $100,000;
- Receive a final decision from the agency contracting officer before appealing to the Board or COFC (or, if a final decision has not been received from the agency contracting officer in a timely fashion, rely on customary "deemed denial" standards in appealing to the Board or COFC);
- Seek monetary damages in both the claim and the Complaint; and
- Refrain from seeking an automatic stay, temporary restraining order, or preliminary or permanent injunction, or any other form of relief that seeks to overturn the award or alter the course of contract performance.

In conclusion, both the Boards and the COFC have accepted jurisdiction over CDA claims alleging that an agency deprived a contractor of a "fair opportunity to be considered" for a task or delivery order award. If a contractor properly frames the Complaint, the Government will be hard-pressed to argue, as it frequently does, that the action is nothing more than a "thinly disguised protest."

One final note -- the COFC decision in *DTI* only addressed the Government's motions to dismiss. While the contractor in *DTI* overcame a significant jurisdictional hurdle, it must now not only prove its case on the merits, but it also must demonstrate its entitlement to damages. As we saw in a recent Board decision, a contractor may have to settle for B&P (*i.e.*, reliance damages) if it cannot meet the more demanding standard for lost profits. *L-3 Communications Corp.*, ASBCA No. 54920, May 5, 2008, 08-1 BCA ¶ 33,857. We will have to wait to see if DTI encounters evidentiary problems and damages limitations at the Court of Federal Claims.

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