

Professional Perspective

Transactions Involving Government Contractors Impact Pending Bids

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The federal marketplace is seeing sustained high volume of mergers, acquisitions, spin-off, and restructuring transactions. As a result, both buyers and sellers should be aware of the developing body of case law at the Government Accountability Office and the Court of Federal Claims regarding the impact of these corporate transactions on pending bids, and how parties may protect them. Since these risks could cause the acquiring entity to be excluded from competition pending at the time of the transaction, they could significantly influence valuation, and should be carefully considered early in the process.

This article overviews recent bid protest decisions and provides some practical guidance on diligence, deal timing, and communications with government customers regarding transactions. It highlights the most likely bid protest risks that may be created by a merger, acquisition, spin-off, or restructuring transaction. Because every transaction is different, it may be prudent to consult government contracts counsel before finalizing the acquisition or merger involving any government contractor.

Rules of the Road

The Anti-Assignment Act, 41 U.S.C. §6305 largely governs the effect of corporate transactions on pending government contract bids. The act generally prohibits the transfer of a government contract to another party without a government waiver or post-closing novation. However, transfers “incident to the sale of an entire business or sale of an entire portion of a business,” i.e., transfers occurring “by operation of law,” are exempt from the statute. *L-3 Communications Integrated Systems, L.P. v. United States*, 84 Fed. Cl. 768, 776 (2008). A transfer by operation of law may happen via corporate mergers, consolidations, reorganizations, or the sale of an entire business or business unit in a stock transaction. Transfers by operation of law occur when the transferee is the transferor's “successor in interest,” meaning the contract or bid essentially continues with the same entity in a different form.

Importantly, corporate transactions may affect the government's duties in evaluating certain bids. Bids for government contracts may not stand if the bidder intends to perform the contract in a materially different manner than outlined in the proposal. Thus, when a bidder is involved in an “imminent and essentially certain” transaction, the procuring agency must consider whether the transaction materially affects the bidder's ability to perform the contract. Whether a transaction is imminent and essentially certain can be demonstrated by a bidder's control over the timing of the closing of the transaction. If the bidder is a public company, disclosure of the pending transaction to the Securities and Exchange Commission indicates an imminent and essential certain transaction.

When evaluating whether a transaction will materially affect a bidder's ability to perform the contract, a procuring agency should consider the following:

- Whether the resultant entity will have access to the same corporate and technical resources
- Whether past performance references remain relevant
- Whether the resultant company has retained management and key personnel referenced in the bid
- The type of contract involved (fixed price versus cost-plus-fixed-fee)

An agency's failure to consider these and other relevant material effects in its evaluation and award decision may provide disappointed offerors a basis upon which to protest the award.

Lessons Learned

Basis to Exclude or Grounds to Protest

The transaction may either give the government a basis to exclude a seller's proposal or give disappointed bidders grounds to protest an award. When a bidder is involved in an imminent and essentially certain corporate transaction, the procuring agency must consider whether the transaction will materially affect the bidder's ability to perform the contract

as proposed. This consideration is highly case- and fact-specific. Despite proper disclosure, the effects of the corporate transaction may result in a company's exclusion from consideration for a pending contract award or give rise to protest grounds.

In *Lockheed Martin Integrated Systems, Inc.*, B-410189.5; B-410189.7, Sept. 27, 2016, 2016 CPD ¶273, a disappointed bidder protested its exclusion from consideration due to the U.S. Army's determination of "unquantifiable cost risks" associated with the protester's disclosed pending corporate restructuring. The GAO denied the protest, holding that the procuring agency had reasonably considered the effects of the impending transaction and found those effects posed a risk to contract performance.

In *Wyle Laboratories, Inc.*, B-408112.2, Dec. 27, 2013, 2014 CPD ¶116, the awardee underwent corporate restructuring shortly after award whereby the resultant contractor was "spun off" as a separate business unit. Although the awardee disclosed the imminent and essentially certain corporate restructuring in its proposal, the GAO sustained the protest due to the agency's failure to adequately consider whether the transaction would materially affect contract performance.

No Standing for Buyer

In order to have standing to protest an award, a disappointed bidder must show that it suffered competitive injury or was prejudiced by the alleged error in the procurement process. This standing requirement generally excludes all parties who were not actual or prospective bidders.

Parties who did not actually submit a bid may still have protest standing if they are the complete successor in interest to an actual or prospective bidder. In *L-3 Communications Integrated Systems, L.P. v. United States*, 84 Fed. Cl. 768 (2008), the Court of Federal Claims held that a successor in interest had standing as a disappointed bidder to challenge an agency's contract award. Here, the entire business unit of the original bidder, including all its assets and key personnel, were acquired by a separate company, making the acquirer the complete successor in interest to the original bidder. The COFC held that the acquirer had standing to protest the award because it was the successor in interest to an actual bidder, since it had bought the entirety of the business unit that made the bid.

An acquirer's inability to offer an identical proposal to that of the acquired entity, however, may bar the acquirer from being a successor in interest. In *Universal Protection Service, LP v. United States*, 126 Fed. Cl. 173 (2016), the COFC held that the acquirer of the original bidder was not a successor in interest because the acquirer could not provide the same resources relied upon in the original bidder's proposal. Since the original bidder relied heavily upon its then-parent's resources, which were not part of the transaction, the COFC considered whether such "departures and now unavailable resources of the parent company" would impact the offeror's ability to perform. The COFC determined the bidder post-transaction could not demonstrate with certainty that it could perform the contract as proposed and dismissed the protest for lack of standing.

No Standing for Seller

Actual bidders may also lose standing due to their involvement in a corporate transaction. Upon the transfer of all the assets necessary to perform the contract, the seller may become a contractor in name only and lack standing to protest an award. In *Wyle Laboratories, Inc.*, B-416528.2, Jan. 11, 2019, 2019 CPD ¶119, the protester had sold all of the assets necessary to perform an indefinite delivery indefinite quantity, or IDIQ, contract, and the novation of that IDIQ contract was pending at the time a bid for a task order under that IDIQ contract was submitted. The protester disclosed its successor in interest, noting that upon novation, its successor in interest would become the prime contractor and perform 100% of the work. The novation was still pending as of the date of award, and the agency determined that it could not make award to the protester without risk given the following:

- The protester had disclosed that it no longer had the assets to perform the work
- The entity performing 100% of the work was not the protester, but its successor in interest, with which the agency did not have privity of contract
- If the novation was not approved, the agency would not receive contract performance as proposed

The GAO found the agency's determination was reasonable and denied the protest.

Press Release Impact

Multiple protest proceedings have highlighted the importance and potential impact of press releases on pending bids. Procuring agencies are not bound by the “four corners” of a bidder's proposal, and may properly consider extrinsic information. In *Wyle Laboratories, Inc.*, a bidder made numerous public statements regarding a pending corporate restructuring prior to receiving an award. In the ensuing protest proceedings, the GAO sustained the protest on the grounds that the procuring agency failed to consider the impact of the corporate restructuring on contract performance.

In *Lockheed Martin Information Systems*, the GAO found that a procuring agency had properly excluded a bid upon consideration of a press release which indicated that an impending transaction would materially affect the bidder's ability to perform the contract. The protester argued that the agency misinterpreted its press release and the material impacts of the transaction, arguing the agency should have analyzed other relevant documents. However, the GAO determined that the agency was not required to do more, given that the protester failed to mention the imminent transaction and the agency reasonably considered the press release.

Managing Risk of Losing

Bid protests arising out of corporate transactions present a real risk to government contractors. Lessons learned from recent bid protest decisions, however, can help mitigate risk and protect awards. To manage risk, government contractors should analyze whether pending or prospective corporate transactions may materially affect their ability to perform pending bids as proposed.

Once a corporate transaction is imminent and essentially certain, bidders should control the narrative by notifying the procuring agency of the transaction rather than allowing the agency to learn of the transaction via press releases, as well as consider adjusting the timing of transactions to reduce the risk posed to pending major awards. Furthermore, government contractors should account for pending bid and novation risk in valuation.