INCREDIBLY BAD ACTIONS BY THE ARMY IN A BID PROTEST—AND THE AFTERMATH

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Most bid protest decisions, whether issued by the Government Accountability Office ("GAO") or the U.S. Court of Federal Claims ("CFC") are generally very blandly written, discussing problems and non-problems in a source selection. A recent CFC decision, is decidedly different, and highly critical of an agency (the Army) for its repeated attempts to undermine the Court's authority in the protest. *Oak Grove Tech, LLC v. United States and F3EA, Inc.*, No. 21-775C (Fed. Claims August 2, 2021), 2021 WL 362711.

Oak Grove challenged the Army's decision to award a Special Operations Forces contract to F3EA, arguing that the award was arbitrary, capricious and not in accordance with the law and the Federal Acquisition Regulation ("FAR"). The Court granted judgment on the record for several reasons:

- The agency acted arbitrarily in finding that F3EA and Lukos (other offerors) submitted compliant, awardable proposals.
- The agency failed to comply with the solicitation's requirement to evaluate the financial responsibility of Lukos' proposal
- The agency should have conducted discussions, but failed to do so
- The Army failed to sufficiently investigate allegations of a Procurement Official's improper conduct in influencing the procurement in favor of F3EA

But probably more important than sustaining the protest, was the Court's harsh language regarding the Army's actions to violate the court rules governing the filing of the Administrative Record—a key part of any bid protest. Here are a few comments from the decision

- The court is required to base its review of agency action on the full administrative record that was before the agency decision maker at the time he made his decision.
- This court's rules provide detailed guidance on what documents typically should be included in the Administrative Record
- This court's review function is undermined when an agency assembles a record that consists solely of materials that insulate portions of its decision from scrutiny or that it deems relevant to specific allegations raised by a protester.
- The government omitted several critical documents from its initial and subsequent Administrative Record filings, which documents directly and unequivocally undermine the government's position (Court then reviews multiple Administrative Record filings and corrections, and additional records)
- The government repeatedly attempted to excuse its failure to include documents utilizing a "not especially relevant" standard—but the agency could cite no authority to support that standard
- Agency counsel's excuse that omissions were "an oversight" does little to mitigate the harm that the government has caused by excluding specific documents that should have been included as part of the record from the outset.

- "As much as the Court would like to assume good faith, the government admits that it made sentient [aware] choices regarding the contents of the Administrative Record, all of which appear to have favored the Agency. Such apparent gamesmanship wastes judicial resources and undermines trust in both the procurement and disputes process. Accordingly the government is ordered to show cause why Defendant should not be sanctioned for wasting the Court's (and Plaintiff's) time and resources on these Administrative Record deficiencies."

These are very strong words targeted towards an agency that has a very long history of successful defending protests, but made many mistakes in this protest.

Takeaway. Counsel and Contracting Officers for the Government must provide a complete Administrative Record at the CFC (and a complete Agency Report at the GAO, which contains the crucial documents). There should be no selective submission of documents—all documents are relevant, and the notion of a "not especially relevant" standard is inappropriate for the submission of the record.

THE AFTERMATH: COURT SANCTIONS GOVERNMENT

The Court subsequently considered the Agency's response to its order for the Government "to show cause why monetary sanctions should not be imposed against Defendant [Government] for its piecemeal and improper handling of the administrative record in this matter." *Oak Grove Technologies, LLC v. United States,* No. 21-775C (Fed Cl. Oct. 29, 2021). The court specifically instructed the government to address its omission of two documents from the originally filed administrative record:

1) A Defense Contract Management Agency ("DCMA") report regarding another offeror that was ineligible for award, placing Oak Grove in line for award if it won the protest.
2) A documentation of the Agency's removal of the First Source Selection Evaluation Board ("SSEB") Chairperson from his role in the procurement (known as the "RM Termination Letter").

First, the court quoted Court Rule 11 which states that an attorney or a client may be sanctioned, and a party may be sanctioned even if its attorney is not sanctioned. Rule 11 provides that when a party (or counsel) presents to the court a motion, pleading or other paper, the attorney certifies that the factual contents have evidentiary support after reasonable inquiry under the circumstances. The agency's contracting officer certified that the administrative record that was filed "constitute the record of administrative actions…that is relevant to the issues raised in the plaintiff's complaint."

In its show cause order the Court ordered the government to address why monetary sanctions should not be imposed pursuant to Court Rule 11and the Court's inherent authority. Instead the government ignored the directive to address Rule 11, and addressed only the court's power to impose sanctions, which is narrow and provides for sanctions when there is no fraud or bad faith." The government contended that sanctions were not warranted because there was no bad faith or fraud, and any omissions were unintentional.

Next, the court stated that "the government cannot escape sanctions by ignoring the applicable Rule 11 standard and pointing only to the heightened standard for imposing sanctions pursuant to the Court's inherent powers. Rule 11 does not require a finding of bad faith, but rather Rule 11 functions to assure that parties assert litigation positions that are *objectively reasonable* at the time of filing." The court concluded that application of the Rule 11 standard showed that the agency failed to appreciate the potential relevance of the omitted documents to the issues in the protest, and that was neither reasonable nor excusable. It contributed to substantial delays in resolution of the case, wasted the court's time, and had the effect of imposing costs on Oak Grove that were unnecessary.

Finally, the court then went on to reiterate what it said in the original decision-the administrative Record must include all documents related to the challenged procurement decision, and this includes, by instruction from the Justice Department, all documents that were before the agency at the time of the challenged decision, even if they were not specifically considered by the final agency decision-maker. The agency unreasonably omitted the DCMA Report and the RM Termination Letter, both of which were relevant, and the omission of which harmed both Oak Grove and the Court.

The Court ordered that the United States pay the legal costs and expenses Oak Grove incurred in dealing with the administrative record issues that were the subject of the court's show cause order. "The Agency's failure to include the omitted documents was neither reasonable nor excusable-it was, rather, an improper compilation, submission and certification of the administrative record" which caused delay, wasted judicial resources and impose costs on Oak Grove.

Takeaway: Agency counsel are warned to ensure that they submit a proper Administrative Record to any court, with all relevant documents (including those before the agency at the time of the challenged decision, even if not considered in the final decision). The type of sanctions imposed on the United States may be assessed if the Administrative Record is shown to be deficient, after the Agency has made a reasonable inquiry.

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