GOVERNMENT CONTRACTS REVIEW

ALSTON & BIRD LLP

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Current Issues Affecting Government Contractors

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By Alston & Bird's Government Contracts Group

The GovCon Files

USAC Turns Up the Heat on E-Rate's Lowest Corresponding Price Requirement

The Universal Service Administrative Company (USAC) has recently begun issuing Payment Quality Assurance (PQA) assessments to E-Rate service providers in the Schools and Libraries Program ("S&L Program"). E-Rate is a federal program that provides eligible K-12 public schools and libraries discounts on approved telecommunications services, broadband Internet access and internal network connections. Although PQAs are generally common, the circumstances surrounding this particular round of PQAs warrant special attention, as they require service providers to certify compliance with the "lowest corresponding price" (LCP) requirement—a requirement that is a well-documented source of confusion.

In the context of providing E-Rate services as part of the S&L Program, the LCP is "the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services." 47 C.F.R. § 54.500(f). The actual LCP rule is set forth in the Code of Federal Regulations and states as follows:

> Providers of eligible services shall not charge schools, school districts, libraries, library consortia, or consortia including any of these entities a price above the lowest corresponding price for supported services, unless the Commission, with respect to interstate services or the state commission with respect to intrastate services, finds that the lowest corresponding price is not compensatory. 47 C.F.R. § 54.511(b).

Although the LCP requirement is not new, there is very little regulatory guidance available on the scope and meaning of the rule, and as a result, there is significant confusion on how exactly to comply. Even the Federal Communications Commission (FCC), under whose direction USAC administers the S&L Program, has acknowledged this lack of clarity.

The FCC raised the question of LCP certification back in March 2013, when it released a Public Notice seeking comment on proposed revisions to Form 472, Form 473 and Form 474, which are E-Rate forms that applicants and/or service providers must complete as part of their participation in the program. One of the proposed revisions to Form 473, the Service Provider Annual Certification Form, on which the FCC solicited comment, was the addition of the following certification: "I certify that this Service Provider is in compliance with and has taken reasonable steps to implement the lowest corresponding price rule as required by the Commission's rules at 47 C.F.R. § 54.511(b)." Interestingly, however, the FCC ultimately decided against adding an express LCP certification and the current, revised Form 473 does not include that language.

On July 23, 2013, the FCC released a Notice of Proposed Rulemaking (NPRM) again seeking comments, this time on various E-Rate topics in an effort to modernize the S&L Program. Significantly, the NPRM also addressed a number of issues surrounding the LCP requirement.

For example, the FCC specifically sought comments on the following:

- whether to measure compliance with the LCP rule as a measure of affordability to ensure that service providers are providing schools and libraries with the lowest corresponding price;

- the extent to which the LCP rule helps to ensure that service providers charge cost-effective prices, as well as its role in competitive bidding; and

- if clarification of the LCP rule is needed, particularly with regard to (1) whether the obligation applies only to competitive bids submitted by a provider in response to a Form 470, (2) whether compliance is a continuing obligation throughout the term of the contract, (3) whether there are procedures to ensure compliance, (4) how the LCP requirement applies to service bundles, and (5) whether, if challenged, the initial burden falls on the challenger to demonstrate that the service provider did not offer the lowest corresponding price.

Other issues that have never been addressed by the FCC include the geographic scope of the requirement, whether there are distinctions between Priority 1 and Priority 2 services, and whether the prices on state master contracts are presumptively cost-effective and compliant with LCP. Initial comments to the NPRM were due on September 16, 2013, and reply comments were due on October 16, 2013. Hundreds of comments were received, but to date, the FCC has not yet issued a final rule.

In the meantime, USAC has issued requests for LCP certifications to many service providers for the first time in its history, from what we can tell. *See* https://www.fundsforlearning.com/news/2014/02/service-providers-begin-to-receive-pqa-requests. The PQA Program is essentially an auditing program under which USAC reviews certain funding payments as a way to determine if the payments were accurate, properly documented and in compliance with the applicable regulations. The purpose of this program, according to USAC, is to prevent waste, fraud and abuse of federal universal service funds, with this round targeting the LCP requirement.

Having elected not to issue formal guidance on the LCP rule or modify the Form 473 to include a specific certification by service providers, it appears that USAC is now using the PQA process, and a formal certification of LCP compliance, as a way to test LCP requirements, despite the numerous unanswered questions. (We might have anticipated, for example, USAC to engage in the analysis of LCP compliance before funding requests were approved, rather than through demanding formal certifications of compliance for past funding requests that were approved by USAC and, at least in some instances, already performed and paid.)

Although these PQAs may appear innocuous, they could potentially pose a major risk for service providers and expose them to liability for already-paid invoices. While it is well-settled that enforcement actions are not the proper means to provide guidance to service providers on the meaning of vague and previously ignored regulations, we advise all service providers to scrutinize their pricing practices—even in the face of aggressive competitions for E-Rate awards—to ensure a good-faith basis exists for each price invoiced to the applicant and USAC.

Fifth Circuit to Weigh Whether Requests for Reimbursement Under E-Rate Actionable Under FCA

In March, the U.S. Fifth Circuit Court of Appeals will hear argument in an appeal that questions whether requests for reimbursement under the federal E-Rate program submitted prior to the effective date of the FERA amendments constitute actionable claims under the False Claims Act. Generally speaking, the appeal questions whether FCA liability exists where the funds used to reimburse E-Rate applicants are paid by private telecommunications carriers into a fund (the Universal Service Fund) that is administered by a private corporation (the Universal Service Administrative Company). Because the funds are paid by private carriers into a fund managed by a private corporation, the Court of Appeals will decide whether a request for reimbursement constitutes a "claim" for payment submitted to the U.S. government or other statutorily authorized agent. Partners Jeff Belkin and Andy Howard represent one of the appellants in the appeal.

The Tangled Web of "Buy America" Looks to Grow

Separate from the Buy American Act, which pertains to federal procurements, Buy America statutes impose domestic source restrictions on federal grants. Buy America restrictions apply to all American Recovery and Reinvestment Act funds, as well as Department of Transportation grants administered by the Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA) and the Federal Railroad Administration (FRA). Although each Buy America provision generally requires the use of iron, steel and manufactured goods that are "produced in" the United States, the interpretation and application of this requirement differs depending on the statute at issue and each agency's implementing regulations. For example, the FTA Buy America statute includes a waiver for certain rolling stock items, and FHWA only applies its Buy America restrictions to manufactured products consisting of at least 90 percent steel or iron. The FRA is currently in the process of developing and implementing regulations that will govern the FRA Buy America statute, which was just enacted in 2008. If history is any guide, FRA's implementing regulations will only add more complexity to the already confusing world of Buy America restrictions.

Protest Decisions

Creative Computing Solutions, Inc., B-408704; B-408704.2 (Comp. Gen. Nov. 6, 2013)

Large Business Does Not Have Standing to Protest Small Business Set-Aside Award

In *Creative Computing Solutions, Inc.*, B-408704; B-408704.2 (Comp. Gen. Nov. 6, 2013), the Government Accountability Office (GAO) dismissed protester Creative Computing Solutions, Inc.'s (CCSI) post-award protest on the basis that CCSI, as a large business, did not qualify as an "interested party" pursuant to 4 C.F.R. § 21.0(a)(1) (2013).

The protest concerned a Department of Homeland Security (DHS) blanket purchase agreement award for compliance support services for DHS's information technology services office. In order to obtain these services, DHS issued a request for quotations (RFQ) under the General Services Administration's (GSA) Federal Supply Schedule. The RFQ was set aside for small businesses. An amendment to the RFQ incorporated solicitation questions and answers that clarified that offerors must certify as a small business at the time of proposal submission. CCSI submitted a quote that did not include a certification of its small-business-size status; however, CCSI's quote did state that it was based on CCSI's underlying GSA Schedule 70 contract, which had been awarded to CCSI as a woman-owned small business.

Upon losing the award, CCSI filed a protest with GAO challenging the award on grounds that DHS misevaluated the quotes and made an unreasonable source-selection decision. DHS moved to dismiss CCSI's protest on the basis that CCSI was not an "interested party," and therefore, did not have standing to challenge the award based on 4 C.F.R. § 21.0(a)(1) (2013). DHS argued that not only did CCSI fail to submit the required small-business certification with its quote, CCSI had not certified that it was a small business on its GSA System for Award Management profile for the North American Industry Classification System code applicable to the current acquisition. Accordingly, DHS argued that CCSI was not an interested party because it was no longer a small business. In response, CCSI argued that at the time it submitted its quote, it properly relied on a certification of its size status as a small business that it previously had submitted to GSA, and that it was improper for DHS to require CCSI to recertify its size status at the time it submitted its quote because the solicitation was for a blanket purchase agreement, and pursuant to 13 C.F.R. 121.404(g)(3)(vi) (2013), "a concern's size may not be determined based on its size at the time of a response to a solicitation for a BPA."

The GAO sustained DHS's motion to dismiss CCSI's protest. As an initial matter, GAO held that CCSI's argument concerning the propriety of DHS requiring certification of the offerors' size status at the time of quote submission was untimely. GAO explained, "Under our Bid Protest Regulations, 4 C.F.R. § 21.2 (a)(1), to be timely, any challenge to the agency's inclusion of that requirement had to be raised prior to the deadline for submitting quotations." Further, GAO determined that there was "no doubt" as to CCSI's size status. GAO reasoned that because "CCSI characterizes itself—and indeed has certified its size status—as a large business for purposes of the applicable NAICS code under which this acquisition was conducted," CCSI "would be ineligible for award of this BPA should its protest be successful." Accordingly, CCSI does not have standing because it is "not an interested party for purposes of maintaining its protest."

Affirmative Duty to Seek Clarification of Ambiguities in a Solicitation

In a recent decision, the Government Accountability Office (GAO) held that a protestor's failure to seek clarification of a patent ambiguity in a solicitation was fatal to the protest. The decision is an important reminder that a contractor who fails to ask questions about the terms of a solicitation does so at its own peril, even when the contractor's interpretation of the solicitation is reasonable.

In the matter before the GAO, Protestor challenged the Defense Information Systems Agency's (DISA) issuance of a task order for the provision of annual subscriptions for information technology research services. DISA issued the task order under a request for quotations (RFQ) to Department of Defense Software Initiative blanket purchase agreement holders. After receiving timely initial quotations from Protestor and the awardee, DISA issued a request for final quotations. Both Protestor and the awardee timely submitted revised quotations; however, the awardee subsequently submitted a second revised quotation one minute after the deadline provided in the agency's request for final quotations.

Protestor argued that DISA improperly considered the awardee's untimely second revised quotation. Protestor advanced two separate arguments in support of its protest. First, Protestor argued that despite calling the solicitation a request for quotations, DISA's solicitation was actually a request for proposals subject to the standard late proposal rule. Protestor based its argument on language in the RFQ, stating that DISA was seeking "offers" that could be "accepted" by DISA within a specific time period. Alternatively, Protestor argued that the solicitation contained a late quotation provision that prohibited DISA from considering the awardee's untimely second revised quotation.

In rejecting Protestor's first argument, the GAO determined that the argument was based on a patent ambiguity in the solicitation that Protestor was required to raise before DISA's issuance of the task order. GAO explained:

A firm may not compete under a patently ambiguous solicitation and then complain when the agency proceeds in a way inconsistent with one of the possible interpretations. Rather, the firm has an affirmative obligation to seek clarification prior to the first due date for responding to the solicitation following introduction of the ambiguity into the solicitation. Where a patent ambiguity is not challenged prior to submission of solicitation responses, we will dismiss as untimely any subsequent protest assertion that is based on one of the alternative interpretations as the only permissible interpretation. (Citations omitted.)

Accordingly, the GAO held that Protestor's first argument was untimely based on Protestor's failure to raise the patent ambiguity with DISA prior to DISA's issuance of the task order.

The GAO rejected Protestor's second argument based on the fact that neither the RFQ nor the request for final quotations contained a provision expressly stating that the agency would not consider quotations received after the submission deadline. Thus, the GAO held that DISA's consideration of the awardee's untimely second revised quotation was "not inconsistent with the terms of the RFQ."

Gartner Inc., B-408933.2; B-408933.3 (Comp. Gen. Feb. 12, 2014)

Changes to the Marketplace

Change to Small Business Concerns Subcontracting

In December, the National Defense Authorization Act was signed into law. This Act includes a significant change for prime contractors seeking to achieve small business subcontracting goals. The Act will enable prime contractors to receive credit for lower-tier small business contractors toward the prime contractor's small business subcontracting goals. The Act modifies prior regulations that limited lower-tier subcontracting credit to only those lower-tier subcontracts with an ANC or Indian tribe. While the new law will greatly improve the subcontracting opportunities for small businesses and improve the prime contractor's ability to meet its subcontracting goals, the change will not be effective for approximately 18 months after the rulemaking process occurs.
The law will expand the field of lower-tier subcontractors that a prime contractor can receive small business subcontracting credit for, providing a method for prime contractors to receive credit for utilizing small businesses—including veteran-disabled, veteran-owned, women-owned and additional specified small business concerns—rather than being limited to only receiving small business credit for contracting with ANC or Indian tribe companies.

This change could significantly improve the dynamic of small business contracting by increasing the utilization of small business concerns and likely reduce the misuse of "pass-through" subcontracting. Further still, the law presents a viable option to assist prime contractors with meeting and satisfying small business subcontracting goals.

Potential Changes to Davis-Bacon Threshold

H.R. 1637 was introduced by Representative Jeff Duncan (R-SC) on April 18, 2013, for the purposes of updating the Davis-Bacon Act threshold from $2,000 to $50,000. The change is designed to update the Davis-Bacon threshold to account for inflation, but in practical terms, this change could significantly alter the landscape for prevailing wage determinations, as currently nearly all federal construction projects qualify under the low threshold.

The updated $50,000 would continue to provide prevailing wages on those projects that are most typically considered construction projects, while removing those that may be light "construction"—e.g., remodeling, redecorating or painting—that would qualify under the lower threshold. The legislation, if passed, could reduce the compliance obligations for small companies and contractors that are not typically involved in heavy construction or have tangential roles to a federal construction project. Moreover, it could lessen the oversight that prime contractors must employ to ensure that lower-tier subcontractors are complying with the applicable Davis-Bacon flow down provisions, particularly in the context of potential Miller Act claims.

The bill is currently before the Subcommittee on Workforce Protections. It will be interesting to see what progress, if any, can be made to update the Davis-Bacon Act thresholds.

Government Contractor Litigation

Allegations of Regulatory Noncompliance Alone Not Actionable Under False Claims Act

The Eighth Circuit Court of Appeals recently concluded that False Claims Act liability does not exist where the alleged "false claim" amounts to nothing more than regulatory noncompliance that is not material to the government's decision to disburse payment.

In *United States ex rel. Ketroser v. Mayo Foundation*, 729 F.3d 825 (8th Cir. 2013), the relators alleged that the defendant violated the False Claims Act by fraudulently submitting claims for Medicare payments for services that it did not provide. At issue in the case was the defendant's "dual-slide" procedure for analyzing tissue samples taken during surgery. As stated in the court's opinion, the defendant prepares one slide—the "frozen slide"—during surgery, which is diagnosed immediately while the patient is still in surgery. Later, it prepares a second slide—the "permanent slide"—from the remaining sample, which is diagnosed after surgery. While the defendant always prepares a written report based on the frozen slide, it often does not prepare a second report based on the permanent slide.

Relators argued that Medicare regulations require the preparation of a second, separate written report for every permanent slide for which a health care provider invoices the government for payment. They argued that the billing codes for these services include accession of the tissue, examination and *reporting*, and argued that by using these codes, the defendant falsely represented that it had created a written report for the permanent slides when, indeed, it had not.

The Minnesota District Court dismissed the claim, finding that the billing codes do not explicitly require written reports for surgical pathology services. Relators appealed.
On appeal, the Court of Appeals affirmed the district court's decision. Based on its examination of the relevant regulations, the appellate court concluded that the regulations do not require a written report for each surgical pathology slide. The court therefore held that in the absence of a clear requirement, relators alleged "nothing more than regulatory noncompliance," which fails to state a claim under the False Claims Act.

The court's conclusion is the proper and logical extension of the rule that non-material, technical breaches of contract terms is not sufficient to create liability under the False Claims Act when the contractor receives payment in spite of the breach. In addition, it is significant to note that this court found that the analysis would not change regardless of whether it applied the old or amended version of the False Claims Act. Therefore, notwithstanding all of Congress' efforts to broaden the scope of the False Claims Act through various amendments, the court reasoned that under both versions, to establish liability under the False Claims Act, which can result in the imposition of treble damages and substantial civil penalties, a relator or the government must demonstrate that the alleged false record or statement is "material to" a false or fraudulent request or demand for money or property from the government. ***See*** 31 U.S.C. § 3729. Where alleged violations of law or contract are not material to a claim for payment, no False Claims liability will arise.

The Federal Circuit Rejects a Narrow Interpretation of the Scope of the Duty of Good Faith and Fair Dealing

The Court of Appeals for the Federal Circuit recently ruled in favor of a construction contractor appealing a Court of Federal Claims decision concerning claims arising from a $50 million U.S. Navy housing project. The key issue before the Federal Circuit was whether the trial court had applied the correct legal standard in deciding the contractor's claim for breach of the implied duty of good faith and fair dealing. In a decision that should prove very helpful to contractors in future litigation, the Federal Circuit held that the trial court applied the wrong legal standard based on an "unduly narrow view" of the duty of good faith and fair dealing.

Like all contracts, federal contracts impose on each party a duty of good faith and fair dealing in the performance and enforcement of the contract. The implied duty is context-specific and depends in part on the terms of the contract. As the Federal Circuit explained:

> In short, while the implied duty exists because it is rarely possible to anticipate in contract language every possible action or omission by a party that undermines the bargain, the nature of that bargain is central to keeping the duty focused on honoring the reasonable expectations created by the autonomous expressions of the contracting parties. (Internal quotations omitted.)

Based on a misreading of Federal Circuit precedent, the trial court held that a breach of the duty of good faith and fair dealing claim against the government can only be established by a showing that the government "*specifically designed* to reappropriate the benefits [that the contractor] expected to obtain from the transaction, thereby abrogating the government's obligations under the contract." (Emphasis added; internal quotations omitted.) The trial court further added that "incompetence and/or the failure to cooperate or accommodate a contractor's request do not trigger the duty of good faith and fair dealing, unless the Government *specifically targeted* action to obtain the benefit of the contract or where Government actions were undertaken for the purpose of delaying or hampering performance of the contract." (Emphasis added; internal quotations omitted.)

The Federal Circuit dismissed the trial court's interpretation of the implied duty of good faith and fair dealing as too narrow. The Federal Circuit held that there is not a "specific-targeting requirement applicable across the board or in this case." Instead, whether specific targeting is required for breach of the implied duty depends on the contract and circumstances at issue. This is because "the *implied* duty of good faith and fair dealing depends on the parties' bargain in the particular contract at issue." The Federal Circuit further held that a breach of the "implied duty of good faith and fair dealing does not require a violation of an express provision in the contract."

Metcalf Constr. Co., Inc. v. United States, 2013-5041 (Fed. Cir. Feb. 11, 2014)

Pros in the Press

On January 17, 2014, Kevin Collins spoke as a panelist at a bid protest seminar presented to the Construction Management Association of America.

Andy Howard spoke at the American Bar Association's Mid-Winter Meeting on the subject of best practices for allocating risk by contract for labor issues on public and private construction projects.

Andy Howard wrote a chapter in the 2014 soft-cover edition of *The Complete Compliance and Ethics Manual* titled "Government Contracting & the Federal Acquisition Regulation System (FAR)."

Jeff Belkin wrote a chapter in the 2014 soft-cover edition of *The Complete Compliance and Ethics Manual* titled "Voluntary Disclosure, Mandatory Disclosure and Government Engagement."

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