



Adding Value to Your Company's Complex Proposals in Response to Government RFPs

June 5, 2018

Agenda

- Preparing for and Responding to the Substantive Requirements of the Solicitation
- Organizational and Personal Conflicts of Interest, and Past Performance Requirements
- Potential Pre-Award Protest Issues and Preparing for Post-Award Protests
- Consideration of Corporate Transactions and Public Information



Preparing For and Responding to the Substantive Requirements of the Solicitation

Black Hat Reviews

- A competitive assessment of potential competitors, and their strengths and weaknesses
- Will be only as good as the data it's based upon
- Use a formal, consistent methodology (e.g., SWOT—Strengths, Weaknesses, Opportunities and Threats) to develop your capture and proposal win strategies
- Will also affect your teaming strategy
- Should the GC participate in Black Hat Reviews?

Identification of and Working with Teammates, Subcontractors, and Vendors

- Black Hat Review should also include a “Gap Analysis”—an assessment of the customer’s solicitation requirements against your company’s internal technical, staffing, financial and other resources
- Do any “gaps” exist, and if so then how can they be filled?

Where “Gaps” in Meeting Customer Requirements May Exist

- Products or Services required
- Schedule
- Special contract terms
- Customer’s price objectives/budget
- Place(s) of performance
- Management or other business requirements
- Classified work
- Security/cybersecurity
- Customer service and training

Evaluating Potential Teammates to Fill in the “Gaps”

- Suggested criteria for evaluating potential teammates
 - R&D, manufacturing, and after sale support
 - Financial or proposal preparation experience/resources
 - Corporate and/or program management capability
 - Reputation with the customer and/or industry (technical competence, quality, past performance)
 - Customer preference
 - Geographical location
 - Ability or likelihood that potential team member will compete independently
- Even if no “gaps” exist, you may want to team with other companies anyway (see Legitimate Reasons to Team--next slide)
- **DOCUMENT YOUR DECISION!**

Legitimate Reasons to Team

- To secure subsystem or component capabilities at an early stage of the proposal process
- To present a stronger position to the customer
- To further the state of the technical art
- To enhance competition by facilitating entry into an otherwise closed market
- To spread financial risk
- To decrease costs (proposal preparation, contract performance)
- To capture/increase revenue
- To effect geographical dispersion of business
- To provide better customer service and support
- To enhance the best utilization of your company's resources

“Illegitimate” Reasons to Team

- To dominate the market
- To eliminate or reduce competition
- To control prices or profit percentages
- To obtain the proprietary information of a competitor

Federal Acquisition Regulation Recognition of Teaming Arrangements

- FAR 9.601—Definition
- FAR 9.602—Generally recognizes their acceptability in most situations
- FAR 9.603—Policy: the Government will recognize the integrity and validity of disclosed teaming arrangements; it will not normally require them, nor encourage their dissolution
- FAR 9.604—Limitations
 - Antitrust statutes
 - Consent to subcontracts (FAR Subpart 44.2)
 - Responsibility determinations
 - Data rights
 - Competition
 - Hold the prime contractor fully responsible for contract performance

Key Issues to Address in Teaming Agreements

- Program/opportunity covered (and does it include or exclude follow-on work?)
- Work split—how precisely defined, is it guaranteed, right of first refusal?
- Team members' proposal preparation responsibilities and coordination duties
- Duration
- Exclusivity—see next slide
- Events that will terminate the Agreement
- Proprietary information—duties and obligations regarding protection, use, and disclosure

Should Your Company Seek, or Try to Avoid, Exclusivity?

- **Prime contractor's perspective:** wants Subcontractor teammates to commit to exclusivity, while preserving the option to team with (and give work to) others, or to perform the work in house
- **Subcontractor's perspective:** wants Prime Contractor to commit to team exclusively with it (preferably for the life of the program), while preserving the Subcontractor's options to team with others
- **Problems with Exclusivity:**
 - May end up tied to a “loser”
 - Subcontractor has no incentive to provide long term cost and schedule control (Prime can try to protect itself through “early termination” language, if Subcontractor is making the team not competitive)
 - Some federal agencies prohibit or closely scrutinize exclusive arrangements for their anti-competitive effects
- **Problems with Non-exclusivity:**
 - Greater risk of compromise of proprietary information, or use in support of a competing team
 - Subcontractor may provide lower prices to a competitor
 - Subcontractor may not use its best efforts, or provide its best personnel or technology, to support your team

Be Careful When Using MOUs or Letters of Intent

- A Memorandum of Understanding (MOU) or Letter of Intent may be desirable in some situations, as a “pre-teaming agreement”
- However, MOUs and Letters of Intent are normally intended to be non-binding documents
- Be careful of “agreement,” “commitment,” or other binding language; these should always get legal review and approval before signing
- A Non-Disclosure Agreement is usually a better “first step” towards creating a binding teaming arrangement

Communications With the Government— Before the RFP Is Released

- Prior to the issuance of the RFP, communications with the Government are allowed, and in fact are encouraged (FAR Subpart 5.4)
- Pre-RFP communications can help the Government understand what's available in the marketplace, help define its requirements, and even enhance competition
- From the company's perspective, pre-RFP communications provide an opportunity to both learn about the Government's needs, and shape its requirements
- Some information may not be disclosed or discussed
 - Unfair competitive advantage
 - Proprietary information of competitors
 - Source selection sensitive information
 - Restrictions on classified information

Communications With the Government— After the RFP Is Released

- The Government is required to furnish identical information to all prospective offerors, and as simultaneously as possible through authorized channels
- Most RFPs provide a formal process for asking questions regarding any RFP requirement, term or condition, usually with a cut-off date and time
 - Most other communications are prohibited, or strongly discouraged
 - Can you ask questions after the cut-off date and time? Yes, but the Government is not obligated to answer them (but it might do so anyway, if the question raises a critical point or otherwise will benefit the Government (e.g., enhance competition))
- Thoroughly “shredding” the RFP is critical to both understanding its requirements and revealing where questions regarding its content may be necessary or appropriate

Communications With the Government After the RFP Is Released (*cont.*)

- The Government will normally answer all questions in writing, by stating each question it receives verbatim, and then its answer (which may or may not be helpful)
- When formulating questions, be careful in how you draft them, so as not to reveal competition-sensitive information (e.g., your identity, bidding strategy, or technical approach)
- Questions are often used to try to get the Government to change or eliminate requirements that either cannot be met or are too costly to meet, or make the questioner less competitive

Communications With the Government After the RFP Is Released (*cont.*)

- Questions are also used to clarify ambiguous requirements
 - If you fail to ask about a requirement that is subject to more than one reasonable interpretation, then you will be stuck with the Government's interpretation, which may not be the one more favorable to you
 - But if the Government fails to clarify an ambiguous requirement, then your reasonable interpretation of it will be accepted if a dispute arises regarding its meaning
 - Artful drafting of questions can often help you validate the interpretation you want, e.g., by stating your interpretation of the requirement as part of your question, which will force the Government to explicitly refute your interpretation if it has a different one
- Can you rely on Government answers that do not get incorporated into an RFP amendment?

Responding to the Substantive Requirements of the RFP

- GCs should play an active role in the proposal review and submission process
- Get on Red Teams, Gold Teams, Green Teams
- What to look for/concentrate on:
 - Misrepresentations of facts—the failure to correct could lead to a protest and/or an allegation of making a false statement; they can often be avoided simply by rephrasing the statement into a future promise
 - Completeness—many competitions are lost due to simple mistakes in misunderstanding, or failing to respond adequately to, one or more RFP requirements
 - Consistency—proposal sections are often written by different people/groups, with different levels of expertise, understandings of the company's capabilities, or understandings of the RFP requirements; a proposal that contradicts itself is more likely to be a loser

Responding to the Substantive Requirements of the RFP (*cont.*)

- What to look for/concentrate on (*cont.*):
 - Clarity—a proposal that is easier to read and understand will likely score higher than one that isn't, and if you don't understand it then the Government's evaluators might not either
 - Regurgitation of RFP requirements (“will comply”) v. “how” the requirements will be met—the former is easier to write, but is lazy and will normally not score as high as a proposal which takes the time to explain, and “sell,” your company's approach to meeting or exceeding the RFP requirements
 - Exceptions to RFP requirements, or terms and conditions—can they be negotiated, or will they cause your company to be disqualified from the competition?
 - Legal/compliance issues—identification of the legal entity that is submitting the proposal, correct description of team member relationships, submission of any required legal forms (e.g., corporate guarantees, certifications), intellectual property disclosure and marking requirements, etc.

Compliance Issues During the Proposal Preparation Process

- Many FAR and DFARS clauses in RFPs mandate, restrict, or prohibit certain conduct during (and after) the proposal preparation process
- Examples:
 - Improper business practices (FAR Part 3)
 - Records retention (FAR Subpart 4.7)
 - Organizational conflicts of interest (FAR Subpart 9.5)
 - Cost or pricing data (FAR Subpart 15.4)
 - Labor laws (FAR Part 22)
- The failure to comply, disclose, avoid, mitigate, etc., could cause a disqualification from the competition, contract performance problems or the imposition of contract remedies, civil or criminal penalties, and/or suspension or debarment
- GCs need to:
 - Ensure that the company's proposal folks are properly trained to comply with the RFP clauses, and to report or raise any issues relating to them for proper disposition
 - Ensure that the company has the appropriate policies and procedures in place to ensure compliance

Small \$ Proposals

- These usually involve standard products and services, and don't require the submission of detailed technical or management proposals
- GCs should ensure that such proposals include:
 - Specifications for the products or services offered
 - Quantity
 - Statement of work (especially for construction or services)
 - Time/place of performance
 - Standard terms and conditions
 - Price
 - Intent to be bound?
- Beware of “Battle of the Forms” issues—do you have a contract, and if so then whose terms apply?



Organizational and Personal Conflicts of Interest and Past Performance Requirements

Conflicts of Interest

- Organizational Conflicts of Interest
- Personal Conflicts of Interest
- The role of the Warranted Contracting Officer

Organizational Conflict of Interest

- The FAR requires that contracting officers identify and evaluate potential OCIs, and directs contracting officers to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a), 9.505.
- The situations in which OCIs arise, as described in FAR subpart 9.5 and GAO decisions, can be broadly categorized into three types:
 - (1) biased ground rules; (2) unequal access to information; and (3) impaired objectivity.

Organizational Conflict of Interest Flags

- Management Support/Consulting Services
- Proposal/Technical/Cost Evaluation
- Preparing Specifications or Defining Requirements
- Systems Engineering/Technical Advice
- Product Recommendation (Brand Name or Equal)
- Systems Integration
- Development of Agency Policy
- Supporting/Furnishing Systems

OCI Analysis Should be Part of Business Planning

- Consider the impact of potential OCIs
- Consider in Strategic Planning – OCIs will limit future opportunities
- Consider impact on future projected revenues
- Consider before divestiture or addition of business units or contracts

Organizational Conflict of Interest Bid Protests: Lessons Learned

- Review solicitation's OCI (& PCI) requirements carefully.
 - Conduct thorough review for potential OCIs and other conflicts.
 - Consider conflicts of subcontractors, affiliates as necessary.
- Fully and proactively disclose all potential OCIs to the agency as called for by the solicitation.
 - Inform the agency so the agency may reasonably consider the potential conflicts, in addition to any mitigation plan or measures that may be necessary or proposed.
 - If you don't disclose your potential OCIs, your competitor may do so in a bid protest.

Personal Conflicts of Interest

- If your company performs “acquisition functions closely associated with inherently governmental functions for, or on behalf of, a Federal agency,” your company is subject to FAR 52.203-16, Preventing Personal Conflicts of Interest (see FAR 3.1106).
 - Review and comply with requirements of FAR 52.203-16 and FAR Subpart 3.11, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions.
 - Failure to do so will create problems in current and future competitions, proposals and bid protests (in addition to current contract administration failures).

Personal Conflicts of Interest

- Requirements of FAR 52.203-16 and 3.1103, briefly summarized:
 - (1) Have procedures . . . to screen covered employees for potential [PCIs]
 - (2) For each covered employee—
 - (i) Prevent personal conflicts of interest . . . ;
 - (ii) Prohibit use of non-public information . . . for personal gain; and
 - (iii) Obtain a signed non-disclosure agreement to prohibit disclosure of non-public information accessed through performance of a Government contract.
 - (3) Inform covered employees of their obligation[s]
 - (4) Maintain effective oversight to verify compliance with [PCI] safeguards;
 - (5) Take appropriate disciplinary action in the case of covered employees who fail to comply with policies established pursuant to this section; and
 - (6) Report to the contracting officer any personal conflict-of-interest violation by a covered employee as soon as identified.

Personal Conflicts of Interest – Key Considerations

- Applicable to “acquisition functions closely associated with inherently governmental functions”
- Applies to “covered employees”
- Applies to those who deal with non-public information
- Sources of PCI – financial interests, employment interests, political affiliations, family ties, etc.
- Execution of the NDA/Employment Agreements/Contracts

Personal Conflicts of Interest – Best Practices

- Identify Key Personnel by Name (beware of proposals that do not identify key personnel by name)
- Insist & Assist that the highest of standards regarding OCI and PCI are maintained
- Training and active oversight should be routine with scheduled meetings
- GC should review each NDA/Post Employment Letter of each covered employee
- Leadership matters

OCI & PCI Thoughts to Take Away

- Appoint an individual to oversee this process
- Use Employment Letters to create contractual obligations
- Charge every manager/reviewer at every level to actively look for OCIs and PCIs
- Charge employees to report conflicts on the hotline
- Personally investigate allegations of a standards of conduct violation
- Subcontractors and Teammates should conform to your Standards

Dealing With Affiliate/Subcontractor Past Performance

- Carefully review the RFP/Solicitation
- Noting Affiliation and Teaming Partners is not sufficient
- Provide sufficient information to avoid questions from the SSB/evaluators
- Questions to clarify past performance could become “Discussions”
- Check CPARS to ensure CPARS ratings do not undermine Proposal Past Performance

Dealing With Affiliate/Subcontractor Past Performance

- Re-read the RFP/Solicitation requirements for Past Performance
- Provide **Specific Facts** concerning affiliation
 - How will the teammate/affiliate be involved in contract performance
 - How will resources be shared
 - Clearly identify who is responsible for performance of each task
 - Align Past Performance to the RFP and the party responsible for performance

Dealing With Affiliate/Subcontractor Past Performance

- Re-read the RFP/Solicitation for Past Performance
- Does it specify whose past performance may be evaluated?
- GAO holds –
 - Absent language to the contrary, an agency may consider
 - Relevant experience and past performance of key individuals
 - Relevant experience and past performance of predecessor companies

Dealing With Affiliate/Subcontractor Past Performance

- Re-read the RFP/Solicitation – are there lessons to be learned from reported case decisions. . .
- If experience of personnel or teammates is used, the proposal should be descriptive of the role of personnel or teammates.
- See *Choctaw Staffing Solutions*, B-413434, Oct. 24, 2016, 2016 CPD ¶ 298 at 6 (agency need not consider the experience of key personnel where the proposal did not include sufficient information in the proposal to determine what role, if any, each key person had in the performance of the prior contracts).

Dealing With Affiliate/Subcontractor Past Performance

- Re-read the RFP/Solicitation – are there lessons to be learned from reported case decisions. . . .
- “Before the agency can properly attribute the past performance of an affiliate to an offeror, it generally must have a **factual basis** showing the planned relationship between the companies on the contract at issue.”
- “Absent a factual basis to conclude that the awardee had a commitment of resources from other separate corporate subsidiaries, we found the attribution of those affiliates’ past performance and experience to the awardee to be improper.”
 - *See Language Select LLP*, B-415097, Nov. 14, 2017 (citations omitted and emphasis added) (protest sustained where agency lacked basis to conclude affiliate’s resources would be used in performance).



Pre-Award Protest Considerations

Pre-Pre-Award Protest Considerations

- Does the solicitation appear to favor a particular offeror?
- Does the solicitation render the company ineligible for award?
- Does the solicitation contain erroneous or ambiguous requirements or evaluation criteria?
- Does the solicitation create a disadvantage unique to the company?
- Does the solicitation accurately state agency needs as understood by company?

Pre-Pre-Award Protest Considerations

- Use of questions and answers to resolve solicitation defects
 - Effective way to address solicitation issues and concerns without resorting to protest
 - Risk that agency will not address question in responsive way
- Other pre-award protest considerations
 - Effect on customer relationship
 - Relative importance of procurement to company
 - Need to submit timely proposal to preserve standing as offeror

Pre-Award Protest Grounds

- Solicitation contains unduly restrictive terms
- Solicitation contains ambiguous or inconsistent requirements or terms
- Solicitation fails to include mandatory clause or provision
- Solicitation requirements unnecessarily favor particular offeror
- Solicitation improperly identifies contract clauses
- Solicitation improperly bundles requirements
- Solicitation employs improper evaluation methodology

Pre-Award Protest Grounds

- Solicitation improperly discloses proprietary information
- Solicitation fails to reflect changed requirements
- Use of FSS Contract for Non-FSS Purchase
- Failure to comply with full and open competition requirements
- Small Business Solicitation Issues
- Improper Cancellation of Solicitation

Preparation for Potential Post-Award Protest

- Ensure that proposal adheres to solicitation requirements
 - Review solicitation requirements and final proposal with proposal team
 - Are all requirements of solicitation addressed?
 - Is proposal responsive to solicitation requirements?
 - Are all elements of solicitation addressed in proposal?
 - To extent that agency engages in discussions/proposal revisions, conduct similar check/review
 - Make certain that responses to agency questions are consistent with any proposal revisions

Sections L and M

- Review Sections L and M in close detail before, during and after proposal preparation, and review compliance again before submission.
 - Section L: Instructions, Conditions, and Notices to Offerors
 - Includes detailed proposal preparation instructions
 - May incorporate FAR 52.215-1, Instructions To Offerors – Competitive Acquisition
 - Section M: Evaluation Factors for Award
 - Describes Basis for Award and evaluation process, typically by proposal volume, consistent with Section L
- Sections L and M may determine whether you win or lose the award, and win or lose a post-award protest.



Consideration of Corporate Transactions and Public Information During Proposal Preparation and in Context of Bid Protests

Matter of Wyle Laboratories
Matter of Lockheed Martin Integrated Systems

Public Information in the Context of Bid Protests

- Public information may be used in a bid protest (by you or your competitor).
 - GAO is more likely than CoFC to consider information outside the agency record.
- Public information may be relevant beyond the context of corporate transactions.
 - Public information may be relevant, for example, to the proposed solutions, corporate experience or past performance sought by the solicitation.
 - This can be used by a competitor to challenge your proposal & evaluation.
- In the case of a pending corporate transaction, disclosures of information may be required or may be prohibited.
- Common sources of public information include a company's website and press releases; SEC filings; and the news media.

Case Study:

Wyle Laboratories, Inc.

B-408112.2, Dec. 27, 2013.

Protest sustained by GAO
where agency did not properly evaluate,
and proposal did not properly address,
pending corporate transaction.

Wyle Laboratories, Dec. 2013

- GAO found the agency evaluation did not reasonably reflect the manner of performance.
- GAO's Digest: "Protest is sustained where the awardee's proposal, and the agency's evaluation thereof, failed to reasonably reflect the manner in which the contract will be performed, the level of costs likely associated with performance, and the corporate entity that will perform the contract."

Wyle Laboratories: GAO's Conclusion

- “In summary, the record here establishes that:
 - (1) SAIC's proposal, and the agency's evaluation thereof, was based on the technical approach, resources, and costs associated with ‘old’ SAIC;
 - (2) ‘old’ SAIC did not intend to perform as the prime contractor, but rather intended that another entity, with substantially fewer resources, that was completely separate from ‘old’ SAIC, would be the prime contractor;
 - (3) notwithstanding all of the evidence indicating that ‘old’ SAIC would not be the entity performing this contract, the SSA relied on ‘old’ SAIC's ‘strikingly lower probable cost,’ which it attributed to its proposed technical approach;
 - (4) the substitution of ‘new’ SAIC as the prime contractor may well have a material effect on both the costs incurred and the technical approach employed during contract performance; and
 - (5) the agency gave no meaningful consideration to either the technical approach or probable costs associated with ‘new’ SAIC's performance of the contract because, in the agency’s words, ‘there was no definitive information to consider.’ ”

Reconsideration Denied, May 2014

- NASA requested reconsideration, which GAO denied.
 - National Aeronautics and Space Administration—Reconsideration, B-408112.3, May 14, 2014.
- “In our prior decision, we found that SAIC’s proposal, and NASA’s evaluation thereof, failed to reflect the manner in which SAIC actually intended to perform the contract. We reached this conclusion because the agency was aware that SAIC contemplated an imminent corporate restructuring that would divest the parent corporation of the primary business unit (SAIC Company 116) responsible for the subject health services contract.”

GAO Guidance: proposals must be consistent with stated restructuring plan

In this decision GAO emphasized that the proposals were not consistent with the plan disclosed in SEC filings and during discussions with the agency:

- “The record in our prior protest showed that SAIC had advised NASA during discussions that it intended a corporate restructuring in which SAIC would spin off certain technical services business units, including Company 116. The remainder of the ‘old’ SAIC would then be renamed ‘Leidos,’ a solutions-focused business, and the spun-off firm thereafter renamed SAIC. SAIC specifically advised the agency that it intended that ‘new’ SAIC--a technical services company with approximately one-third of the corporate resources of ‘old’ SAIC--would be the prime contractor[.]”
- “The record also showed that SAIC’s technical proposal was inconsistent with this intended plan, and instead reflected the corporate structure and full corporate resources of ‘old’ SAIC. In our decision we concluded that the evaluation was improper where SAIC’s proposed technical approach and cost proposal were materially different from SAIC’s stated intent, as reflected in the discussions responses furnished to NASA.”

Case Study:

Lockheed Martin Integrated Systems

B-410189.5, Sept. 27, 2016.

Protest denied by GAO
where agency excluded proposal
due to pending corporate transaction.

GAO denied the LMIS protest where agency excluded proposal due to pending transaction

- GAO's Digest: "Protest is denied **where the agency's evaluation reasonably considered an upcoming corporate restructuring involving the protester, and excluded the protester's proposal** from eligibility for award when the agency concluded that it could not determine the realism of the protester's costs and identified other risks associated with the anticipated transaction."
 - Lockheed Martin Integrated Systems, Inc., B-410189.5, Sept. 27, 2016.

In Context of Wyle Labs and VSE Corp.

“The protester contrasts our decision in *Wyle Labs., Inc.*, in which we sustained an allegation that the agency unreasonably failed to consider the effect of a corporate restructuring on the awardee’s proposal, with our decision in *VSE Corp.; The Univ. of Hawaii-Costs*, B-407164.11, B-407164.12, June 23, 2014, where we denied an allegation that the agency unreasonably failed to consider a corporate restructuring.”

Contrast to VSE Corp.

- “In *VSE Corp.; The Univ. of Hawaii-Costs*, the information available to the agency was a press release that ‘was nothing more than an announcement of [the awardee's] board of directors stating its intentions to plan to examine the possibility of future action by [the awardee].’ ”
- “We found that such an indefinite plan ‘did not trigger any obligation by [the awardee] to report or the agency to consider’ the possible corporate restructuring, and we found nothing unreasonable in the agency’s decision not to consider the transaction.”

Contrast to Wyle Labs

- “In contrast, in *Wyle Labs., Inc.*, the awardee had made ‘various statements regarding the pending corporate separation,’ but ‘the record contain[ed] no documentation indicating that the agency considered any data reflecting the impact of the pending corporate restructuring.’ ”
- “We found the agency’s evaluation unreasonable where the agency ignored the possible impact of a transaction that was **imminent and essentially certain.**”

GAO's Conclusion and Guidance

- “Therefore, an agency **should** analyze the effect of a possible corporate restructuring on an offeror's proposal when the transaction at issue is ‘**imminent and essentially certain.**’ Nat’l Aeronautics and Space Admin.--Recon., supra.”
- “Indices of whether a transaction is imminent and essentially certain include whether the timing and manner of the spin-off contemplated were within the control of the offeror, and **whether the offeror had disclosed detailed plans to the SEC**, including an anticipated time frame for closing the transaction. See id.”

Outcome of LMIS Decision

- “Here, LM issued a press release on January 26, 2016, stating that LM had ‘entered into a definitive agreement to separate and combine its realigned [IS&GS] business segment with Leidos Holdings, Inc.’ ”
- “LM exercised considerable control over the timing and manner of the transaction, and, as the press release and accompanying documents made clear, had detailed transaction plans that it had shared with the SEC, including an expected quarter in which the transaction would close.”
- “On this record, the agency could reasonably conclude that the transaction at issue, the transfer of LM's IS&GS business segment to Leidos, was **imminent and essentially certain**, and the agency reasonably considered the . . . press release when evaluating the possible impact of the transaction on LMIS’ proposal.”

Lessons Learned

- The agency may learn of a pending transaction through the media, a company press release, or other means.
- The agency may consider the information.
- In unusual circumstances, an agency might exclude a proposal based on a pending corporate transaction.
- The agency may take this action based on public information contained in a press release.
- The agency might not consider additional information contained in SEC filings.

Lessons Learned

- According to GAO, the agency “**should** analyze the effect of a possible corporate restructuring on an offeror’s proposal when the transaction at issue is ‘**imminent and essentially certain.**’”
- Under these circumstances, a company should address the plans for a corporate transaction (to the extent it reasonably can) in its technical and cost proposals.
- The technical and cost proposals should be consistent in this regard.
- Detailed plans disclosed to the SEC may indicate that a transaction is “imminent and essentially certain.”

Reconsideration Denied

- GAO denied Lockheed Martin's request for reconsideration.
 - Lockheed Martin Integrated Systems, Inc., B-410189.7, Aug. 10, 2017
- GAO set forth these key facts:
 - “LMIS did not disclose the impending transaction in its final proposal, which was submitted a few months earlier on November 3, 2015, or otherwise advise the agency of the impending transaction.”
 - “The agency maintained that it first became aware of the transaction through LMIS' January 26, 2016 press release.”
 - “Given the information contained in the press release, the agency evaluators attempted to assess the impact of the transaction on LMIS' proposal, notwithstanding the lack of information regarding the transaction in the proposal.”
 - “Ultimately, the agency selected SAIC for award on June 13, 2016, without consideration of LMIS' proposal in the cost/technical tradeoff.”

GAO addressed the manner in which the agency considered the transaction

- GAO summarized Lockheed Martin's prior protest:
 - “In its protest, LMIS challenged the exclusion of its proposal from award consideration.”
 - “LMIS argued that the Corps misinterpreted GAO decisions regarding corporate transactions when it decided to consider the Lockheed/Leidos transaction.”
 - “LMIS also protested that the agency's concerns regarding the transaction were unfounded, arguing that the Corps' allegedly mistaken interpretation of the press release led to unreasonable conclusions regarding the impact of the transaction on LMIS' proposal.”
 - “According to LMIS, the Corps should have raised any concerns with LMIS prior to disqualifying the proposal.”

GAO endorsed its prior decision, which defended the agency's actions

- “In our decision, we concluded that, based on our decisions involving corporate transactions, it was reasonable for the agency to have considered the transaction and assessed the impact of the transaction on the proposals because the transaction was **‘imminent and essentially certain.’**”
 - Citing Lockheed Martin Integrated Sys., Inc., B-410189.5, B-410189.6, Sept. 27, 2016, 2016 CPD ¶ 273, at 8-9, citing Nat’l Aeronautics & Space Admin.--Recon., B-408112.3, May 14, 2014, 2014 CPD ¶ 155 at 3.
- “We also found that it was not unreasonable for the agency to rely primarily on information contained in LMIS’ press release, without considering other information sources such as Securities and Exchange Commission (SEC) filings or engaging in exchanges with LMIS, particularly in light of the fact that LMIS’ proposal made no mention of the transaction. *Id.* at 9-10, 13.”
- “Further, based on our review of the record, we found no merit to LMIS’ argument . . . that the agency’s conclusions regarding the impact of the transaction were unreasonable. *Id.* at 10-13.”

GAO defended its decision as consistent with prior GAO case law

- “As an initial matter, we reiterate that our protest decisions regarding matters of corporate status and restructuring are highly fact-specific, and turn largely on the individual circumstances of the proposed transactions and timing.”
- “Primarily, our decisions on the subject generally focus on whether it was reasonable for an agency to reach conclusions regarding an impending transaction, or to not consider the transaction at all during its evaluation of proposals.”

GAO defended its decision as consistent with prior GAO case law

- GAO case law usually focuses on an agency's lack of consideration of a corporate transaction, as GAO stated here:
 - “As highlighted above, our bid protest decisions in this area generally follow an agency's lack of consideration of a corporate transaction--impending or already consummated--and focus on whether such failure to assess the transaction rendered an award improper.”
 - “The opposite occurred here; the impending Lockheed/Leidos transaction was considered by the Corps.”
 - “Thus, unlike the circumstances in Wyle Laboratories and Veterans Evaluation Services, here the protest did not turn on whether the agency should have considered the transaction as part of its evaluation, because the agency had already considered it.”
 - “As we explained in the decision, **an agency generally is permitted to consider information outside of the four corners of a proposal during its evaluation of proposals.**”

GAO advised agencies to analyze restructuring when “imminent and essentially certain”

- “In this respect, consistent with our decisions in this area, **when an agency becomes aware** of an impending corporate transaction prior to award--either through information in an offeror's proposal or through other information resources--**and such transaction is imminent and essentially certain** (or already consummated), **an agency should analyze the effect** on proposals of the corporate restructuring at issue.”
 - Citing Nat'l Aeronautics & Space Admin.--Recon., supra.
- “Thus, to be clear, **key in our analysis** on these matters **is both whether an agency is aware of a particular transaction, as well as its imminence and certainty.**”

Here the transaction was not uncertain and it was reasonable to assess the impact

- “Here, because the Lockheed/Leidos transaction at issue was not speculative or an uncertain future matter at the time the agency was evaluating proposals, and because the agency learned of the transaction prior to award, we agreed with the Corps that it was reasonable for the agency to assess the impact of the transaction (despite LMIS not discussing the transaction in its proposal).”
- **Lesson Learned:** Better to address relevant information in the proposal (to the extent possible and legally permissible under the circumstances).

GAO looks at reasonableness of agency assessment or lack thereof

“Next, once it is established that a transaction should be considered by an agency, our Office’s inquiry turns to the reasonableness of the agency's assessment of the impact of the transaction, as was the case here, or, when a transaction is not considered by an agency, we assess whether the protester was prejudiced by the agency's failure to analyze the effect of the transaction.”

GAO distinguished Lockheed's case from Wyle's case

- “In this respect, we agree with the protester that these cases--when an agency fails to consider an impending corporate transaction--ultimately turn on whether an awardee will perform the contract in a manner materially different than proposed due to the corporate restructuring.”
 - Citing Request for Reconsideration at 3, 5, citing Wyle Labs., Inc., *supra*, at 11.
- “However, we disagree . . . that this element should be the initial or only inquiry informing whether an agency should even consider a particular business transaction.”

Lessons Learned in Context of Protests and Corporate Transactions

- If your competitor has announced public plans for a corporate transaction that are “imminent and essentially certain” and that could affect performance, that may provide grounds for a protest.
 - Success of the protest ground may turn on whether the agency was aware of and reasonably considered the information.
 - If the agency was not aware, then success of the protest ground may “ultimately turn on whether an awardee will perform the contract in a manner materially different than proposed due to the corporate restructuring.”

Lessons Learned in Context of Protests and Corporate Transactions

- If you have announced public plans for a corporate transaction that are “imminent and essentially certain” and that could affect performance, that may provide grounds for a protest to your competitor (or grounds for the agency to exclude your proposal).
 - Success of the protest ground may turn on whether the agency was aware of and reasonably considered the information.
- Therefore, it is a best practice to reasonably address the available information in your proposal, so that the agency may reasonably consider the information during its evaluation.

Lessons Learned in Context of Protests and Public Information

- Public information may be used in a bid protest.
- Public information may be used to challenge your proposal evaluation.
 - Past performance and corporate experience
 - Proposed solutions
 - Corporate restructuring
- If there is public information that bears upon your proposal and that may be considered by the government or used by a competitor in a protest, it is a best practice to address the relevant information on your own terms in your proposal.

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Thank you!
Questions?