OT Counsel Corner Takeaways on Recent Production and Protest Issues

On July 6, 2023 Denise Scott, Chief Counsel at the U.S. Army Combat Capabilities Development Command, Armaments Center (DEVCOM-AC) Legal Office at Picatinny Arsenal, NJ led a discussion on issues that counsel encounter in going to production and defending protests.

A few takeways from the discussion on the theme of recent production issues:

- Although the FY23 NDAA no longer requires the solicitation and award to include notice of the possibility of follow-on production to take advantage of 10 U.S.C. 4022(f), it is still best practice to include such a notice where that is the Government's intent. In addition to being transparent with performers, the prototype phase frequently is of lesser value than the production phase and informing competitors of the potential for production can increase their interest.[1]
- The statute requires that the follow-on production award must be issued to participants in the transaction. A common scenario is that a traditional contractor will work with a series of nontraditional defense contractors (NDCs) during the prototyping phase "to a significant extent" and avoid the cost share requirement. But when the prototype is successful, and ready to go into production, the NDCs' participation is no longer required because, for example, the NDCs already provided critical intellectual property or an innovative research and development approach. Nothing in the statute requires significant participation by the NDCs for the follow-on production award, so this is not necessarily a barrier to production. And the argument can be made that the incorporation of the NDCs during prototyping accomplished the goal of the statute and they likely have some continuing relationship or reward as part of the production award even if they are not participating to a significant extent.
- The statutory requirement that there be successful completion of the prototype is very flexible. Best practice for agencies using iterative or spiral development is to ensure that the SOW has clear evaluation criteria for each stage or version as opposed to relying on "soft" criteria such as it was a "favorable" result.
- The follow-on production award may include ancillary goods and services to the successful prototype, for example, components, spares, ancillary items, training, and contractor logistics support. But as part of the review, look at the production buy and if the successful prototype is only 25% of the total, you have to ask if that makes sense (in this scenario you likely have a problem).
- Be careful that changes to the follow-on production award do not undermine the concept of a successful prototype. For example, if the Services begin to leverage the follow-on production award to obtain "variants" of the original successful prototype, this warrants additional scrutiny.
- Pursuant to 10 U.S.C. 4022 (a)(2)(A)(ii), there needs to be a written determination for follow-on production awards greater than $100 million that "the use of the authority of this section is essential to promoting the success of the prototype project." For FAR-based production awards, this can be difficult to justify because, for example, presumably the contractor is willing to accept a FAR-based contract. This may be a reason to make follow-on production award as an other

[1] Notwithstanding the FY23 NDAA changes, the notice requirement still appears in the 2018 version of the OT Guide as well as the OSD Memorandum "Definitions and Requirements for Other Transactions Under Title 10, United States Code, Section 2371 b" (November 2018) and arises from GAO's decision in *Oracle America, Inc.*, B-416061 (May 31, 2018). The reference to a statutory requirement is based on GAO's interpretation; there has never been an explicit statutory requirement for prior notice of a follow-on award in the solicitation or award. In addition to the FY23 NDAA change to 10 U.S.C. 4022(f), DFARS Case 2023–D006, 88 Fed. Reg. 33834 (May 25, 2023), removes the notice requirement from DFARS 206.001–70(a)(1).

transaction award, or, alternatively, to write a J&A to justify the FAR-based award to avoid duplication of costs and unacceptable delay.

- An acquisition strategy is key! It may not be required, but thinking through the process in advance with the PM or requiring activity helps to streamline decisions as well as lays the foundation to successful defense a protest. The strategy should include "exculpatory" language that retains the flexibility of the approach, but with the strategy it's much easier for the agency to maintain transparency with the performers and stay on track with a tight schedule.

In addition, Ms. Scott led a discussion of protest issues and a recent protest that was withdrawn after the agency filed its report. Here are a few takeaways with respect to OT protests:

- If an OT award is going to be protested, the likelihood is that the protest will challenge the follow-on production award. Make sure you have ticked the box that competitive procedures were used to award the prototype OT.
- In any protest filed before GAO, the agency is likely to face a strong presumption that CICA applies. Any language – even language in internal emails – that references FAR Part 15 concepts such as "debriefings" can undermine an agency's position that the award is an OT. So be careful that you train the OT Team to avoid any FAR-based terminology. GAO has not shown a willingness to grant a motion to dismiss at an early stage for lack of jurisdiction, forcing the agency to address the underlying substantive arguments made by protesters.
- GAO's timeliness rules apply to OT awards, so clearly document when you provided feedback to performers so that you can show they failed to protest within 10 days of knowing or when they should have known of protest grounds.
- In this protest, the acquisition strategy had a layer of competition built in among the performers whose prototypes were successful. So, once the agency identified successful prototypes (there were more than one), they asked for proposals where the performers provided pricing and any updates to the license agreements (in case performers wanted to provide additional rights to the Government), among other things. This approach adds an additional layer of competition and aids the Government in making the best decision on the production award. Once again, when taking this approach, the agency should make clear this is not a competition subject to the FAR, but rather, ensure that the authorization for the competition is under 10 U.S.C. 4022(a) and use terminology that is not rooted in traditional FAR-based contracts.

DAU greatly appreciates Ms. Scott's insight and (wink) hopes to have her return for a future session. In the meantime, her slides can be found under "attachments" at the OT Counsel Corner Event Page,