Federal Contracting News

Feds May Be Real Winners if Appeal Helps 'Confused' Contractors

By Daniel Seiden

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- Contractor criticizes consistency of legal review of bid protest overrides
- Four-part test would help agencies too, could follow 'checklist,' be 'bullet proof,' attorney says

Contractors need more predictability about when federal agencies may allow contract winners to proceed with performance despite a protest filed by an unsuccessful bidder, Safeguard Base Operations LLC will tell the Federal Circuit in Washington Nov. 7.

The Competition in Contracting Act requires agencies to stop performance of protested contracts.

But agencies may authorize performance anyway by issuing an override after a written finding that immediate performance either serves the best interests of the U.S., or urgent and compelling circumstances require it.

Safeguard, which says the Department of Homeland Security unfairly overrode its protest of a $78 million contract award, says judges are applying inconsistent standards when weighing legal challenges to the reasonableness of overrides.

The U.S. Court of Appeals for the Federal Circuit has the chance to provide contractors and agencies alike with a much needed clearer understanding of what justifies an override by requiring mandatory application of a four-factor test, which only some U.S. Court of Federal Claims judges currently apply, the company says.

The test, which calls, among other things, on agencies to consider costs of and alternatives to overrides, could hold agencies accountable to the procurement and bid protest system, and help contractors know when override litigation is worth pursuing, some attorneys say.

"Uncertainty regarding application of the factors erodes agency accountability because contractors may hesitate to challenge overrides if the outcome is unpredictable," said Daniel H. Ramish of Smith Pachter McWhorter PLC in Tysons, Va.

"Judicious use of stay overrides is essential because the automatic stay is the linchpin of the GAO bid protest system," he said.

Contractors want predictability to reduce litigation and transaction costs, said James J. McCullough of Fried, Frank, Harris, Shriver & Jacobson LLP in Washington.

But if the Federal Circuit adopts the test, predictability would also emerge from agencies knowing precisely what to say to get courts to approve overrides, he said.

"Agencies would be bullet proof by strictly adhering to a four-factor checklist to show the court their override passes muster. They'd never lose so long as they checked off all the factors," McCullough said.

Luck of the Draw

The four-factor test comes from a 2006 claims court decision, *Reilly's Wholesale Produce v. United States*, which said agencies' override decisions should consider:

- whether significant adverse consequences would occur absent the override;
- whether reasonable alternatives are available;
- how the potential costs for proceeding with the override compare to the purported benefits; and
- the effect of the override on the competition and integrity of the procurement.

Safeguard, in its opening brief to the Federal Circuit, draws attention to what it calls an "intra-court split" in the claims court over use of the test by identifying five decisions by Federal Claims judges issued between 2008 and 2013.

The three decisions that applied the test invalidated overrides. The two that didn't apply the test upheld them.

One decision, relying on the test, said normal protest procedures took precedence over the performance of a contract to feed U.S. soldiers in Afghanistan because the Defense Department didn't show how a contract delay would threaten health, welfare, or safety.

Another decision, which didn't rely on the test, conversely said performance of a contract to support State Department personnel in Iraq couldn't wait for a protest to play out.

The State Department acted reasonably to minimize security concerns and limit its presence in a "dangerous place," the court said.

The federal procurement world needs a more predictable process, Safeguard contends. The fate of an override "should rest with the consistent application of the law, not the luck of the draw," it says.

Some other attorneys who have represented contractors in override-related litigation agree.

Not mandating application of the test makes it more difficult for protesters to know their chances of success until after they file a challenge to an override and the court assigns a judge to their case, said Marina Burton Blickley of Odin, Feldman & Pittleman PC.

The protesting contractor must then "review the assigned judge's prior opinions to see how that judge has assessed these cases in the past to try and determine what test or factors the judge is more likely to rely on," she said.

Only Rationality Required

But the government says the claims court should only be required to assess whether an agency's override was rational, not whether it checked four specific boxes.

As for the contract override that Safeguard is challenging, the company contends that because DHS didn't consider the last prong of the four-part test—the integrity factor—the override allowing a rival to perform a $78 million dormitory services contract without delay was unlawful.

The government, meanwhile, says that the contract's connection to supporting law enforcement functions, like ensuring border security, protecting federal buildings, and investigating drug crimes, were rational reasons for allowing contract performance to go forward.

Some attorneys say the government's more relaxed view of what is required to support an override finds support in both the statutes at issue, and the Federal Circuit's own recent caselaw.

"With an override, the bottom line is that the decision needs to be reasonable—that is what the Administrative Procedure Act standard of review calls for," said Michelle E. Litteken of PilieroMazza PLLC in Washington.

The four-part test "provides one approach to assessing whether the decision is reasonable, but those factors are not the sole standard to adjudicate the issue," she said.

And McCullough, of Fried, Frank, said the Federal Circuit's October 2018 ruling in *Dell Fed. Sys. L.P. v. United States* doesn't auger well for Safeguard and other attorneys pushing for the test.

Though it wasn't an override case, the claims court in that protest ordered the Army to stop a plan to address defects in a computer procurement.

The Federal Circuit reversed, ruling that the claims court improperly relied on the judge-made test applied in that case, which lacked both statutory and regulatory support, he said.

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