Nash & Cibinic Report

January 2014

GUEST APPEARANCE

¶MAKING PROTEST COSTS UNALLOWABLE UNDER FAR 31.205-47(f)(8): Contrary To CICA And FASA

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Protests serve a broader purpose than allowing vendors to vindicate individual expectations to Government business. Instead, the primary purpose of the bid protest system is to advance the public interest by ensuring that the Government obtains the most advantageous contracts by complying with applicable regulations and treating all bidders and offerors without discrimination. See *Grumman Data Systems Corp. v. U.S.*, 28 Fed. Cl. 803 (1993), 35 GC ¶ 717. Accordingly, "Congress recognized that open competition requirements under the [Competition in Contracting Act of 1984] resulted in losing bidders filing protests 'as a means to discover the propriety of an award decision,'" *DataMill, Inc. v. U.S.*, 91 Fed. Cl. 740 (2010), 52 GC ¶ 188.

Put in perspective, Congress empowered the bid protest system as an essential component to full and open competition. Yet, without proper incentives, losing offerors are less likely to protest, thus limiting the effectiveness of the bid protest system. As shown below, Federal Acquisition Regulation 31.205-47(f)(8)—the cost principle provision that makes protest costs unallowable—subverts the comprehensive overhaul of the bid protest system established by Congress in CICA, Pub. L. No. 98-369 and the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, to motivate disappointed offerors to help police the award of Government contracts to better assure full and open competition.

CICA's And FASA's Overhaul Of The Bid Protest System

• *Background on CICA and Protests*—In an April 9, 2009 report to Congress, the Government Accountability Office made the following observation on the impact of the Competition in Contracting Act of 1984 on the bid protest system: "At the heart of [CICA's] bid protest provisions is a balancing act that attempts to ensure that procurements can proceed without undue disruption, while also providing a mechanism for holding agencies accountable, and protecting the rights of aggrieved offerors to fair treatment by the government." See *GAO, Report to Congress on Bid Protests Involving Defense Procurements*, B-401197, 2009 CPD ¶ 101, 2009 WL 1058644. For example, to

incentivize the filing of well-founded bid protests, Congress authorized the reimbursement of bid protest costs for successful protests. Specifically, 31 USCA § 3554(c)(1), as recodified for CICA, then stated:

If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may declare an appropriate interested party to be entitled to the costs of—

(A) Filing and pursuing the protest, including reasonable attorneys' fees; and

(B) Bid and proposal preparation.

• *Background on FASA and Protests*—FASA was enacted a decade after CICA. Supposedly, Congress regarded FASA as the most significant procurement reform legislation since CICA. See *Global Computer Enterprises, Inc. v. U.S.*, 88 Fed. Cl. 350 (2009). In enacting FASA, Congress closely scrutinized the federal bid protest system. See *DataMill*, stating:

As the court in *A & D Fire Protection, Inc* [*v. U.S.*]. noted, "[i]n the interest of efficiency, bid protests were targeted by [the] FASA as one of the areas in need of reform[.]" 72 Fed. Cl. [at 133 [(2006)]. The FASA "revise[d] and simplif[ied] the bid protest process with a view towards reducing the number of protests that are filed." S. Rep. No. 103-259, at 7. For example, Congress recognized that open competition requirements under the CICA resulted in losing bidders filing protests "as a means to discover the propriety of an award decision. These protests unnecessarily tax[ed] the already burdened procurement system in a manner which could be obviated simply by requiring the appropriate disclosure of such information in the form of a debriefing."

FASA modified 31 USCA § 3554(c)(1) to also allow the protester to be reimbursed the costs of consultants and expert witnesses. As a result of FASA, 31 USCA § 3554(c)(1) states:

If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal agency conducting the procurement pay to an appropriate interested party the costs of—

(A) filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees; and

(B) bid and proposal preparation.

It is noteworthy that, at the time that FASA was enacted, FAR 31.205-47(f)(8) did not exist. Instead, FAR 31.205-47(f)(8) was promulgated as a final rule on August 8, 1996 in Federal Acquisition Circular 90-41, 61 Fed. Reg. 41476.

• *Two Pillars of Financial Incentives for Protests*—The bid protest system as overhauled by Congress in CICA and FASA was predicated on two pillars of financial incentives to motivate vendors to protest serious procurement irregularities:

- (1) First, successful or not, a protester (or awardee defending an award) could charge the cost of a protest to an indirect cost account. The indirect cost was allowable inasmuch as it was a reasonable business expense that was not prohibited by FAR Part 31. See *Bos'n Towing & Salvage Co.*, ASBCA 41357, 92-2 BCA ¶ 24864, 1992 WL 40703, holding that legal expenses involving a GAO protest were allowable.
- (2) Second, under 31 USCA § 3554(c)(1), if the protest was deemed meritorious, the GAO could recommend the payment of bid and proposal costs to the protester as well as reasonable fees of attorneys, consultants, and experts.

FAR 31.205-47(f)(8) Subverted The First Pillar Of Financial Incentives To Protest

FAR 31.205-47(f)(8), as added in 1996, adds to the list of unallowable costs:

(8) Protests of Federal Government solicitations or contract awards, or the defense against protests of such solicitations or contract awards, unless the costs of defending against a protest are incurred pursuant to a written request from the cognizant contracting officer.

The subverting of CICA and FASA by FAR 31.205-47(f)(8) is analogous to the subverting of another procurement statute addressed in *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854 (Fed. Cir. 1997), 39 GC ¶ 153. In *Burnside-Ott*, the court found that the FAR councils subverted the Contract Disputes Act of 1978, 41 USCA § 7101 et seq., by promulgating a FAR provision that denied contractors the right to appeal under the CDA the amount of fee awarded under a cost-plus-award-fee contract. The Federal Circuit held:

The CDA was a *comprehensive overhaul* of the process for reviewing claims related to government contracts. It provided for substantive changes in the law concerning the handling and review of contract disputes. As part of those changes, the CDA specifically provides that review of contract claims "shall" proceed de novo. Thus, any attempt to deprive the [board of contract appeals] of power to hear a contract dispute that otherwise falls under the CDA conflicts with the normal de novo review mandated by the CDA and *subverts the purpose of the CDA*. In government contract disputes, unlike contract disputes between two private parties, the initial determination in each dispute is made by one of the parties, i.e., the CO. Congress commanded that the CO's decision on any matter cannot be denied Board review. To the extent that the Government attempts to use the contract provision to defeat jurisdiction, Clause H-21 cannot stand. [Emphasis added.]

See *Not Subject to the "Disputes" Clause? (Has Anyone Heard of Burnside-Ott?)*, 27 N&CR ¶ 2, and *Can Contractors Dispute Award-Fee and Award-Term Decision?: Who Ever Heard of Burnside-Ott*, 20 N&CR ¶ 15.

Just as the CDA was intended to be a "comprehensive overhaul" of disputes, so too CICA and FASA were intended to be a "comprehensive overhaul" of protests. The same way the Federal Circuit held in *Burnside-Ott* that the promulgation of FAR 16.405 "subverts the purpose of the CDA," so too the promulgation of FAR 31.205-47(f)(8) "subverts the purpose of" CICA and FASA.

FAR 31.205-47(f)(8) Was Intended To Discourage Protests

FAR Case 93-010 was initiated by the Defense Contract Audit Agency through a December 23, 1992 letter to the DAR Council. This DCAA letter recommended that the bid protest expenses incurred by Government contractors not be allowable costs. The DCAA letter initiating FAR Case 93-010 espoused two principles for the proposed rule:

- 1. The Government will not encourage litigation by contractors.
- 2. Government contractors will not be put in the better position than contractors in the commercial area.

Nowhere in the DCAA letter that initiated FAR Case 93-010 is there any mention of the congressional overhauling of the bid protest system through CICA or FASA. Turning to the two "principles" espoused by the DCAA for FAR 31.205-47(f)(8), it is noteworthy that neither of the purported principles has the stature of a FAR Guiding Principle. See FAR 1.102. When each of the DCAA's purposed principles is separately analyzed, it is apparent that the DCAA principles should not apply to the issue of whether protest costs should be allowable.

• *First DCAA Principle: "The Government will not encourage litigation by contractors."* As explained above, CICA encouraged protests as a means to "to ensure that procurements can proceed without undue disruption, while also providing a mechanism for holding agencies accountable, and protecting the rights of aggrieved offerors to fair treatment by the government." GAO Report to Congress. Conversely, the DCAA letter initiating FAR Case 93-010 indicated that the purpose for disallowing bid protest costs was to discourage protests. Specifically, the letter stated that "[b]y amending FAR 31.205-47(f)(1). . . the Government will not be encouraging bid protest litigation." Hence, ostensibly, FAR 31.205-47(f)(8) was promulgated to discourage protests.

• *DCAA's Second Principle: "Government contractors will not be put in the better position than contractors in the commercial area."* The problem with the DCAA's second principle is that, when it comes to contract formation, the Federal Government holds itself up to a much higher standard than "the commercial area." Protests of contract awards "in the commercial area" are almost nonexistent.

Ironically, the DCAA's position ignores one of the FAR's Guiding Principles—"Conduct business with integrity, fairness and openness," FAR 1.102(b)(3).

Succinctly put, the second principle cannot be reconciled with the bid protest system as overhauled in CICA and FASA. As previously explained, Congress encouraged protests as a means "to ensure that procurements can proceed without undue disruption, while also providing a mechanism for holding agencies accountable, and protecting the rights of aggrieved offerors to fair treatment by the government." GAO Report to Congress. Hence, to advocate making protest costs unallowable by espousing "the commercial area" as the benchmark for the FAR councils disregards the congressional scheme to use protests to assure full and open competition.

FAR Councils Ignored Comments From Industry

In promulgating FAR 31.205-47(f)(8), the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council ignored comments from industry apprising that FAR Case 93-010 was contrary to the congressional overhaul of the bid protest system. One example of such comments was made by the American Bar Association:

In any event, the rationale stated by the FAR Councils in support of the proposed rule sweeps too broadly. Specifically, it ignores the fact that bid protests serve an important function in ensuring compliance with procurement laws and regulations. For example, when Congress codified that bid protest system as part of CICA, it noted that "a strong enforcement mechanism is necessary to insure that the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief." *Conference Report on Competition and Protest Provisions* in H.R. 4170, H.R. Rep. 861, 98th Cong. 1st Sess. 1421, 1435 (1984), reprinted in 1984 U.S.C.C.A.N. 2123, *see also* Executive order 12979, Oct. 25, 1995 (directing executive branch agencies to take certain actions to enhance the effectiveness of the agency protest process). Thus, we submit, there is an affirmative policy rationale for continuing to treat the costs of pursuing bid protests as allowable. Moreover, even if the fee-shifting provisions create too much incentive for filing protests, wholesale disallowance of protest costs inappropriately create a disincentive to pursuing protest remedies.

Similarly, the National Security Industrial Association provided the following comments on FAR Case 93-010:

The proposal would reverse long-established policy. As far as we can determine, no prior contract cost principle in the last 50 years has made the recovery of bid protest costs unallowable. . . .

*** * ***

Indeed, this history evidences that the protest remedy has long been recognized by the GAO and Congress and the courts as an important public policy to enable bidders to assure that solicitations and contract awards comply with the rules of government procurement.

Another example of the FAR councils ignoring the comprehensive overview of the protest process by CICA can be found in the comments of the Aerospace Industries Association:

Bid protest costs are an ordinary and necessary cost of doing business with the Government and satisfy a fundamental goal of the Competition in Contracting Act (CICA) of 1984 (P.L. 98-369) to ensure the integrity of the competitive bidding process by providing a procedure whereby bidders act as a private attorney general. Bid protests are a fundamental protection to contractors against agencies that fail to follow prescribed laws, rules or regulations or fail to conduct the source selection in accordance with the stated solicitation provisions. These laws, rules, regulations, and solicitation provisions charge the procuring agency with a public trust and fiduciary responsibility to conduct federal procurements in an open, fair and equitable manner. Accordingly, bid protests should not be discouraged as a matter of public policy by making the costs associated with bid protests expressly unallowable.

Hence, the administrative history of FAR Case 93-010 shows that the FAR councils were apprised by industry that FAR 31.205-47(f)(8) subverted the overhaul of the bid protest system established by Congress in CICA and FASA.

Conclusion

In summary, FAR 31.205-47(f)(8), which makes the costs to protest or to intervene in a protest unallowable, is contrary to the statutory scheme in CICA and FASA to encourage meritorious protests as a means of assuring full and open competition. *Jerry Gabig*