

ALWAYS READ YOUR OPPONENT'S ENTIRE PROTEST

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My book, “100 Worst Mistakes in Government Contracting” (Nat’l. Contr. Mgt. Assn. 2008) by Richard D. Lieberman and Jason D. Morgan, includes two important mistakes: “*you failed to read the entire solicitation....*” and “*you failed to read your entire contract....*” While these are definitely classic mistakes, one more should be added: “*you failed to read your opponent’s entire protest.*” LMC Med Transportation (“LMC”) found out the hard way at the Court of Federal Claims. *Excelsior Ambul. Svc. v. United States*, No. 15-189C (Fed. Cl. March 23, 2016). The case also points out significant differences between a protest at the Court, and a protest at the Government Accountability Office (“GAO”).

The Case. LMC was awarded an ambulance service contract by the Department of Veterans Affairs (“VA”), but the award was protested on Feb. 27, 2015 by Excelsior, an unsuccessful offeror, at the Court of Federal Claims. Excelsior alleged that LMC did not possess the required licenses, was violating subcontracting regulations, and was violating minimum wage laws. The VA contracting officer notified LMC that Excelsior had protested in the Court but LMC declined to intervene, stating to the VA that it was its “understanding that Excelsior’s protest [was] solely based on pricing...[LMC would] not hire an attorney at this point to intervene....” LMC advised the contracting officer that it had opted to “self-intervene.”

Soon thereafter, the VA decided to take corrective action, however, while taking the corrective action it eventually confirmed the contract award to LMC. Excelsior then challenged the VA’s corrective action, and LMC again elected not to intervene at the Court. Three months later the Court held that award to LMC was improper because LMC did not have a license required by the solicitation. The VA decided not to appeal the decision, and two weeks later, LMC sought to intervene in this protest for purpose of pursuing an appeal. LMC claimed it had been misinformed by the contracting officer that the protest only involved pricing, and could not have known the basis of Excelsior’s protest until the court released its final decision.

The court rejected LMC’s motion to intervene, stating that it should have known of its right to intervene on February 27, 2015, but waited for 11 months to file its intervention. The court pointed to the differences between the GAO bid protest rules, and the Court’s bid protest rules:

At GAO: If an unsuccessful offeror files a protest at GAO, the procuring agency is required to notify the successful offeror of the protest *and furnish copies of the protest submissions to the successful offeror.* FAR 33.104(a)(2), 4 CFR § 21.3(a).

At the Court of Federal Claims: Contracting officers are **not** required by statute or regulation to advise successful offerors of the grounds of a protest that has been filed at the court. FAR 33.105, which deals with protests at the Court, includes no similar requirement to provide the unsuccessful offeror with a copy of a protest. There is a requirement in the Court’s Appendix C (Procedure in Procurement Protest Cases) that a protester file a “pre-filing notification” with the Court, the Department of Justice, the

contracting officer and the apparently successful offeror, *but the pre-filing notification does not require a statement of the intended grounds of protest.*

In this case, the Court noted that “Excelsior’s complaint [at the Court] was publicly available, via PACER [Public Access to Court Electronic Records—an online service allowing users to obtain case and docket information online], on the date it was filed (February 27, 2015), 11 months before LMC filed its motion to intervene. The court noted that LMC, by deciding to “self-intervene” and not formally intervene in the protest, had assumed the risk that the VA might not adequately represent its interest. But there was no recourse at that point for LMC, and it was out of luck and could no longer seek to obtain the contract.

Comment on the case: You may ask yourself, “why didn’t LMC intervene at the court when it first heard about Excelsior’s protest?” I do not know why, but speculate that it would have required LMC to hire and pay for an attorney. This points out another significant difference between bid protests at the GAO and the Court, namely, “who can represent you” in each of those forums:

At the GAO: GAO’s bid protest statute states that “[t]o the maximum extent practicable, the Comptroller General [GAO] shall provide for the inexpensive and expeditious resolution of protests under this subchapter.” 31 U.S.C. § 3554(a)(1). In keeping with this purpose, GAO permits a protest to be signed by “the protester or its representative,” 4 CFR §21.1(c)(2). GAO’s “Bid Protest Guide” makes it clear that “[a]lthough protesters may be represented by counsel, filing a bid protest with GAO...does not require the services of an attorney.” GAO-09-471SP at 4. Protesters frequently use Presidents, Chief Executives or another person as their representative, and thereby avoid the cost of an attorney.

At the Court: Only attorneys eligible to practice before the court may represent other parties. RCFC 83.1. The Court’s rules state that an “individual who is not an attorney may represent oneself... but may not represent a corporation, an entity or any other person in any proceeding before the court.” RCFC 83.1(a)(3). There are very few “individuals” who are government contractors; most are corporations, LLCs, or companies, which must retain counsel in order to appear before the Court.

In all likelihood, LMC was probably trying to save money, but in the end, it lost a contract it thought it should have won. This case points out two important rules for protesters, or for awardees:

- 1. Always obtain and read the complete copy of any protest that is filed at the GAO or at the Court, if it concerns your company. Never assume anything. Get the complete and accurate story so you can make an intelligent decision on what to do.**
- 2. Always intervene when your contract award or intended contract award is protested. You may intervene with a non-attorney “representative” at the GAO, but in order to intervene at the Court you must obtain an attorney who is admitted to the Court. Only by intervening can you ensure that your rights and interests will**

be protected. The United States (or the agency being represented by the Justice Department at the Court) may have different interests from you, the contractor, as shown in this case.