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Editor's Note: Mitigating Risk
Victoria Prussen Spears 147

**Timing Is Everything: The Impact of Transactions on Pending Bids
and Proposals**
Erin M. Estevez, Jeremy D. Burkhart and Kelsey M. Hayes 149

**The 2021 Anti-Kickback Statute Year in Review and 2022 Outlook:
What's Old Is New**
Miranda Hooker and Allison DeLaurentis 155

**Pass-Through or Do Not Pass Go: CBCA Lacks Jurisdiction Over
Software Company Claim to Enforce License Agreement**
Kara L. Daniels and Amanda J. Sherwood 169

**Senior HHS Official Discusses Role of OIG in FCA Resolutions and
Enforcement Priorities for 2022**
Matthew Dunn, Krysten Rosen Moller and Tara Carrier 172

**The First Circuit's *Swift* Twist: A New Standard for Government
Motions to Dismiss Qui Tam Actions Under the False Claims Act**
Aime Joo, Murad Hussain and Jennifer Oh 176

**ASBCA Denies Contractor Statute of Limitations Defense Against
Incurred Cost Submission Based Government Claim**
Paul E. Pompeo and Amanda J. Sherwood 179

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Timing Is Everything: The Impact of Transactions on Pending Bids and Proposals

By *Erin M. Estevez, Jeremy D. Burkhardt and Kelsey M. Hayes**

Recent decisions from the Government Accountability Office and the U.S. Small Business Administration's Office of Hearings and Appeals illustrate the real-world impact that transactions can have on an ongoing procurement and provide practical insight into how contractors can mitigate those risks. The authors of this article discuss the decisions and their implications.

To what extent does a completed or imminent corporate transaction affect a government contractor's ability to compete for award of an opportunity in its pipeline? What steps can a contractor take to prevent a contemplated transaction from negatively impacting its eligibility for or evaluation with respect to a pending bid? Recent decisions from the Government Accountability Office ("GAO") and the Office of Hearings and Appeals ("OHA") of the U.S. Small Business Administration ("SBA") illustrate the real-world impact that transactions can have on an ongoing procurement and provide practical insight into how contractors can mitigate those risks.

CAN A TRANSACTION IMPACT EVALUATION OF AN OFFEROR'S PENDING BID FOR AN AWARD?

In two recent bid protest decisions, GAO came to opposite conclusions regarding whether a procuring agency properly considered the impact that the same corporate transaction would have on pending procurements.

In *Vertex Aerospace, LLC*,¹ GAO found the agency's evaluation unreasonable because it failed to adequately consider the impact of the awardee's recent acquisition by another entity, but in *PAE Aviation and Technical Services, LLC*,² GAO found the agency had properly concluded that the same transaction did not appear likely to impact performance, begging the question of what the key difference was in the conduct of the procurement that led to the contrast in outcomes.

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¹ B-420073, B-420073.2, Nov. 23, 2021, 2022 CPD ¶ 5.

² B-417704.7, B-417704.8, June 8, 2021, 2021 CPD ¶ 293.

In *Vertex*, the U.S. Air Force (“USAF”) had awarded the Aircraft Maintenance Enterprise Solutions (“ACES”) multiple-award indefinite delivery/indefinite quantity (“IDIQ”) contract for aircraft maintenance services to eight contractors.³

On November 20, 2020, through a series of corporate transactions, one of those contractors became the immediate parent company of another.⁴ Nearly a month later, the agency issued a task order solicitation to holders of the ACES IDIQ contract.

During evaluation, the contracting officer received notice of the November 2020 acquisition by virtue of a related novation request.⁵ However, the agency did not analyze whether the acquisition would impact the relevant offeror’s ability to perform consistent with its task order proposal or, at the very least, the contemporaneous evaluation record did not address the potential ramifications. The agency ultimately concluded that offeror’s proposal represented the best value and issued the award accordingly.

Vertex protested, contending that the agency’s evaluation of proposals was unreasonable and that the agency failed to adequately consider the potential impact of the awardee recently being acquired by another firm. GAO ultimately sustained the protest because “the record contained insufficient documentation and analysis . . . to conclude that the agency meaningfully and reasonably considered the effect of this corporate transaction on the awardee’s ability to perform the task order.”⁶

However, just months earlier, in *PAE Aviation and Technical Services*, GAO was faced with a nearly identical issue arising out of the same transaction as was at issue in *Vertex* but reached a different conclusion.

In *PAE*, the protester challenged a U.S. Customs and Border Protections (“CBP”) award for aviation logistics and support.⁷ Among other arguments, the protester contended that the awardee failed to inform CBP of its pending acquisition and that CBP unreasonably evaluated the awardee’s technical and cost proposal due to the transaction.⁸ Unlike in *Vertex*, the agency considered the transaction during the evaluation and documented that analysis.

³ *Vertex*, 2022 CPD ¶ 5 at 1.

⁴ *Id.*

⁵ *Id.* at 5–6.

⁶ *Id.* at 11.

⁷ *PAE*, 2021 CPD ¶ 293 at 1.

⁸ *Id.* at 1–2.

While CBP was performing its responsibility determination of the awardee, the agency learned through public reports that the awardee had been acquired.⁹ After CBP's procurement team saw that the awardee was still registered in the System for Award Management ("SAM") with the same data universal numbering system ("DUNS") number, CBP concluded that "there was no indication that this new ownership changes [the awardee]'s corporate structure or will have an impact on its ability to perform as proposed." This determination was included in the contracting officer's contemporaneous documentation.¹⁰

GAO ultimately denied the protest, stating that "the record provides no basis to find that the transaction will have a significant impact on contract performance."¹¹

In the *Vertex* decision, GAO specifically distinguished *PAE*, noting that in *PAE*, the agency made an explicit pre-award determination that the transaction would not adversely impact that procurement and then documented that decision.¹² This was considered a "contemporaneous finding that was given due deference by [GAO]."¹³

However, in *Vertex*, because there was no contemporaneous documentation, GAO had "insufficient information from which to assess the adequacy and reasonableness of the agency's consideration of the effect of the corporate transaction" and thus sustained the protest.

KEY TAKEAWAYS FROM *PAE* AND *VERTEX*

The key takeaway from these two decisions is that contractors must understand their obligations for notification and the government's need to adequately document the details of the transaction.

First, if an offeror is in the process of a corporate transaction, that offeror should include a description of the transaction in any proposals it submits and notify the procuring agency for any already-pending bids as soon as practicable. At the latest, this notification should be made immediately upon the transaction's closing. Notice of the transaction provides an offeror with two advantages: (1) the opportunity to assert that the transaction will not impact performance (cost or technical), and (2) an impetus to the agency to consider this issue and document its determination in the course of its evaluation.

⁹ *Id.* at 14.

¹⁰ *Id.*

¹¹ *Id.* at 15.

¹² *Vertex*, 2022 CPD ¶ 5 at 21–22.

¹³ *Id.* at 22.

This is the second key, documentation. If an offeror does these things, it minimizes the chance that an eventual award can be successfully protested. Careful attention to pending and pipeline bids during the planning and execution stages of a transaction is merited for these reasons.

WHAT IMPACT DOES A TRANSACTION HAVE ON A SMALL BUSINESS OFFEROR'S CERTIFICATION AND RECERTIFICATION OBLIGATIONS?

What if a pending procurement is set aside and the corporate transaction will result in the offeror becoming other than small? In general, under the U.S. Small Business Administration's ("SBA") certification rules, a business's size is determined as of the date of its initial offer, including price. Thus, as long as the firm is small at that time, it will be considered small throughout the life of the contract, including (with exceptions) orders issued under multiple-award contracts ("MACs"). However, if a business goes through a corporate transaction, such as a merger, sale or acquisition, or novates its small business contract, it is required to recertify its size status pursuant to FAR 52.219-28, Post-Award Small Business Program Representation and 13 C.F.R. § 121.404.

Revisions to SBA's regulations that became effective in late 2020 now require small businesses with pending bids and proposals to recertify their size status if an acquisition occurs after bid or proposal submission but prior to contract award. Whether the small business will remain eligible to receive a pending award depends on two primary factors: timing and the nature of the procurement. With respect to timing, if the merger, sale or acquisition occurs within 180 days of the date of an offer and the offeror is unable to recertify as small, it will not be eligible as a small business to receive the award of the contract.¹⁴ If the transaction occurs more than 180 days after the date of an offer, an award can be made, although it will not count as an award to small business for purposes of the agency's small business goals.¹⁵ So, what about the nature of the procurement?

In a recent OHA opinion, *Modern Healthcare Services, JV*,¹⁶ the appellant (Modern Healthcare) claimed that the awardee should not have been eligible for a small business procurement because the awardee had been acquired by a large firm after submission of its initial offer but prior to award and within 180 days of its bid. Modern Healthcare contended that the awardee was required to recertify its size per 13 C.F.R. § 121.404(g) and that such recertification should have resulted in the awardee being deemed ineligible for award.

¹⁴ 13 C.F.R. § 121.404(g)(2)(iii).

¹⁵ *Id.*

¹⁶ SBA No. SIZ-6114, Nov. 29, 2021.

The SBA Area Office initially determined that the awardee was not required to recertify its size after the acquisition, because the contract at issue was not a MAC, relying on dicta from a previous OHA decision. Before the OHA sustained Modern Healthcare's appeal and remanded the case to the Area Office for a new size determination, the OHA confirmed that the version of SBA's regulation in effect at the time the awardee certified its size in connection with the submission of its initial offer, including price, was the controlling regulation.

Thus, the OHA applied SBA's regulations in effect in 2018, which referred only to the agency's inability to take small business credit for awards made after a recertification as other than small—not the revised regulation that came into effect in late 2020 containing the 180-day limitation on eligibility. Nonetheless, the OHA made an important holding that is likely still applicable under the 2020 version of SBA's regulations: SBA's recertification rules apply to single-award contracts and MACs.¹⁷

Further still, whether the MAC at issue was set aside for small businesses is also relevant for the analysis.

In *Odyssey Systems Consulting Group, Ltd.*,¹⁸ GAO had to decide what effect a size recertification made after a merger, sale or acquisition had on a multiple-award contract that was a set aside for small business. There, Millennium Engineering and Integration, LLC ("Millennium"), a GSA OASIS 5B IDIQ contract holder, had submitted a proposal for a task order in support of the Space and Missile Systems Center ("SMC"). Thirty-eight days after submitting its proposal, but before award, Millennium was acquired by another company, causing it to no longer qualify as a small business.¹⁹ The agency then awarded the task order to Millennium. The protester challenged the award before GAO, arguing that Millennium was ineligible because it was no longer small.

GAO invited SBA to provide its views on the protest. SBA explained, consistent with the revised regulations, that if a firm recertifies as other than small within 180 days of offer and before award, the firm will generally be ineligible for the award of either a task order or a contract. However, although SBA agreed that Section 121.404(g)(2)(iii) for transactions after an offer but before award applied at the task order level, the SBA reasoned that this section was not controlling for the protest at bar.

¹⁷ *Id.* at 17–20.

¹⁸ B-419731, et al., July 15, 2021, 2021 CPD ¶ 260.

¹⁹ *Id.* at 3.

In the SBA's view, Section 121.404(g)(4) "provides an exception to the general rule" for size recertification between offer and award in circumstances involving a MAC set-aside for small businesses. Thus, the SBA contended that, pursuant to 13 C.F.R. § 121.404(g)(4), the agency could still make award to Millennium but simply could not receive small business credit for pending and future awards against Millennium's OASIS contract.

While GAO was "not convinced that SBA's interpretation is the only reasonable interpretation of the regulation," it ultimately deferred to SBA and held that Millennium was properly found to be eligible for award (although GSA could not receive credit toward its small business goals).²⁰

KEY TAKEAWAYS FROM MODERN HEALTHCARE SERVICES AND ODYSSEY SYSTEMS

The takeaway from these decisions is that early planning for a contemplated transaction is critical. A transaction could impact eligibility for a set-aside award depending on (1) the timing, and (2) how the opportunity is being procured.

CONCLUSION

Any time a government contractor is considering a potential corporate transaction, it should analyze the potential impact on its current federal awards, pending bids, upcoming competitions and future pipeline opportunities.

The impact will depend on various factors, including the timing of the transaction and nature of the relevant procurements. Early planning and appropriate communication with the government could make a meaningful difference and directly impact the contractor's bottom line.

²⁰ *Id.* at 8.