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Claims Court Backs Protest Over $5B Navy Construction Deal

By **Daniel Wilson**

Law360 (January 11, 2023, 9:01 PM EST) -- A U.S. Court of Federal Claims judge has sustained a protest over an approximately $5 billion Navy contract for global emergency construction services, saying the Navy didn't properly correct its initial failure to consider the reasonableness of the bidders' pricing.

Naval Facilities Engineering Systems Command had not asked for pricing data from bidders during corrective action, data that bidder SLS Federal Services LLC had argued the Navy should have originally taken into account when awarding global contingency construction contracts to six of the company's rivals, meaning the Navy effectively hadn't conducted corrective action at all, Judge Eric G. Bruggink ruled in a Jan. 3 decision, unsealed Tuesday.

"We hold that the agency's corrective action was unreasonable and failed to address the original 'impropriety,'" Judge Bruggink said, blocking the Navy from moving forward with those contracts.

Representatives for SLS, the Navy and the six contract awardees did not immediately respond to requests for comment Wednesday.

Under the deal, worth up to $5 billion in total, Aptim Federal Services LLC, CDM Joint Venture, ECC Contingency Constructors LLC, Gilbane Federal, Jacobs Project Management Co. and Perini Management Services Inc. were chosen to compete for task orders for construction and engineering services in response to global emergencies, such as natural disasters and humanitarian conflicts, according to the decision.

Cost was considered the most important factor in the Navy's assessment of bids to determine who offered the best value, and SLS had protested to the U.S. Government Accountability Office after missing out on a contract, arguing that the Navy should have evaluated the reasonableness of the prices proposed by bidders but didn't.

The company also argued that the Navy should have conducted discussions with bidders about their proposals, and after the GAO said there was "potential merit" in SLS' price reasonableness argument, the Navy agreed to take corrective action.

But the Navy ultimately changed little from its initial evaluation and said it intended to award contracts to the same six bidders, prompting SLS to protest again to the GAO and then, after disputes over

document production, to the federal claims court, according to the decision.

Jacobs, intervening in the case, argued that SLS had effectively waived its price reasonableness argument because the Navy's failure to ask for pricing information from bidders was clear from the contract solicitation, and that SLS should have disputed that issue before bids were due.

If the Navy had raised that defense at the GAO, it was indeed likely SLS' argument would be considered too late, according to Judge Bruggink. But it hadn't, instead promising to take corrective action, so it was the Navy itself that had effectively waived its defense, the judge said.

And the Navy, despite that promise to take corrective action, had never sought out the missing price data, making its corrective action unreasonable, according to Judge Bruggink.

"The agency did not (and could not) analyze price reasonableness under [the Federal Acquisition Regulation]," Judge Bruggink said. "Simply put, the regulation — which allows evaluation of price without separately considering cost — presupposes that agencies possess, at the very least, some pricing information. Here, the parties do not appear to dispute that the agency never requested, received, or evaluated any price data from the bidders."

The Navy had argued that soliciting a contingency contract, where the required work is not clear ahead of time, makes it effectively impossible to analyze fixed-price proposals. But that argument was undermined by other examples where agencies had conducted price reasonableness analysis for similar contracts, showing such analysis may be difficult but isn't impossible, the judge said.

Judge Bruggink also found that the Navy abused its discretion when it failed to conduct discussions with bidders, violating the Defense Federal Acquisition Regulation Supplement. The DFARS has a presumption of discussions with bidders about their proposals for defense contracts worth $100 million or more, meant to help ensure the government receives the best value.

While the Navy had effectively argued that the DFARS presumption doesn't apply when it states from the start of its procurement process that it won't be conducting discussions, that was incorrect, and the Navy had to at least properly justify why it didn't conduct discussions, according to the judge.

But the only documented justification from the Navy was a statement that the six highest ranked proposals were "clearly awardable without discussions [and] present[ed] the best value," Judge Bruggink said.

"That is not enough," the judge said.

SLS is represented by Kyle R. Jefcoat, David R. Hazelton, Leah Friedman, Genevieve Hoffman, W. Allen Perry and W. Blake Page of Latham & Watkins LLP.

The Navy is represented by Liridona Sinani of the U.S. Department of Justice's Civil Division and Nicolle A. Vasquez of the Naval Facilities Engineering Systems Command Atlantic.

Jacobs, as an intervenor, is represented by Robert J. Symon, Patrick R. Quigley and Lisa A. Markman of Bradley Arant Boult Cummings LLP.

The case is SLS Federal Services LLC v. U.S. et al., case number 1:22-cv-01215, in the U.S. Court of Federal Claims.

--Editing by Andrew Cohen.
