

LEGAL ADVISOR



A PilieroMazza Update for Federal Contractors and Commercial Businesses

Understanding the Impact of M&A on Pending Proposals

By Kimi Murakami



When our corporate team is working with a buyer or seller on an M&A transaction, we are often asked about what will happen to pending proposals. Specifically, clients often ask if pending proposals can be novated from the seller to the buyer. The short answer is no, a proposal cannot be novated. The Anti-

Assignment Act, which prohibits the transfer of awarded government contacts from the original contract holder to a third party, is silent as to proposals. There is no parallel process for pending proposals as found in the novation regulations for the transfer of awarded contracts to a successor-in-interest.

That said, the fact that a pending proposal cannot be novated does not mean it cannot be included as a valuable asset in the M&A transaction. To maximize the value of pending proposals for buyers and sellers, steps should be taken to ensure the government will recognize the buyer as the successor-in-interest to the proposal. A common practice is to notify the customer and explain why the transaction will have no affect on the proposal. Ideally, you will be able to explain that all of the assets relied on in the proposal are transferring to the buyer so the government should feel comfortable that the pending proposal is unaffected by the transaction.

In transactions where the buyer is the complete successor-in-interest to the seller, the buyer should be able to confidently acquire the seller's pending proposal. This is because the U.S. Court of Federal Claims ("COFC") has held that a pending proposal remains viable when transferred to a buyer that is the complete successor-in-

interest to the seller. See L-3 Communication Integrated Systems L.P. v. U.S., 84 Fed. Cl. 768 (2008) ("a bid or proposal may be assigned to an offeror's complete successor-in-interest").

However, the parties may have less confidence in the acquisition of a pending proposal when the buyer is not the complete successor-in-interest to the seller. The potential risk in this situation is shown in U.S. Government Accountability Office ("GAO") protest decisions. In Wyle Laboratories, Inc., B-408112.2 (Dec. 27, 2013), GAO found "there can also be no dispute that the substitution of a new prime contractor, in place of the original offeror, may well have a material effect on both the costs incurred and technical approach employed during contract performance." Additionally, in FCi Federal, Inc., B-408558.7 (Aug. 5, 2015), the proposal at issue relied on the resources of the offeror's parent company. As a result, when the offeror was sold and no longer had the same parent company, the offeror's proposal relying on the former parent "no longer reflected the manner in which the contract will be performed and the resources, experience, and past performance to be relied upon in the performance of the contract."

A similar risk exists for a buyer in attempting to file a protest challenging an agency's failure to select a proposal acquired from a seller. In Universal Protection Service, LP v. U.S., 126 Fed. Cl. 173 (2016), after ABM Security Services submitted an offer it was acquired by Universal. Ultimately, a different contractor was awarded the contract and Universal filed a protest. The COFC held that Universal was not a successor-in-interest to ABM Security Services, and, therefore, Universal did not have standing to challenge the award.

Continued on page 2

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IMPACT OF M&A.....Continued from page 1

Another potential consideration unique to small business contractors is whether the M&A transaction triggers the need to recertify size status for the pending proposal. Before last year, there was no rule requiring size recertification on pending proposals. But SBA added such a rule in 2016. The new rule states that, if a merger, sale, or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award.

Small business contractors also have to be mindful of how an M&A transaction may affect pending proposals under SBA's affiliation rules. SBA's so-called "present effect rule," if triggered, will treat a pending transaction as if it has already been completed. Therefore, if you are considering starting an M&A transaction before submitting proposals for critical small business contracts, you need to consider whether the contemplated M&A transaction, if SBA gives it present effect, will have an adverse affect on those proposals.

The above is intended to demonstrate that proposals can be included in M&A transactions, but there are unique considerations that must be carefully considered to ensure the buyer and seller maximize the value and potential of those proposals in the transaction. Our Business & Corporate Group, working closely with our Government Contracting and Small Business Groups, regularly advises clients on this and many other aspects of M&A transactions.

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