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A Possible Disagreement Between GAO And Fed. Claims Court

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Between 2013 and 2014, a series of cases bounced between the U.S.Government Accountability Office and the U.S. Court of Federal Claims about a contract to provide custom surgical packs and custom procedural trays to the U.S. Department of Veterans Affairs. The cases are: In re: Marathon Medical Corp., B-408052 (June 4, 2013); a series of cases before the COFC, concluding with Manus Medical LLC v. U.S., 115 Fed.Cl. 187 (March 10, 2014); and In re Marathon Medical Corp., B-408052.2 (May 30, 2014).

The final case from the COFC concluded that the certificate of competency ("COC") process of the Small Business Administration cannot be used to cure a material defect in an offeror's proposal. As an overview, the COFC judge observed: "This is a relatively simple case made more complicated by some curious agency actions following receipt of a GAO bid protest decision."[1]

At its core, the simplicity of the case came down to whether the GAO reasonably concluded that the VA had engaged in unequal discussions with the offerors in the first instance.[2] The COFC concluded that it had not.[3]

In the procurement at issue in those cases, the request for proposals provided for contract award to the lowest-priced-technically-acceptable offeror. Marathon Medical Corporation was the lowest-priced offeror, but its proposal was viewed as incomplete because it failed to include three required references.

The VA sent "an 'evaluation notice'" to Marathon asking whether Marathon's proposal included the three required references. Marathon provided four references, but played it straight and admitted that its proposal had not included the information originally. The VA did not consider the four references that Marathon submitted, concluding instead that Marathon's proposal was unacceptable (for failure to submit the references). And, the VA eliminated Marathon from the competition.

Manus Medical LLC was the second lowest-priced offeror. As was permitted by the RFP, Manus proposed to provide "equal or equivalent components" to those required by the RFP. For those offerors proposing equal or equivalent items, the RFP required the offerors to "furnish as part of his/her bid all descriptive material ... necessary for the purchasing activity to: (i) Determine whether the product

offered meets the salient characteristic requirement" of the RFP — that is, that the proposed "equal items" were the same or equivalent to the brand name items in the RFP.

According to the GAO decision, Manus' proposal did not include sufficient information for the VA to make that determination. So, the VA sent an evaluation notice to Manus, inquiring whether it would be possible to view the Manus-proposed samples. Manus responded to that "evaluation notice" by providing all of the proposed components for review by the source evaluation board chairman, who subsequently made the determination that the Manus-proposed components were "equivalent" to what was required by the RFP. And, the VA selected Manus for award.

In sustaining the protest, the GAO's rationale was straightforward:

Since visual inspection of the requested samples was necessary for Manus to meet its obligation of establishing that the proposed equal items were in fact equivalent to the name brand items, the request that Manus bring in the components for visual inspection amounted to discussions with Manus for the purpose of allowing it to establish the acceptability of its proposal. Accordingly, the agency was required to treat Marathon equally, and allow Marathon a similar opportunity to meet the solicitation's requirements. In this case that would mean allowing Marathon to provide the references it initially omitted. Since the agency failed to do so the agency engaged in unequal discussions.[4]

If the VA let Manus submit samples in response to the evaluation notice and considered those samples in determining the acceptability of Manus' offer, the VA similarly was required to accept and consider the references that Marathon had submitted in response to the evaluation notice that Marathon had received. The VA did not do so, so the GAO concluded that the VA had engaged in disparate discussions. The GAO recommended that the VA take corrective action by reopening discussions and accepting revised proposals from the offerors.[5]

From there, a series of Manus-initiated protests were filed at the COFC, essentially seeking to block the VA from implementing what Manus viewed as arbitrary corrective action.[6] From Manus' view, the exchanges between the VA and Manus were Federal Acquisition Regulation 15.306 "clarifications" — not "discussions." And, the VA had acted properly in engaging in "clarifications" with Manus only. According to the redacted filings, Manus' reasoning was that the samples that were submitted were all for items included in Manus' original bid, so Manus did not "modify" its bid as part of the exchanges. Accordingly, those exchanges were "clarifications," not "discussions," according to Manus.[7]

Recall those Manus "clarifications" involved submitting samples that apparently were necessary for the VA to determine the acceptability of Manus' offer. At the GAO, exchanges that are "used to furnish information required to determine the technical acceptability of a proposal" are discussions.[8] It is not so clear that the COFC views such exchanges in the same manner.

First, there is the apparent disagreement between the COFC and the GAO in the Marathon and Manus cases. There, the COFC concluded that the VA's original award to Manus was proper.[9] As the GAO has acknowledged, the COFC was aware of the GAO's decision that "the award to Manus was the result of disparate discussions" at the time it rendered its decision. So, even though the COFC did not address disparate discussions in the Manus III decision, in the GAO's view, the decision signaled the court's disagreement with the GAO's prior decision on that point.[10]

Second, other cases from the COFC note that even if exchanges request additional information from

offerors “essential to the evaluation criteria”, the exchange “still may only be a clarification.”[11] The COFC’s reasoning can be traced to the Federal Circuit decision, Information Technology & Applications Corp. v. U.S., 316 F.3d 1312 (2003).

In that case (“ITAC”), the Federal Circuit opined that an agency’s characterization of exchanges as “clarifications” or “discussions” was entitled to some deference. And, the court rejected the appellant’s argument that “a clarification cannot call for new information if the information is ‘necessary to evaluate the proposal.’” Id. at 1323.

The Federal Circuit noted: “There is no requirement in the regulation that a clarification cannot be essential for the evaluation of the proposal.” Id. In Davis Boat Works, for example, the COFC cited to the ITAC case, when holding that an agency engaged only in “clarifications” when it asked one offeror how it intended to meet individual specification requirements. The offeror responded by providing a 25-page “DRAFT Process Guide” and a two-page summary response to the agency’s question. While the COFC noted the case “present[ed] a somewhat close issue,” it found that the agency’s classification of those exchanges as clarifications — not discussions — “was both permissible and reasonable.”[12]

At the GAO, “the agency’s characterization of the exchange [as discussions or clarifications] is not controlling[].”[13] And, the GAO has provided the following guidance:

It seems clear that where an offeror is permitted to change the terms of its offer (i.e., materially alter its technical or cost elements) in response to exchanges with the agency, discussions have occurred. ... What is less clear is the line between clarifications and discussions in the context of informational infirmities in proposals.

In this context, we have held that clarifications may not be used to furnish information required to determine the technical acceptability of a proposal. ... We have also found exchanges to be discussions where the terms of the offer were not changed, but the pervasiveness of the information exchanged exceeded the scope of clarifications. ... These circumstances connote constraints on clarifications based both on the depth as well as the breadth of the exchanges undertaken by the parties.[14]

The GAO went on to explain that the “statutory regime” governing exchanges suggests that clarifications “are necessarily ’minor’ in nature.” According to GAO: “If ... the exchange is undertaken to change the offer or exceeds the scope of minor clarifications by, for example, seeking to cure a deficiency or address a material omission, then it likely constitutes discussions.”[15]

The GAO and the COFC agree that exchanges that permit an offeror to modify its proposal amount to discussions — no question. But, the two forums do not appear to be aligned in how to decide whether exchanges in “the context of informational infirmities in proposals” amount to discussions or clarifications.

Some judges at the COFC will afford discretion to the agency’s characterization of whether an exchange is a clarification or discussions. The GAO does not appear to afford the agency such discretion. And, the GAO seemingly views exchanges to obtain information necessary to determine technical acceptability of a proposal to be discussions, where the COFC may not.

As a practical matter, such differences must be kept in mind when selecting a bid protest forum — and analyzing whether a GAO-recommended corrective action is likely to be further litigated.

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[1] Manus, 115 Fed.Cl. at 191.

[2] See, e.g., Marathon Medical Corporation, B-408052, June 4, 2013, 2014 CPD ¶ 162.

[3] See Marathon Medical Corporation, B-408052.2 (May 30, 2014) (acknowledging COFC's disagreement with GAO's decision); see also Manus, 115 Fed.Cl. at 191 (finding that "there was nothing improper about the VA's original decision").

[4] Marathon Medical, B-408052.

[5] See n.4.

[6] See Manus Medical LLC v. US, Case No. 13-428C, filed 6/27/13 ("Manus I"); Manus Medical, LLC v. US, Case No. 13-727 C, filed 9/25/13 ("Manus II); and Manus Medical, LLC v. US, Case No. 14-26C, filed 1/10/14 ("Manus III"). At some point during the Manus I proceedings, the case went sideways. The agency reportedly told the COFC that it no longer intended to implement GAO's corrective action, but instead would request a COC determination from the SBA for Marathon. As a result, the COFC dismissed Manus I, finding that the case was moot. Manus filed Manus II in an attempt to enjoin that COC corrective action. Manus II was dismissed by the COFC because the controversy was not yet ripe, as no award had been made. After the SBA issued the COC and the VA selected Marathon for award, Manus filed Manus III, challenging that award. The COFC concluded that "an agency cannot lawfully cure proposal defects by submitting them to the SBA[.]" 115 Fed.Cl. at 189. That decision, interestingly, was followed by a subsequent protest by Marathon to the GAO, which was dismissed because "the matter involved ha[d] been decided by a court of competent jurisdiction." Marathon, B-408052.2, May 30, 2014. (A copy of the B-408052.2 decision was obtained pursuant to a 4 C.F.R. Pt. 81 request.)

[7] See, e.g., Redacted Complaint ¶¶ 44-53, Manus Medical LLC v. US, Case No. 13-428C.

[8] See, e.g., Evergreen Helicopters of Alaska, Inc., B-409327.3, April 14, 2014, 2014 CPD ¶ 128 ("[W]e have held that clarifications may not be used to furnish information required to determine the technical acceptability of a proposal.")

[9] See Manus, 115 Fed.Cl. at 192.

[10] See Marathon Medical Corporation, B-408052.2 (May 30, 2014) ("Specifically, the Court found that the original award to Manus was proper and that the agency properly rejected Marathon's proposal because it did not include the required past performance information. While the Court did not specifically address the issue of disparate discussions, the Court was aware of our decision that the award to Manus was the result of disparate discussions, but still determined that the award was proper, thus signaling its disagreement with our decision.")

[11] See Davis Boat Works Inc. v. US, 111 Fed.Cl. 342, 353-54 (May 17, 2013); see also, e.g., Mil-Mar Century Corp. v. U.S., 111 Fed.Cl. 508, 538 (May 23, 2013).

[12] Davis Boat Works, 111 Fed.Cl. at 354.

[13] See Evergreen Helicopters of Alaska Inc., B-409327.3, April 14, 2014, 2014 CPD ¶ 128.

[14] See n.15.

[15] Id.
