

When M&A And Bid Protest Worlds Collide

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Law360, New York (May 5, 2016, 4:13 PM ET) -- The U.S. Court of Federal Claims has put a new spin on the old adage “buyer beware” as it relates to companies that merge with or acquire federal government contractors. On April 26, 2016, in *Universal Protection Service, LP v. United States*, the court dismissed a \$250 million bid protest by Universal on behalf of its newly acquired subsidiary, ABM Security Services, ruling that ABM’s reliance on its previous parent during the proposal phase deprived Universal of standing as a successor in interest before the court.

This case traces its origins back to July 2014, when the United States Postal Service issued a purchase plan for obtaining contractors to staff and operate the National Law Enforcement Communications Center (NLECC) and provide security guard services at multiple locations across the United States, which attracted several offerors including ABM. Following an initial unsuccessful business disagreement with USPS and two follow-on rounds of bid protests and corrective action, USPS re-evaluated proposals in the fall of 2015.

On October 26, 2015 – while USPS was conducting its final corrective action – Universal acquired ABM’s assets from its parent company, ABM Industries, Inc. Two days later ABM informed USPS that its assets had been transferred to Universal, including the offer

for the NLECC and security guard services. In late November 2015, USPS informed ABM that it was reaffirming the award decision, and ABM lodged another business disagreement. The USPS responded in early December 2015 that Universal was not an interested party to challenge the award because it was not an actual or prospective offeror for the solicitation and it could not simply “step into the shoes of an actual offeror, long after a solicitation [had] closed” without advance approval from USPS. In January 2016, Universal filed a protest with the court.

In its protest, Universal alleged that the USPS performed flawed proposal evaluations, held unequal discussions, and made an arbitrary and capricious best value decision. The court did not get to the merits of those issues. Rather, it dismissed the protest on the ground that Universal lacked standing because it was not a complete successor in interest to ABM.

As a general rule, only parties that actually submit bids have standing to bring a post-award bid protest before the court. However, the court has recognized a limited exception to this rule where the third party qualifies as a “complete successor in interest.” To qualify as a complete successor in interest, the third party must acquire all of the bidder’s assets such that the bidder’s proposal remains intact and can be

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executed fully under the new parent-subsidary relationship. Typically, the court reserves a finding of complete successor in interest to cases where the third party is a “de facto same legal entity” having acquired all, or substantially all, of the assets necessary to execute the proposal and the resulting contract. The USPS and the intervening awardee argued that Universal lacked standing because it never submitted a bid. In response, Universal argued that it was the complete successor in interest to ABM.

Following a fact-intensive analysis, the court ruled that Universal did not qualify as a complete successor in interest and dismissed its protest. Specifically, the court found that the Universal-owned version of ABM was substantially different from the ABM that had submitted the proposal to USPS, and that Universal could not offer an identical proposal to include all of the assets and services ABM proposed when it was owned by ABM Industries. In support of its finding, the court reasoned that the pre-acquisition ABM based much of its USPS proposal on its close relationship with ABM Industries, relying heavily on the parent company’s financial statements and its code of ethics and business conduct. Moreover, ABM’s proposal relied on assets that did not transfer to Universal, including several key personnel and a software license ABM identified in its proposal. The court found that those close ties between ABM and ABM Industries severed when ABM Industries sold ABM to Universal without transferring all of the

assets that ABM had promised USPS in its proposal. The court found that Universal could not replicate those resources in its new parent role, and therefore did not qualify as a complete successor in interest.

The dismissal was a harsh result for Universal. In acquiring ABM, it gained a subsidiary but lost its protest, and, in turn, its right to keep fighting for a \$250 million award. In light of the court’s ruling, government contractors contemplating mergers or acquisitions should recognize that these transactions can fundamentally alter a contractor’s features, impacting its responsibility status, its eligibility for award and even its standing to bring a bid protest. The implications of the Universal case also extend beyond the bid protest realm to any context involving the assignment or potential assignment of an existing government contract. In those cases, as with a bid protest, the government likely will insist that any new parent company joining the government contractor’s corporate family provide identical resources and support so that the contractor’s performance continues free of any unnecessary risk, change or interruption.

A company considering a merger or an acquisition involving a government contractor can prepare for these challenges by identifying any implicated government contracting obligations or opportunities and structuring its deal in a way that ensures stability and predictability vis-a-vis the government. For example, the acquiring company should carefully review the contractor’s existing government

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contracts and proposals to ensure that the transaction transfers all assets necessary for the contractor to continue or begin performing its obligations. Alternatively, the acquirer can review its own capabilities to ensure it has the resources necessary to step into the shoes of the contractor's current parent and provide the required support for existing government contracts or proposals.

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