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Small Business

View from Wiley Rein: The Federal Circuit's (Accidental?) Expansion of Interested Party Status in *Tinton Falls Lodging Realty, Inc. v. United States*



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The Court of Appeals for the Federal Circuit's recent decision in *Tinton Falls Lodging Realty, Inc. v. United States*, No. 2014-5140 (Fed. Cir. Sep. 2, 2015), appears to expand the scope of protesters who have standing to protest the award of a contract and could have significant repercussions for any government contractors involved in litigating bid protests before the Court of Federal Claims (''COFC'') and the Federal Circuit. In *Tinton Falls*, the Federal Circuit concluded there was no clear error in the COFC's determination that the protester Tinton Falls, which did not qualify as a small business, had standing to protest the award to another offeror in a procurement set aside for small businesses. The Federal Circuit reached this conclusion based on the ''realistic possibility'' that, if the awardee were found to be other than small based on Tinton Falls' protest, the government would have to evaluate whether it could still solicit the contract as a small business set-aside or whether it would need to reopen the bidding process on an unrestricted basis. In the event that the government reopened the bidding process on an unrestricted basis, Tinton Falls would be eligible to compete for the hypothetical reopened bid.

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Standing in Bid Protests. As a general matter, to establish standing in a bid protest, a protester must show that it is an ''interested party'' that will be prejudiced by the award of the contract. An ''interested party'' is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award, or failure to award, a contract. To demonstrate prejudice, the protester must show there is a ''substantial chance'' it would have received the contract award but for the alleged error in the procurement process. The key question in *Tinton Falls* was whether Tinton Falls could show prejudice even when it would not have been eligible for award of the small business set-aside contract if it prevailed on its argument that the winning offeror was also ineligible for award.

***Tinton Falls* Expansion of Bid Protest Standing Principles.** The Federal Circuit's decision stems from a Department of the Navy small business set-aside for the management and coordination of lodging and transportation services for federal civil service mariners who were completing training in Freehold, New Jersey. In particular, the solicitation called for the winning contractor to provide hotel rooms near the training center, transportation between the hotels and the training center, and various associated services, such as planning

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for emergency medical treatment for the mariners housed at the hotels.

After a size protest disqualified the original awardee from receiving the award, the Navy awarded the contract to DMC Management Services, LLC (''DMC''). Once award was made to DMC, Tinton Falls filed a size protest with the Small Business Administration (''SBA''), alleging that DMC intended to subcontract the lodging services portion of the contract, which accounted for more than 80% of the value of the contract, to hotels that did not qualify as small businesses and thus violated the ''ostensible subcontractor rule.'' Ultimately, the SBA disagreed, determining that the primary and vital requirements of the contract were the management and coordination of lodging and transportation services to the training facility, and that DMC was not unusually reliant on subcontractors to perform these requirements.

Simultaneously, the Navy contracting officer filed his own size protest against Tinton Falls with the SBA. He alleged that Tinton Falls was affiliated with Hotels Unlimited, Inc., a larger parent entity, and thus ineligible for award because it was not a small business, and the SBA agreed. Tinton Falls subsequently appealed the SBA's decision as to the primary and vital requirements of the contract to the COFC, arguing that the SBA lacked a rational basis for determining that the primary and vital requirements of the contract were a coordinated package of lodging and transportation services. The COFC found for the SBA, determining that it had a rational basis to conclude as it did.

On appeal to the Federal Circuit, the intervenor DMC argued that Tinton Falls lacked standing to pursue the appeal because Tinton Falls could not demonstrate that there was a ''substantial chance'' it would have received the contract award but for the alleged error in the procurement process. DMC maintained, first, that Tinton Falls did not qualify as a small business because of its affiliation with Hotels Unlimited and therefore could not compete in a reopened bid process unless the bid was solicited on an unrestricted basis and, second, that Tinton Falls did not ''intend'' to win the original contract because it did not submit the lowest-priced bid.

On the first point, the Federal Circuit found no clear error in the COFC's determination that Tinton Falls had standing. The COFC determined that if Tinton Falls were to succeed in proving that DMC was ineligible for award, the government would be obligated to evaluate whether it could still solicit the contract as a small business set-aside or whether it would need to reopen the bidding process on an unrestricted basis. In the event that the government were to resolicit the contract as an unrestricted basis, Tinton Falls would be able to compete. Because of this ''distinct possibility'' that the government might rebid the contract on an unrestricted basis, Tinton Falls was able to demonstrate that there was a ''substantial chance'' it would have received the contract award but for the alleged error in the procurement process.

On DMC's second point, the Federal Circuit deemed DMC's allegation that Tinton Falls did not intend to win the initial contract irrelevant. To establish that it was prejudiced by the award of the contract and thus had standing, Tinton Falls did not need to show that it would win the contract in competition with other hypothetical bidders, only that it was a qualified bidder and could compete for the contract.

Potential Impact of Tinton Falls on Bid Protests. The Federal Circuit's expansive interpretation of interested party status in *Tinton Falls* is notable for a number of reasons:

- The decision was clear that it did not intend to rule on whether, in all circumstances, an offeror unqualified for award in a particular procurement has standing because it would be a qualified offeror if the contract was solicited with substantially different eligibility requirements. Thus, the precedential effect is uncertain, though the decision is sure to be relied on by protesters in an effort to establish more general applicability. The precedential value of the decision is made all the more ambiguous by the fact that the Federal Circuit applied the ''clear error'' standard in reviewing whether the COFC properly found Tinton Falls to have standing—a legal issue usually reviewed *de novo* on appeal.

- In the narrower context on which the Federal Circuit did rule, we can expect more protests from offerors that have been disqualified from small business set-asides because they are other than small. *Tinton Falls* places seemingly few limitations on these offerors' ability to protest.

- We may even see large businesses submit offers on projects they would not have considered bidding on before, with the hope that they will be able to protest the size of the awardee and, as appropriate, the other offerors and the government will re-compete the contract on an unrestricted basis.

- It is interesting to note that the government did not challenge Tinton Falls' standing. It was instead the intervenor DMC that made the argument. Typical agency practice is to present all possible arguments to dismiss the bid protest on jurisdictional or procedural grounds without getting to the merits.

- The decision would likely have come out differently had there been other technically acceptable offerors in the competitive range. In his dissent, Judge Reyna pointed to the fact that two other small businesses submitted lower bids than Tinton Falls and would have been next in line to receive the original contract. In a footnote, the majority rejects this argument because these other bids were twice found to be technically unacceptable.

- It is unclear at this point whether the Government Accountability Office will adopt the same approach as the COFC and Federal Circuit.

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