

HOLD BACK THE TIERS: THE DIFFICULTIES AND POTENTIAL FOR MISUSE OF CASCADING EVALUATIONS

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U.S. Government Contracts & Procurement Policy Alert

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In what seems to be an increasing and unfortunate trend for our clients, and for Federal procurement generally, certain agencies are issuing or contemplating solicitations that utilize an improper and/or unauthorized multi-tiered, cascading evaluation. This particular procurement method, if appropriately applied, solicits proposals from both large and small businesses if the market research regarding potential small business sources is inconclusive. The agency then reviews the proposals in a hierarchical fashion, with the proposals of certain categories of small business concerns (e.g., service-disabled veteran-owned small businesses) evaluated prior to proposals of all other than small business concerns. Generally, if there is sufficient competition among a "tier" of a particular category of small business concerns, then the agency restricts competition to that tier. However, if there is not sufficient competition in a tier, then the agency "cascades" the procurement down to the next tier. If the cascading continues, eventually the procurement is subject to full and open competition.

The use of a cascading evaluation has some obvious benefits (e.g., it may increase contracting opportunities for small businesses). However, both small and other-than-small business concerns should be wary of the improper use of cascading evaluations. Small businesses should be concerned about whether the agency conducted sufficient market research and properly ascertained that the procurement should not be set aside for particular small businesses. Large companies should also be concerned about an agency's election to use a cascading evaluation and whether it is appropriate. For instance, what used to be a hard "yes" or "no" determination (i.e., set aside the procurement or not) can now be answered with "maybe." As a result, a procurement may be competed amongst small businesses only (at least initially) without meeting the "Rule of Two," a specification for setting aside procurements for small business set forth in FAR 19.502-2. This requires an other-than-small contractor that wants to compete for a contract to spend time and money on a proposal that the agency will "maybe" evaluate.

In addition to the significant policy concerns at issue, an agency's use of a cascading evaluation also raises serious legal concerns: Does the agency have statutory or regulatory authority to utilize this procurement method? What considerations should the small business set aside regulations have on cascading evaluation procurements? How does *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016) (requiring the Department of Veterans Affairs to apply the Rule of Two) impact these concerns? How do the Government Accountability Office ("GAO") and the U.S. Court of Federal Claims address issues regarding legal authority? While Congress passed legislation authorizing agencies within the Department of Defense to use cascading

evaluations, it is not entirely clear that other agencies are permitted to do so.

Notably, government contractors must act quickly in navigating these complicated questions. GAO considers a challenge to the use of cascading evaluations as a challenge to the terms of a solicitation. Pursuant to GAO's bid protest regulations, a protester must raise such a challenge prior to the due date for proposal submissions.

Government contractors should assess the risks described above before preparing a bid or proposal in response to a solicitation utilizing a cascading evaluation. We can help identify the issues as they apply to your company. The K&L Gates Government Contracts and Procurement Policy group has experience in challenging an agency's use of cascading evaluations in a solicitation using innovative statutory, regulatory, and policy arguments. Our knowledge of and experience with the issues surrounding cascading evaluations allows us to assist you in making a decision regarding whether to protest an agency's use of cascading evaluations. Please feel free to contact us at the information below to discuss whether protesting a solicitation containing a cascading evaluation is right for your company.

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