



Bid Protest Weekly

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Introduction

General Counsel, P.C.'s Government Contracts Practice Group is pleased to provide you with the *Bid Protest Weekly*. Researched, written and distributed by the attorneys of General Counsel, P.C., the *Bid Protest Weekly* allows the Government Contract community to stay on top of the latest developments involving bid protests by providing weekly summaries of recent bid protest decisions, highlighting key areas of law, agencies, and analyses of the protest process in general.

General Counsel, P.C.'s Government Contracts Group has over eighty years of combined government contract law experience (both as in-house and outside legal counsel), helping clients solve their government contract problems relating to the award or performance of a federal government contract, including bid protests, contract claims, small business concerns, and teaming and subcontractor relations.

If you have any questions or comments regarding the discussed content, or questions about bid protests, please feel free to contact the attorneys at General Counsel, P.C. at (703) 556-0411 or visit us at www.generalcounselaw.com.

1. **Innovative Builders, Inc., B-402507.2, September 15, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Technical Evaluation

General Counsel P.C. Highlight: In reviewing a protest challenging an agency's past performance evaluation, GAO examines the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations.

Innovative Builders, Inc. (Innovative) protests the award of a contract under a request for proposals (RFP), issued by the Department of the Army (Army), for the construction of a seawall and related work.

The RFP contemplated the award of a fixed-price contract to construct the seawall and other work. Offerors were informed that award would be made on the basis of a performance-price tradeoff, considering past performance and price. The past performance factor consisted of company specialized experience and past performance surveys. With regard to company specialized experience, offerors were required to submit at least three examples of recent, relevant construction projects. With regard to past performance surveys, offerors were requested to submit performance information for each project.

Eleven of the nineteen proposals received, including Innovative's, received a neutral/unknown confidence rating since the offerors had not identified at least three recent, relevant projects.

Innovative initially protested this rating and GAO sustained the protest. However, following the agency's reevaluation of Innovative's past performance, the agency found that Innovative's projects were not recent and were not of the same type, scope, effort, and complexity as required by the RFP. The agency again rated Innovative's proposal as neutral under the past performance factor and this protest followed.

Innovative asserts that, with regard to the project that was determined to be not recent, that by the RFP issue date it had completed over 50% of the portion of the overall project that was assigned to the firm, and thus the agency should have found the project to be recent. Innovative also asserts, with regard to the remaining four projects that were found to not be relevant, that each of these projects contained features that were relevant to the work being procured here.

GAO states that in reviewing a protest challenging an agency's past performance evaluation, it will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. GAO's review of the record finds that the agency's conclusions were reasonable.

With respect to the project that the agency found to not satisfy the requirement that the project be 50% complete by the RFP issuance date, GAO states that Innovative had only been performing the project for six months with a completion date of 16 months later. Innovative also did not identify what work comprised its portion of the project, or identify that 50% of the work had been completed by the RFP issuance date. Therefore, the agency reasonably concluded that the project did not satisfy the RFP's requirements.

GAO agrees that Innovative's fourth and fifth projects were not sufficiently similar in scope, type, effort and complexity to be considered relevant to the construction project in the contract. Construction in the current contract would require forming and placement of structural concrete, reinforcement, vinyl sheet pile, storm drainage or trench drains, compacted fill, and other things. The Army found that Innovative's fourth project required less concrete, no vinyl sheet pile, no storm drainage or trench drains, no compacted fill, less beach fill and less rip rap. Its fifth project contained less concrete, less vinyl sheet pile, less timber pile, and did not contain any forming or placement of structural concrete or concrete piles. GAO stated that the agency's judgment that the projects were not relevant was reasonable. The protest is denied.

2. Training Management Solutions, Inc., B-403461.2, September 29, 2010

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Corrective Action

General Counsel P.C. Highlight: A contracting agency properly may take corrective action in order to rectify an error in the solicitation concerning the basis for award, where there is no evidence that the agency acted in other than good faith.

Training Management Solutions, Inc. (TMSI) protests the corrective action taken by the Department of the Army under a request for proposals (RFP) for digital training management system sustainment.

The RFP contained three technical evaluation factors: (1) technical approach; (2) management and staffing; and (3) past performance. The technical factors when combined were significantly more than price. TMSI filed a protest prior to the current protest and the agency took corrective action, which included amending the solicitation to reflect that the combination of technical factors is approximately equal to price, accept revised proposals, reevaluate, and make a new award decision.

GAO states that it has no basis to object to the agency's corrective action. The contracting officer stated that the original RFP was in error when it identified the combined technical factors as significantly more important than price. A contracting agency properly may take corrective action in order to rectify an error in the solicitation concerning the basis for award, where there is no evidence that the agency acted in other than good faith. Here, GAO states, the agency reasonably remedied the error and TMSI offers no evidence that the agency acted in bad faith. The protest is denied.

3. Information Ventures, Inc., B-403321, September 27, 2010

Link: [GAO Opinion](#)

Agency: Department of Health and Human Services

Disposition: Protest sustained.

Keywords: ID/IQ; Multiple Awards

General Counsel P.C. Highlight: Under FAR §16.504(c)(1)(i), a contracting officer must, to the maximum extent practicable, “give preference to making multiple awards of indefinite quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources.”

Information Ventures, Inc. (IVI) protests the determination by the Department of Health and Human Services to award a single indefinite-delivery/indefinite-quantity (ID/IQ) contract, rather than multiple contracts, under a request for proposals (RFP) for support services for the preparation of toxicological profiles.

GAO states that under FAR §16.504(c)(1)(i), a contracting officer must, to the maximum extent practicable, “give preference to making multiple awards of indefinite quantity contracts under a single solicitation for the same or similar supplies or service to two or more sources.” The FAR also sets out a number of conditions under which the multiple award approach is not to be used. Two of the conditions include when the expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards, or where multiple awards would not be in the best interests of the government. The contracting officer is required to document the determination for reasonableness. Where GAO concludes that the rationale advanced by the contracting officer is not sufficient to overcome the preference for multiple awards, it will sustain the protest.

GAO finds that the contracting officer, in reliance on the two exceptions to the use of multiple contracts referenced above, determined that both conditions were met.

The argument to make a single award under the RFP is that the award of multiple contracts will require it to reestablish a quality assurance branch to ensure the consistency and accuracy of the profiles submitted by the various contractors and thus, the expected costs of administering multiple contracts will outweigh the expected benefits. GAO finds that the problems that the agency encountered were a result of the novelty and complexity of the requirement when the first awards were made and were not as a result of its decision to award multiple contracts. Also, GAO sees no basis to conclude that, as a result of its experience in administering contracts for preparation of the profiles over the course of the past 20 years, the agency is not now in a position to define the technical requirements for the profiles with sufficient precision to eliminate the issues of inconsistency. The protest is sustained.

4. **Standard Heater Tube, Inc., B-403155, September 24, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Air Force

Disposition: Protest denied.

Keywords: Brand Name or Equal; Product Testing

General Counsel P.C. Highlight: The establishment of testing procedures is matter within the technical expertise of the procuring activity, and GAO will not object to the imposition of such a requirement unless it is shown to be without a reasonable basis.

Standard Heater Tube, Inc. (Standard) protests the terms of request for quotations (RFQ) issued by the Department of the Air Force for heater tubes and associated filter kits. Standard asserts that the RFQ is unnecessarily restrictive in that it requires a “brand name or equal” product and requires that quoted equal products be tested for suitability under specifically defined procedures.

The RFQ was posted on FedBizOpps and provided that heater tubes “shall be able to conduct thermal stability tests in accordance with the American Society for Testing and materials (ASTM) D 3241-Standard Test Method for Thermal Oxidation Stability of Aviation Turbine Fuels. Heater tubes shall be Alcor Part Number: AL-91652 or equal. Equivalent heater tubes shall comply with the characteristics outlined in the ASTM D 3241, Table 2. Heater tubes shall be established as conforming by the ASTM D02 Subcommittee on Aviation Fuels using the procedures outlined in the ASTM Research Report #D02-1550.” The RFQ advised that quotations “must clearly show that item offered meets all requirements.”

GAO states that the determination of a contracting agency’s needs and the best method of accommodating them are matters primarily within the agency’s discretion. GAO finds nothing objectionable in the agency’s reliance on the ASTM standard in determining the necessary characteristics of the required heating tubes. GAO has held that it is reasonable for an agency to attempt to comply with technical requirements that were specifically formulated for application in the procurement.

The language of ASTM 3241 articulates the need to conduct testing using the same equipment used to establish the test procedure and the ALCOR heater tube specified in the RFQ was part of the equipment used to develop the test procedure in question. The agency has sufficiently established that the brand name or equal provision is necessary to ensure the validity of the heater tube ratings. GAO concludes that the brand name or equal requirement is unobjectionable.

The establishment of testing procedures is matter within the technical expertise of the procuring activity, and GAO will not object to the imposition of such a requirement unless it is shown to be without a reasonable basis. GAO finds that RR-1550 is a reasonable means of

ensuring the acceptability of the required heater tubes. The agency asserts that use of ASTM D 3241 is prescribed by an applicable military standard.

GAO finds that a contracting agency's responsibility for determining its needs includes determining the type and amount of testing necessary to ensure both product compliance with the specifications and that a particular product will meet the government's needs. Here, the agency has demonstrated that the heater tubes are critical components, that uniformity of the tubes is necessary to ensure valid test results, and that the RR-1550 testing protocol is a reasonable means of ensuring uniformity. The protest is denied.

5. Science Applications International Corporation, B-403051, September 17, 2010

Link: [GAO Opinion](#)

Agency: Department of Defense

Disposition: Protest denied.

Keywords: Technical Evaluation

General Counsel P.C. Highlight: The establishment of testing procedures is matter within the technical expertise of the procuring activity, and GAO will not object to the imposition of such a requirement unless it is shown to be without a reasonable basis.

Science Applications International Corporation (SAIC) protests the award of a contract to Booz Allen Hamilton Inc. (BAH) under a request for proposals (RFP) issued by the Department of Defense for advisory and assistant support services for the agency's cooperative threat reduction (CTR) program. SAIC challenges the DTRA's evaluation of its technical proposal and the evaluation of BAH's past performance.

The RFP anticipated award of a cost-reimbursement, indefinite-delivery/indefinite-quantity (ID/IQ) contract, with a five-year period of performance. The maximum value of the contract is \$300 million with a minimum guaranteed value of \$1 million. The solicitation advised offerors that proposals would be evaluated based on the following three factors: mission capability, past and present performance, and cost. The mission capability factor had five subfactors: management approach, technical approach, transition plan, sample scenario, and initial task order. The mission capability factor was more important than the past and present performance factor.

SAIC challenges the DTRA's evaluation of every weakness and significant weakness assessed for its proposal under the management approach and transition plan subfactors of the mission capability factor. SAIC also argues that the agency's evaluation of BAH's past performance was unreasonable.

GAO states that the evaluation of an offeror's proposal is a matter within the agency's discretion. A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable. In reviewing a protest against an agency's evaluation of proposals, GAO will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. In reviewing an agency's evaluation of offerors' proposals, GAO does not limit its consideration to contemporaneously documented evidence, but instead considers all the information provided, including the parties' arguments, explanations, and any hearing testimony. During a hearing conducted by GAO, each witness provided detailed and credible testimony that either amplified the contemporaneous record, or reasonably explained why the contemporaneous record did not reflect the facts described.

SAIC challenges the agency's evaluation of its proposal as marginal under the management approach and transition plan subfactors. SAIC argues that the agency unreasonably assigned its proposal a two-star/significant weakness under the management plan subfactor regarding the protester's plan for the oversight of its overseas offices.

The management approach subfactor required offerors to "describe a thorough, complete, and effective approach to accomplish the overall program and contract objectives as stated in the SOO with an acceptable level of risk." The agency described the significant weakness under this factor as follows: "Failed to effectively demonstrate ability to oversee overseas staff and offices." For example: Communications plan with overseas offices does not mention communications with Defense Threat Reduction Office (DTRO) chiefs. DTROs are government overseas offices that are responsible for CTR efforts in nations receiving assistance. The agency found that that SAIC's proposal did not provide a plan to communicate with the overseas offices that will perform the requirements of the SOO in target countries for the CTR program.

GAO states that the agency reasonably concluded that an individual or team responsible for a particular subject matter might not be effective in supervising or facilitating communication for all of the subject matters and tasks of the overseas offices. To the extent that the agency viewed this approach to be part of SAIC's approach for oversight of its overseas offices, we think the agency reasonably viewed this as an element of the overall significant weakness.

SAIC next asserts that the DTRA unreasonably assigned its proposal a two-star/significant weakness under the transition plan subfactor, based on the protester's proposed approach to the staffing of its overseas offices. The agency found that the protester did not adequately address its approach to retaining or replacing the current overseas staff during transition.

GAO held a hearing to take testimony on the merits of the evaluation. The testimony showed that the agency found that SAIC's proposal had not addressed the risks arising from a significant degree of turnover in its subcontractors. In this regard, the agency noted that the subcontractors proposed by SAIC would be new to the contract. The agency also found that, under the incumbent contract, BAH provided 23 of 25 overseas staff positions and that SAIC's proposal did not adequately address how these personnel would be retained or replaced in light of the fact that BAH was not proposed by SAIC as a subcontractor. GAO finds these conclusions reasonable.

Next, SAIC argues that the DTRA unreasonably assigned its proposal a one-star/minor weakness under the management approach subfactor, based on the agency's conclusion that the protester did not demonstrate an adequate commitment to meet the socioeconomic subcontracting goals identified in the solicitation.

The RFP required offerors to "demonstrate a commitment to meeting the socioeconomic goals" set forth in the solicitation. Section L of the solicitation stated that offerors will be evaluated on their commitment to meeting the goal of subcontracting at least 15% of the total contract value to small businesses and/or historically black colleges/minority institutions, with 33% of that 15% goal being subcontracted to service-disabled veteran-owned small businesses (SDVOSB).

The agency found that three of the subcontractors identified by SAIC as small businesses did not qualify as small businesses under NAICS code 541990. The agency recalculated the subcontracting percentages for SAIC, and found that the protester's proposal reflected a lesser percent than required. GAO thinks that the RFP clearly stated the basis upon which offerors would be evaluated regarding their approach to small business subcontracting goals. On this record, GAO concludes that the agency reasonably evaluated SAIC's proposed subcontractors by evaluating them under the NAICS code set forth in the solicitation and reasonably assigned a weakness here to the protester's proposal.

Next, SAIC argues that the DTRA unreasonably assigned its proposal a one-star/minor weakness under the management approach subfactor regarding performance metrics. The agency found that SAIC's proposal did not clearly explain how the identified metrics would be used to improve contract performance.

The RFP required offerors to demonstrate "the ability to effectively measure and evaluate [their] execution of the SOO; to plan, track and forecast success in [their] mission, and in anticipation of contractor's future work needs as outlined in the SOO." The solicitation further required offerors to "clearly define the types and nature of the metrics to be used, the nature of the inferential data to be collected and processed, and the plan for utilizing these for continual process improvement."

After reviewing the record, GAO thinks that the agency reasonably concluded that the metrics described in SAIC's proposal were not accompanied by a sufficiently detailed plan demonstrating how the data collected will be utilized to improve contract performance.

Finally, SAIC argues that the DTRA unreasonably ignored negative information concerning BAH's performance as a subcontractor to SAIC under the incumbent contract in its evaluation of the BAH's past and present performance. The agency responds that it considered this information, but concluded that it was not relevant to the evaluation of BAH's performance. GAO concludes that the agency's evaluation of BAH's past and present performance was reasonable. The protest is denied.