



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. **Biblia, Inc., B-403006, September 13, 2010**

Link: [GAO Opinion](#)

Agency: Defense Logistics Agency

Disposition: Protest sustained.

Keywords: Bid Protest Jurisdiction; Source Selection Decision

General Counsel P.C. Highlight: A source selection decision must be in writing and made in accordance with the stated evaluation criteria. Without such a written determination, the decision is considered to be unreasonable and arbitrary.

Biblia, Inc. (Biblia), protests an award by the Defense Logistics Agency (DLA), under a solicitation for a one-time barge movement from South Carolina to Virginia.

A solicitation was issued for barge transportation services to 72 carriers. The solicitation requested that carriers submit a tender for the movement by completing a carrier worksheet and returning it to the Surface Deployment and Distribution Command (SDDC). Carriers were informed that tenders “will be evaluated and all responsive responsible tenders will be sent to the Transportation Officer.” Seven tenders were received and they were ranked according to price. They were then sent to the transportation officer for review and a source selection decision. Biblia was ranked first with the lowest tender. However, another tender was chosen.

As a preliminary matter, DLA asserts that the protest is outside of GAO’s bid protest jurisdiction because the shipment was a “spot movement,” or a one-time shipment of a commodity on one bill of lading that requires special equipment or services not otherwise provided by tariff or special rate tender. GAO states that it has declined jurisdiction over protests of “spot buys” because each involved the issuance of a bill of lading for a one-time shipment using informal procedures without issuing a formal solicitation or making a source selection. Where, as here, the agency issued a formal solicitation to 72 carriers requesting price tenders and other information, and provided evaluation factors which would be considered in determining which tender would be selected for award, the spot buy clearly goes beyond the informal spot movement procedures employed by the agency in those cases where jurisdiction was declined. GAO will consider the protest.

Biblia asserts that the agency's evaluation was flawed because it was the best value carrier with the lowest tender. GAO agrees. GAO states that an agency's evaluation and award decision are required to be made in accordance with the terms of the solicitation. The solicitation here indicated that award would be made to the low cost carrier, which had been determined responsive and responsible under the factors set forth. There is nothing in the record that supports the transportation officer's best value decision. The record provides no documentation as to why the low cost carrier was not selected. Since the record does not provide a reasonable basis for the best-value award decision, GAO sustains the protest.

2. **HID Global, Inc., B-403103, September 15, 2010**

Link: [GAO Opinion](#)

Agency: Government Printing Office

Disposition: Protest denied.

Keywords: Terms of the Solicitation; Buy American Act; Trade Agreement Act

General Counsel P.C. Highlight: The Buy American Act requires that only domestic end products be acquired for public use. In comparison, the Trade Agreements Act provides that eligible products from World Trade Organization Government Procurement Agreement (WTO GPA) countries are entitled to "nondiscriminatory treatment." The Trade Agreements Act exemption is applicable to procurements by federal agencies designated as covered by the WTO GPA.

HID Global, Inc. (HID), protests the terms of a request for proposals (RFP) issued by the Government Printing Office (GPO) for specialized passport cover material for use by the Department of State. HID asserts that the RFP improperly includes the domestic preferences of the Buy American Act, without also incorporating the provisions of the Trade Agreements Act of 1979, that provide an exemption to the Buy American Act preferences.

The Buy American Act requires that only domestic end products be acquired for public use. In comparison, the Trade Agreements Act provides that eligible products from World Trade Organization Government Procurement Agreement (WTO GPA) countries are entitled to "nondiscriminatory treatment." The Trade Agreements Act exemption is applicable to procurements by federal agencies designated as covered by the WTO GPA. Since the procurement at issue in the protest here is being conducted by the GPO, and the GPO is not a

covered agency under the WTO GPA, the Trade Agreements Act exemption from the Buy American Act domestic preference provisions does not apply.

HID maintains that the State Department is a de facto procuring agency for this procurement, along with the GPO and since the State Department is included on the list of federal agencies covered by the WTO GPA, HID argues that the provisions of the Trade Agreements Act apply and supersede the Buy American Act domestic preferences. GAO disagrees.

The GPO is procuring fabric and creating passport covers for the State Department, but it does not follow that the State Department is a de facto procuring agency. GAO states that in the absence of compelling indicia that the State Department was a co-procuring agency, it will not ascribe to the State Department a status that the agencies themselves did not. The protest is denied.

3. Enterprise Information Services, Inc., B-403028, September 10, 2010

Link: [GAO Opinion](#)

Agency: Department of the Air Force

Disposition: Protest denied.

Keywords: Terms of the Solicitation; Re-Certification of Size Status

General Counsel P.C. Highlight: A contracting officer has the discretion to require small business concerns to re-certify their size status in response to a solicitation for any new task order under a long-term contract.

Enterprise Information Services, Inc. (EIS) protests the terms of a task order request for proposals (RFP), issued by the Department of the Air Force for network services in furtherance of the agency's enterprise network services acquisition procurement.

The solicitation contemplates the issuance of a task order under the successful offeror's General Services Administration (GSA) 8(a) streamlined technology acquisition resources (STARS) contract. The 8(a) STARS contract is a multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) government-wide acquisition contract set aside for 8(a) small business concerns. The STARS contract was originally awarded in 2004, with a three-year base period and two two-year options. At the time of contract award, all contract holders

were required to certify their size eligibility. In 2009, GSA exercised the second option and required contract holders to re-certify their size status as part of the exercise of the contract option.

EIS asserts that the Air Force lacks a reasonable basis to require firms to re-certify their small business size status as of the time they submit task order proposals. EIS states that it certified its size status when submitting its initial proposal to GSA for award of its 8(a) STARS contract, and re-certified its size status in 2009 prior to exercise of the current contract option.

GAO states that the purpose of the 8(a) business development program as it relates to government acquisitions is to ensure that a fair proportion of all government contracts be placed with eligible small disadvantaged business concerns. The size re-certification requirement here is consistent with these purposes. The agency's decision to require re-certification also is consistent with the regulatory scheme applicable.

As a general rule, an 8(a) contractor's eligibility is determined as of the date that the concern submits its initial offer. Also, the determination of a business's size status also occurs as of the date the concern submits a written self-certification that it is small to the contracting activity as part of its initial offer. For purposes of contracts with durations of more than five years, a contracting officer must require that a concern re-certify its small business size status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option thereafter. A contracting officer has the discretion to require concerns to re-certify their size status in response to a solicitation for any new task order under a long-term contract.

Here, the 8(a) STARS contract has a total duration, including options, of seven years. It therefore meets the definition of a long-term contract and GAO concludes that the Air Force contracting officer has the discretion under the applicable regulations to request a size re-certification in connection with the submission of task order proposals. Requesting recertification under these circumstances is presumptively proper and reasonable, given that doing so furthers the statutory goals of the 8(a) program and is permitted by applicable regulations.

4. All Points International Distributors, Inc., B-402993; B-402993.2, September 3, 2010

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Evaluation; Source Selection Authority

General Counsel P.C. Highlight: Source selection officials have broad discretion in determining the manner and extent to which they will make use of technical and price evaluation results. GAO reviews the decision, not of the evaluators, but of the source selection authority. Evaluators' judgments are relevant only to the extent that they affected the source selection authority's best value determination.

All Points International Distributors, Inc. (API) protests the issuance of a blanket purchase agreement (BPA) to Thermo Bond Buildings, LLC (Thermo), under Department of the Army request for quotations (RFQ), for dog kennels and supporting equipment. The RFQ was issued to holders of contracts under specified General Services Administration (GSA) schedules, for dog kennels and materials. The RFQ provided for issuance of a BPA based on a "best value" evaluation. The source selection board (SSB) evaluated the quotations and determined that Thermo's quote was the overall best value, even though API's price was low.

API first asserts that the SSB's evaluation was inconsistent with the evaluation factors stated in the RFQ. GAO finds the arguments without merit. Source selection officials have broad discretion in determining the manner and extent to which they will make use of technical and price evaluation results. GAO reviews the decision, not of the evaluators, but of the source selection authority. Evaluators' judgments are relevant only to the extent that they affected the source selection authority's best value determination. GAO finds no indication in the record that any of the asserted improprieties with regard to the SSB's evaluation affected the source selection authority's decision. The source selection authority did not make use of the scores and other determination by the SSB that API asserts were inconsistent with the RFQ. Since the source selection authority did not base her best value determination on the SSB's judgments, the fact that the evaluators may have deviated from the RFQ's evaluation scheme in arriving at its judgments is irrelevant.

API next asserts that the finding that its special features were not unique or innovative was inconsistent with the RFQ since there was no mention in the RFQ of "innovative" or "unique." GAO finds that an agency properly may take into account specific matters that are logically encompassed by, or related to, the stated evaluation criteria. The Army states that "innovative" and "unique" are reasonably subsumed within the term "special," and therefore are encompassed by the evaluation factors in the RFQ. GAO agrees.

API asserts that the accessibility of the sleeping area and the height of the exercise area are unclear and therefore had a negative impact on its quotation's evaluation. GAO states that it will not sustain a protest unless the protester can demonstrate a reasonable possibility that it was prejudiced by the agency's actions. Here, there is no indication that these findings affected the source selection.

GAO finds API's last two assertions without merit as well. API asserts that the SSB identified six special features in its quotation, but the contracting officer identified only three. GAO repeats that source selection officials are not bound by the recommendations of lower-level evaluators. API's disagreement with the contracting official's conclusions does not render the evaluation unreasonable. Finally, API asserts that the Army improperly double-counted certain strengths of Thermo's quotation by crediting them under multiple evaluation factors. GAO finds nothing improper in an agency's finding that a single strength has value under multiple factors. The protest is denied.