



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 fifty 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. **Esterhill Boat Service Corp., U.S. Court of Federal Claims Case No. 09-735C, January 28, 2010**

Agencies: Department of Veterans Affairs

Disposition: Dismissed

Keywords: Terms of the solicitation; time for filing

General Counsel, P.C. Highlight: Any challenge to the terms of a solicitation as being overly restrictive must be filed prior to the time for receipt of proposals.

Esterhill Boat Services Corporation provided leased space to the Department of Veterans Affairs in Rumford, Maine for a Community-Based Outpatient Clinic. When the VA entered its final year on the lease it decided to solicit proposals for a new site for the facility. The solicitation included various specifications including a requirement that a certain amount of the required square footage be located on one floor of a building. Esterhill and two other bidders submitted proposals. Esterhill proposed its existing facility, which did not have the required square footage located on a single floor. The VA excluded Esterhill from the competitive range for failing to meet the one-floor requirement and eventually awarded the contract to Federated Realty. Esterhill then sought relief from the U.S. Court of Federal Claims primarily based on a claim that the VA's one-floor requirement was unduly restrictive.

The Court examined Esterhill's claim that the one-floor requirement in the solicitation was not justified in light of the agency's needs — that it was overly restrictive of competition. In defense, the VA argued that Esterhill's protest was too late and that it should have filed this protest before the time for receipt of proposals, citing *Blue & Gold Fleet, L.P. v. United States*, and that by not raising the issue at that point Esterhill had waived its right to assert the claim after the award had been granted. In *Blue and Gold Fleet* the Court stated that the proper time for a protest against the terms of a solicitation is before the bids or proposals are submitted. The Court noted that Esterhill could have sought review by the court pre-award, but instead chose to gamble by submitting a proposal and hoping to win the contract. The Court agreed with the VA that Esterhill's protest was now too late and that it had waived its right to challenge the terms of the solicitation as being overly restrictive.

2. **Ridgeline Industries, Inc., B-402105, January 7, 2010**

Link: [GAO Opinion](#)

Agency: Defense Logistics Agency

Disposition: Protest denied.

Keywords: Sole-Source Award

General Counsel, P.C. Highlight: Agency is justified in issuing a sole source award where the purpose of the award is to maintain the contractor as a source of supply for a national emergency or to achieve industrial mobilization.

The Defense Logistics Agency issued a sole-source contract to Camel Manufacturing Company for military tents. Ridgeline Industries, Inc. protested the sole-source award as unreasonable and argued that it should have been allowed to compete for the award.

DLA responded to the protest by stating that due to the conclusions of a study that it had conducted, it determined that vendors and suppliers had experienced difficulty in producing and meeting the requirements to supply tents that measured up to the military specifications. As a result DLA decided to fund a minimum sustaining rate of production to preserve domestic production capacity while it made long-term plans for the supply of tents. The sole-source award to Camel, in DLA's justification, was based on Federal Acquisition Regulation 6.302-3, which provides for the award of a contract to a particular source to maintain the source for a national emergency or to achieve industrial mobilization.

Ridgeline asserted that this justification was unreasonable because it was not considered for the contract and it too was at risk of closing its doors. DLA distinguished Ridgeline's production experience as being capable of producing only components, rather than complete tents. GAO agreed with DLA's rationale for preserving its supply-line of tents and held that Ridgeline had failed to meaningfully challenge DLA's explanation.

3. SDV Solutions, Inc., B-402309, February 1, 2010

Link: [GAO Opinion](#)

Agency: Department of Agriculture

Disposition: Protest denied.

Keywords: Price reasonableness; price realism

General Counsel P.C. Highlight: GAO will not re-evaluate proposals in considering a bid protest, but will only consider whether the Agency's evaluation was reasonable.

In October of 2009, the Department of Agriculture issued a request for proposals (RFP) for contractors to provide maintenance and support services on Hewlett Packard equipment at certain locations. The RFP was issued as a total set-aside for service-disabled, veteran-owned small businesses and would use Federal Acquisition Regulation Part 12 for commercial items in its evaluation, based equally on past performance, price, and technical/management approach.

SDV Solutions, Inc., the incumbent, was one of three bidders that submitted proposals, with the eventual contract being awarded to Kelco Computing Solutions. SDV protested the award to Kelco by alleging that the USDA improperly evaluated Kelco's past performance and by challenging the USDA's evaluation of Kelco's unusually low price.

When a protest alleges inequities related to an agency's evaluation of past performance, GAO examines the record to ensure that the evaluation was reasonable and consistent with the solicitation's criteria, rather than substituting its own judgment in the evaluation process. Here, SDV claims that Kelco should have been rated lower on past performance because it did not have relevant experience as a prime contractor performing government contracts. However, the solicitation did not require relevant experience as a prime contractor, rather that the offerors had focused on prior government customers for similar services. Based on this analysis, GAO held that the USDA's evaluation was consistent with the solicitation.

SDV also claimed that Kelco's price was unreasonably low and that SDV provided a more realistic price based on its incumbent experience. However, GAO said this argument reflects

a misunderstanding of the solicitation. The RFP only required a price reasonableness analysis and not a price realism analysis, where a reasonableness analysis only looks to see whether the offered price is too high. Also, based on confirmations that Kelco made to the contracting officer during a series of verifications, it was determined that Kelco had properly addressed the issue of pricing for the option years as included in the solicitation. As such, SDV's protest was denied.

4. **AINS, Inc., B-400760.4, B-400760.5, January 19, 2010**

Link: [GAO Opinion](#)

Agency: Department of Justice

Disposition: Protest sustained.

Keywords: Blanket purchase agreement, Meaningful discussions

General Counsel P.C. Highlight: When an agency engages in discussions with a vendor, the discussions must be “meaningful,” that is, sufficiently detailed to lead the vendor into the areas of its quotation requiring amplification or revision.

In response to the establishment, by the Department of Justice, of a blanket purchase agreement (BPA) with Privasoft Corporation, AINS, Inc. protested to the GAO arguing that DOJ's evaluation of quotations was unreasonable and lacking in even-handedness and that there was a failure to conduct meaningful discussions. Following a request for quotations by DOJ, and a series of protests and reevaluations, Privasoft was selected to receive the BPA for an automated Freedom of Information Act system and related services.

After receiving initial quotes, the DOJ issued a series of requests to each offeror for additional information, including a request that AINS submit a new project schedule. DOJ did not explain that it believed that AINS's project schedule was unattainable. Despite remedying some of the flaws in its proposal, AINS's resubmitted proposal still contained certain weaknesses. Further, the evaluators concluded that, even though Privasoft's proposal was at a higher price, that the superiority of Privasoft's product and technical approach outweighed the price differential.

In response to the award of the BPA to Privasoft, AINS protested by arguing that the evaluators failed to conduct meaningful discussions by failing to advise that they considered the schedule to be overly aggressive. GAO noted that, in order for discussions to be meaningful, they must be sufficiently detailed to lead the offeror into the areas of the quotation that require amplification or revision. The facts of this record indicate that while DOJ requested a new schedule from AINS, this was not a sufficient effort on behalf of the evaluators to indicate to AINS that its schedule was too aggressive. As such, GAO agreed with AINS on its claim regarding the lack of meaningful discussions and sustained AINS's protest on unequal discussions

AINS also challenged DOJ's evaluation of its quotation as being unreasonable and asserted that DOJ was not even-handed in its assessment. Here, GAO again agreed with AINS, finding that several areas of its evaluation were not consistent in how it rated each quotation. In particular, AINS pointed to DOJ finding AINS's reduction of level of effort as inadequate. Because the evaluators seemingly did not rely on any other evidence in determining this adequacy beyond merely noting a reduction in level of effort from its initial quotation to its final quotation, this was an improper determination. Additionally, AINS also argued that DOJ's evaluators unequally assigned ratings to its quotation and that of Privasoft based on a series of technical matters related to the software. Again, GAO agreed with AINS by analyzing the steps taken by the evaluators in judging the product evaluation factor and determining that the weight and rationale behind the evaluators' treatment of the two quotations was varied.

Based on its agreement with both of AINS's arguments, GAO sustained the protested and recommended that DOJ reopen discussions as appropriate, reevaluate proposals, and make a new source selection decision.