



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. **Mid-America Taping & Reeling, Inc., d/b/a Mid-America Government Supply, B-403381, September 15, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Brand name or equal

General Counsel P.C. Highlight: In a brand-name-or-equal procurement, it is the offeror's burden to demonstrate adequately that its proposed equal product meets the test required for substitution in the solicitation.

Mid-America Taping & Reeling, Inc. (Mid-America), a small business, protests the award of a contract by the Department of the Army under a request for quotations to supply and install dental chairs and equipment.

The Army issued the RFQ as a fixed-price commercial item solicitation, seeking quotations to supply and install 22 dental chairs and associated equipment. The RFQ specified each item by a brand name, listed a catalog number for each item, and stated that the requirements were for brand name or equal equipment. The RFQ also listed 18 salient characteristics. The RFQ contained a provision under FAR §52.211-6, which informs offerors that, to be considered for award, quotations for "equal" products had to include sufficient information to show that the offered items met the salient characteristics listed.

Mid-America's quotation stated that the offered items were equal to the brand name specified in the RFQ and while the quotation briefly described each item, it did not stat whether the equipment complied with each of the salient characteristics listed. GAO states that it will review the record to ensure that the evaluation and source selection decision were reasonable and consistent with the terms of the solicitation and applicable procurement statutes and regulations. Here, the record shows that the agency reasonably determined that Mid-America's quotation was unacceptable since Mid-America failed to address the salient characteristics, as required by the RFQ. The protest is denied.

2. **ONS21 Security Services, B-403067, September 16, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Air Force

Disposition: Protest denied.

Keywords: Size Determination

General Counsel P.C. Highlight: An SBA area office formal size determination becomes effective immediately, and a contracting officer may award a contract based on that determination. If an award has been made, and the formal size determination is subsequently reversed upon appeal by the SBA Office of Hearings and Appeals, the OHA decision does not to apply to that procurement and the award of the contract may stand.

ONS21 Security Services (ONS21) protests the award of a contract under a request for proposals (RFP), issued by the Department of the Air Force, for communications security support services. ONS21 asserts that the agency improperly failed to terminate the award after the Small Business Administration's (SBA) Office of Hearings and Appeals (OHA) reversed a formal size determination issued by an SBA area office finding that the awardee qualified as a small business.

The agency originally published a presolicitation synopsis on the FedBizOpps website announcing that the RFP would be issued under North American Industry Classification System (NAICS) code 541690, which has a small business size standard of \$7 million. The contracting officer subsequently decided that it would be more appropriate to use NAICS code 541513 (which has a small business size standard of \$25 million) for the procurement due to the complexity of the work. The agency then published a combined synopsis/solicitation on FedBizOpps advising the offerors that the applicable NAICS code for the RFP was 541513, but the actual RFP document remained unchanged. Two proposals were received.

ONS21 filed a timely size status protest alleging that the awardee was not a small business and at that time, the contracting officer realized the difference in the two NAICS codes. ONS21 then contacted the SBA area office asserting that the awardee does not meet the small business size standard of NAICS code 541690. The SBA area office issued a formal size determination that the awardee was a small business for the purposes of the procurements, that the NAICS code applicable to the RFP was unclear, and that the more appropriate NAICS code was 541513, under which the awardee qualified as a small business. The agency proceeded with performance of the contract.

OHA issued a decision reversing the SBA area office's size determination. The OHA ruled that the SBA area office's application of any NAICS code other than 541690, which was listed in the RFP, was improper. The agency still decided not to terminate the contract. ONS21 protests that the agency acted unlawfully in choosing not to terminate the contract after it received the SBA OHA decision that the awardee was not a small business for the procurement under the RFP's NAICS code 541690.

GAO states that since the issue raised, regarding an SBA OHA's reversal of an SBA area office formal size determination after an award has been made, concerns a matter of interpretation involving SBA's regulations, it requested a report on the protest from SBA. The SBA's report states that an SBA area office formal size determination becomes effective immediately, and a contracting officer may award a contract based on that determination. If an award has been made, and the formal size determination is reversed upon appeal by the SBA OHA, the OHA decision is not to apply to that procurement. Based on the SBA regulations, GAO states that since the SBA OHA decision here was received after award, there was no requirement for the agency to terminate the award. The protest is denied.

3. **Andros Contracting, Inc., B-403117, September 16, 2010**

Link: [GAO Opinion](#)

Agency: Department of Veterans Affairs

Disposition: Protest dismissed.

Keywords: Protester Comments

General Counsel P.C. Highlight: E-mail filing of documents with GAO means timely filing at the provided e-mail address (Protest@GAO.gov), not by e-mailing any other address in GAO, or by e-mailing a copy of the document to the GAO attorney.

Andros Contracting, Inc. (Andros) protests the award of a contract by the Department of Veterans Affairs (VA) under a request for proposals (RFP) for elevator replacement and renovation.

The agency issued the RFP as a set-aside for service-disabled veteran-owned small business firms. The RFP provided that award would be made to the lowest-priced technically acceptable offeror. In order for its proposal to be considered technically acceptable, an offeror was required to demonstrate that its proposed elevator contractor had the technical

qualifications and experience needed to meet the project requirements by providing evidence of certain qualifications, which were divided into two principal subparts (A and B). Andros' proposal was found technically unacceptable where it failed to submit any information specifically responsive to subfactor B.

Under GAO Regulations, comments on an agency report must be filed with the Office within 10 days after receiving the report, except where GAO has granted an extension or established a shorter period. The time for Andros to file its comments on the agency had not been extended or shortened by GAO. A document is filed when it is received by GAO by 5:30 p.m., Eastern Time, on that day. Protests and other documents may be filed by hand delivery, mail, commercial carrier, facsimile transmission, or e-mail (protest@gao.gov).

On the day that comments were due, Andros attempted to file the comments by e-mail, but used an incorrect e-mail address. The comments were not received at the correct address by the due date and time. Andros also e-mailed a copy of its comments to the individual e-mail address of the GAO attorney handling the case; that e-mail was received one minute before deadline. GAO states that e-mail filing means timely filing at the provided e-mail address, not by e-mailing any other address in GAO, or by e-mailing a copy of the document to the GAO attorney. Since Andros chose to file its comments on the agency report by e-mail but its comments were not received at the designated e-mail address by the deadline, the comments were not timely filed. The protest is dismissed.

4. **Rice Services, Inc., B-402966.2, September 16, 2010**

Link: [GAO Opinion](#)

Agency: Defense Commissary Agency

Disposition: Protest sustained.

Keywords: HUBZone Program Priority

General Counsel P.C. Highlight: Under the law in effect at the time, the SBA's HUBZone program had priority over all other programs (including 8(a) program and SDVO Program) for purposes of deciding whether a procurement should be set-aside. That law has been subsequently changed. Under the current law, a contracting officer may use his or her discretion in deciding whether to set-aside for the HUBZone, 8(a) program, or the SDVO program, so long as the program requirements have been met.

Rice Services, Inc. (Rice), a Historically Underutilized Business Zone (HUBZone) small business concern, protests the terms of a solicitation issued as a set-aside for service-disabled veteran-owned small business concerns (SDVOSBCs) by the Defense Commissary Agency (DeCA) for shelf stocking and custodial services.

DeCA issued a solicitation as a total set-aside for SDVOSBCs. Rice alleges that the procurement should instead be set aside for competition limited to HUBZone small business concerns. GAO has considered this issue in several prior protests and has concluded that the HUBZone statute requires procuring agencies to set aside procurements for HUBZone small business concerns when the conditions set forth in the statute are met. Protests raising the sole issue of HUBZone set-aside priority will be addressed in an “expedited and summary manner” where the agency acted contrary to our decisions in reliance on a DOJ Memorandum Opinion that stated that there is no statutory requirement to prioritize the HUBZone program.

GAO states that the plain language of the HUBZone statute requires an agency to set aside an acquisition for competition restricted to qualified HUBZone small business concerns where it has a reasonable expectation that not less than two qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price. The DeCA was required to consider whether the conditions for setting aside a procurement for HUBZone small business concerns were met, and if so, to set aside the procurement for HUBZone small businesses. Because the agency did not perform this mandatory step, GAO concludes that it was improper for the agency to proceed with this procurement as an SDVOSBC set-aside. GAO recommends that the agency undertake reasonable efforts to ascertain whether it will receive offers from at least two HUBZone concerns and award will be made at a fair market price. The protest is sustained.

5. Shaw-Parsons Infrastructure Recovery Consultants, LLC; Vanguard Recovery Assistance, Joint Venture, B-401679.8; B-401679.9; B-401679.10, September 8, 2010

Link: [GAO Opinion](#)

Agency: Department of Homeland Security, Federal Emergency Management Agency

Disposition: Protest sustained in part, denied in part.

Keywords: Past Performance

General Counsel P.C. Highlight: An agency's scoring methodology must be fair and effective in assessing an offerors proposal in light of the stated evaluation criteria.

Shaw-Parsons Infrastructure Recovery Consultants, LLC and Vanguard Recovery Assistance, Joint Venture, protest the award of architect/engineering (A/E) services contracts pursuant to a solicitation issued by the Department of Homeland Security, Federal Emergency Management Agency (FEMA).

Prior to the current protest, GAO sustained a protest filed by Shaw-Parsons in connection with FEMA's award of the above contracts. In sustaining Shaw-Parsons' protest, GAO concluded that FEMA failed to consider in its past performance evaluation information contained in past performance questionnaires (PPQ), which was "too close at hand" for FEMA to have ignored. GAO recommended that FEMA conduct a reevaluation, giving reasonable consideration to the PPQs it received for the firms remaining in the competition as the information related to the quality of their past performance.

Offerors were invited to submit their qualifications to provide the services required by the Sources Sought Notice (SSN) issued in connection with the procurement. Firms were advised that their qualifications would be evaluated under the following five factors: (1) specialized experience and technical competence; (2) capacity to accomplish work within the required time; (3) professional qualifications; (4) past performance; and (5) location in the general geographic area of the project.

After firms had submitted their qualifications, FEMA sent them PPQs, which were to be completed by the firms' past performance references and returned to FEMA. The PPQs allow references to rate a firm's performance as "Superior," "Acceptable," or "Unacceptable" in the following four categories: (a) Quality of Product or Service; (b) Cost Control; (c) Timeliness of Performance; and (d) Business Relations. The PPQs also allow the references to supplement their adjectival ratings with narrative comments.

After the initial protest, the Source Evaluation Board (SEB) reconvened for the purpose of reevaluating the firms' past performance giving consideration to information contained in their submissions and PPQs. When the SEB evaluated and rated the firms' PPQs, it evaluated and rated two components: (1) the information contained in the PPQ narratives, which supported the adjectival chart ratings; and (2) the particular adjectival chart ratings themselves. Because the four evaluation categories set forth in the PPQs did not precisely match the six areas for evaluation established in the SSN, the SEB reviewed the narrative comments and considered any comments which it believed to be relevant to the six past performance areas set forth in the SSN. The SEB documented its consideration and

evaluation of these narratives in a chart, which identified, for each firm, any comments from the PPQs that the SEB considered to be a strength or a weakness and the SSN category that best corresponded to the strength or weakness. At the conclusion of the SEB's reevaluation, none of the firms' overall past performance ratings changed from the prior evaluation.

The SEB forwarded its final report to the Source Selection Authority (SSA), who signed the report. Upon learning the results of the agency's reevaluation, Shaw-Parsons and Vanguard filed these protests.

Generally, Shaw-Parsons and Vanguard allege that the analytical framework used by the agency in reevaluating firms' past performance was inconsistent with the terms of the solicitation, our prior decision, or that it was in some way unreasonable or unfair. GAO sustains the protest filed by Vanguard as it relates to the agency's methodology for evaluating the PPQ chart ratings component of the overall PPQ evaluation.

GAO states that the evaluation of an offeror's past performance is within the discretion of the contracting agency, and it will not substitute its judgment for reasonably based past performance ratings. A protester's mere disagreement with the agency's determinations as to the relative merit of competing proposals, and its judgment as to which proposal offers the best value to the agency, does not establish that the evaluation or source selection was unreasonable.

In its protest, Vanguard argues that its Acceptable PPQ chart rating was unreasonable because the agency's scoring methodology effectively penalized Vanguard for having submitted PPQs for two less relevant contracts. Specifically, in considering Vanguard's two less relevant PPQs, the SEB assigned 7.5 points as opposed to 10 points for each Superior rating, and using these scores calculated an average score for Vanguard. Vanguard maintains that had these less relevant contracts not been submitted, its past performance rating score would have been 36.25, thus leading to a Superior rating, yet when the less relevant contracts were included in the average, its score was reduced to 34.83, even though it received Superior ratings across-the-board on the PPQs for the two less relevant contracts. According to Vanguard, any reasonable consideration of its less relevant contracts could only have increased its score since it received all Superior ratings for these contracts. GAO agrees and sustains the Vanguard protest.

Shaw-Parsons challenges numerous aspects of FEMA's reevaluation process as well as the reasonableness and fairness of FEMA's past performance judgments. GAO has reviewed all of the issues raised by Shaw-Parsons and concludes that they do not provide a basis to sustain its protest. GAO denies the Shaw-Parsons protest.

GAO recommends that the agency, consistent with the details of the GAO decision, reevaluate Vanguard's past performance information. Based on that reevaluation, GAO recommends that the agency make a new source selection determination.