



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. **Baldt Inc., B-402596.3, June 10, 2010**

Link: [GAO Opinion](#)

Agency: Department of Navy

Disposition: Protest dismissed.

Keywords: Timely Filing; Protest of Terms of the Solicitation

General Counsel P.C. Highlight: Any protest challenging the terms of a solicitation must be filed prior to the time for receipt of proposals.

Baldt, Inc. (Baldt) protests the award of a contract, under a request for quotations (RFQ), issued by the Department of the Navy (Navy), for a non-magnetic stud link chain. The Navy issued the RFQ using simplified acquisition procedures (available for purchases of \$100,000 or less. Baldt's proposed price was \$864,000 and the awardee's price was \$720,000.

GAO finds that the protest is untimely and not for consideration by the GAO where protests based upon alleged improprieties in a solicitation that are apparent prior to the time set for receipt of initial proposals must be filed prior to that time. Baldt knew, or should have known, prior to the time set for receipt of quotes, that its own quote would be priced more than eight times higher than the simplified acquisition threshold, and that any resulting contract would likely exceed the threshold. GAO finds that Baldt was required to protest the Navy's use of simplified acquisition procedures prior the closing time, rather than waiting after award.

The "good cause" or "significant issue" exceptions to GAO's timeliness rules do not apply since Baldt has not demonstrated a compelling reason beyond their control that prevented Baldt from filing a timely protest and the record does not show that the issues raised are of widespread interest to the procurement community that would warrant resolution in the context of an otherwise untimely protest. The protest is dismissed.

2. **Baine Clark Company, Inc.--Costs, B-401172.4, June 7, 2010**

Link: [GAO Opinion](#)

Agency: Department of Army

Disposition: Reimbursement amount recommended.

Keywords: Bid protest costs

General Counsel P.C. Highlight: In support of a request for payment of bid protest costs, the protester's counsel must submit sufficient evidence to support its monetary claim, which must be adequately documented and reasonable in its nature and amount

Baine Clark Company, Inc. (Baine) has asked GAO to determine the amount that it should recover from the Department of the Army (Army) for costs of filing and pursuing a protest of the adequacy of price evaluation of quotations under a request for quotations issued for the lease of three pick-up trucks.

GAO conducted "outcome prediction" alternative dispute resolution, reporting the anticipated decision sustaining the firm's protests and recommending reimbursement of reasonable protest costs. Baine submitted its claim to the agency for reimbursement of attorneys' fees, itemized by the firm's initial attorney and his retained co-counsel.

The Army offered to settle for a lesser amount, claiming that some of the attorney time entries appeared duplicative or excessive, or were associated with a different protest previously dismissed by GAO. Baine objects to the reduction of costs.

GAO states that a protester seeking to recover the costs of pursuing a protest must submit sufficient evidence to support its monetary claim and the amount claimed may be recovered to the extent that the claim is shown to be sufficiently related to the filing and pursuit of successful protest grounds, is adequately documented, and is reasonable in its nature and amount. GAO finds that three of the attorney's itemized work entries are disallowed where the entries aggregate allowable and unallowable costs in a way that GAO cannot tell from the record what portion is unallowable. Therefore, GAO finds that the questionable entries must be disallowed in their entirety.

As for six work entries for the co-counsel, GAO finds that two of the work entries are not allowable since they concern efforts toward possible settlement of the action. The other four challenged by the Army are allowable costs, and will be included in the recommendation. GAO recommends reimbursement to Baine in the amount of \$24,908.34.

3. **Stephen Lucas Construction, LLC, B-402654, June 9, 2010**

Link: [GAO Opinion](#)

Agency: Department of Veteran Affairs

Disposition: Protest denied.

Keywords: Invitation for Bid

General Counsel P.C. Highlight: Bidders are responsible for delivering their bids to the proper place at the proper time. Where a bid is delivered by a commercial carrier, the bid is regarded as hand-carried.

Stephen Lucas Construction, LLC (Stephen) protests the award of a contract to Construction Management Engineering & Consulting, Inc. (CMEC) under invitation for bids (IFB), issued by the Department of Veterans Affairs (VA) for columbarium and drainage improvements at an Oregon cemetery.

The IFB, a total service-disabled veteran-owned small business set-aside, recommended that bids be submitted by overnight courier service. Bid opening was scheduled for 2 p.m. on March 3. The record showed that on March 3 at 10:51 a.m., CMEC's bid was delivered to the address listed in the IFB prior to bid opening, and it was sent by Federal Express. Once CMEC received confirmation that its bid package had been received, it contacted the contracting officer and advised him that its bid package had arrived. Also, on March 3, prior to bid opening, CMEC had a courier deliver a bid modification. The contracting officer picked up CMEC's bid modification, but failed to pick up CMEC's original bid.

The contracting officer announced during bid opening that "if any bids are received by the VA before 2:00 p.m. deadline and are not present at the bid opening, those bids are considered to be within VA custody and will be considered timely." CMEC's bid modification was lowest in price and Stephen's was second lowest. After bid opening, the contracting officer received CMEC's original bid. After reviewing CMEC's bid and verifying that it was received prior to the deadline, VA made award to CMEC.

Stephen argues that there is no proof that the VA had in its possession the CMEC bid prior to bid opening. GAO states that bidders are responsible for delivering their bids to the proper place at the proper time and where a bid is delivered by a commercial carrier; the bid is

regarded as hand-carried. A late hand-carried bid may be considered for award where improper government action was the paramount cause of its late delivery and consideration of the late bid would not compromise the integrity of the competitive bid system.

GAO finds that CMEC's original bid was timely received where the evidence shows that an agency employee signed for the original bid package at 10:51 a.m. on March 3 and CMEC acted reasonably to ensure the delivery of the bid to the contracting officer before bid opening. The VA's actions were the paramount cause for the contracting officer not having the original bid at bid opening. The protest is denied.

4. **JER 370 Third Street, LLC, B-402025.2; B-402541, June 1, 2010**

Link: [GAO Opinion](#)

Agency: General Services Administration

Disposition: Protest sustained.

Keywords: Cancellation

General Counsel P.C. Highlight: An agency may cancel an existing solicitation where it has a reasonable basis for doing so. The potential for cost savings provides a reasonable basis for cancellation.

The General Services Administration (GSA) issued a solicitation for offers (SFO), for the lease of office space to be used by the Environmental Protection Agency (EPA) in San Francisco. JER 370 Third Street, LLC (JER) was one of four offerors that submitted proposals.

The SFO sought proposals for the lease of office and related space for a term of 15 years and included sections defining both "location requirements" and "unique requirements," and the SFO advised offerors that a failure to meet the latter requirements would render an offer unacceptable. Award was to be made on a best value basis, with technical factors and price considered. Technical factors were considered significantly more important.

The GSA determined that JER had not proposed a building of the "highest quality," which, in turn, did not comply with the solicitation requirement pertaining to the ceiling cavity, posing a significant risk to the government. Award was made to Lincoln Property Company (Lincoln) based on technical superiority even though its proposal contained a higher price.

GSA sent Lincoln a lease, which it refused to sign. Rather than make award to the next in line offeror, GSA decided to cancel the solicitation. It reasoned that the solicitation had not been adequate since comparable quality space was available at significantly lower rates and modification of the SFO's requirements might increase competition.

JER asserts that although an agency may cancel an existing solicitation where it has a reasonable basis for doing so, GSA did not have a reasonable basis. GSA maintains that JER's offer was ineligible for award since it failed meet critical solicitation requirements. GAO finds that GSA failed to produce a technical evaluation report endorsed by the evaluation panel members in its response to the protest and thus, the record lacks documentation as to the technical evaluation panel's conclusions regarding JER's offer. GAO additionally finds that GSA's justification for canceling and resoliciting does not support a finding that offers of space comparable in quality to the Lincoln building at similar rates may be anticipated. GSA did not establish that it will receive prices more favorable than the protester's if it resolicits. GAO recommends that the GSA reinstate the cancelled solicitation and proceed with the source selection process and reimburse JER reasonable costs of filing and pursuing the protest. The protest is sustained.

5. **Sabre Systems, Inc., B-402040.2; B-402040.3, June 1, 2010**

Link: [GAO Opinion](#)

Agency: Department of Justice, Drug Enforcement Administration

Disposition: Protest denied.

Keywords: Technical Evaluation; Discussions

General Counsel P.C. Highlight: An agency is not obligated to reopen negotiations to give an offeror the opportunity to remedy a defect that first appears in a revised proposal

A solicitation issued by the Department of Justice, Drug Enforcement Administration (DEA), for information technology support services, contemplated issuance of a time-and-materials task order for a two-year base period, with two-year and one-year options. Performance requirements, including human resources, security, and deliverables, were identified in a detailed statement of work (SOW). Proposals were to be evaluated on a "best value" basis under three factors: technical; past performance; and price.

Three vendors, including Sabre Systems, Inc. (Sabre), submitted proposals, which were evaluated by a technical evaluation panel (TEP). The TEP rated Sabre's proposal very good overall under the technical factor and low risk under the past performance factor. However, the contracting officer awarded the contract to another company at a higher price based on a price/technical tradeoff. Sabre filed a protest and in response, DEA notified GAO that it would take corrective action. Sabre's protest was dismissed as academic.

In the re-evaluation, the TEP rated Sabre's proposal good overall, with low past performance risk, but rated the other company's proposal very good overall, with low past performance risk. Sabre filed another protest asserting that the re-evaluation was inadequate and resulted in the identification of unreasonable new weaknesses, specifically, a weakness regarding its proposing a deputy project manager (DPM) as part of its communication initiative.

GAO finds the evaluation unobjectionable where the solicitation required vendors to demonstrate their understanding and management of important events or tasks and the TEP found that Sabre's communication initiatives failed to clearly define the different roles and responsibilities needed to properly implement the new responsibilities. The TEP acknowledged that Sabre had provided additional details, but found that Sabre failed to clearly identify or define the DPB's role.

Sabre also asserts that the agency failed to provide it with meaningful discussions regarding previously unidentified weaknesses under the demonstrated understanding and management/technical approach subfactors. GAO states that when an agency engages in discussions with an offeror, the discussions must be meaningful, that is, they must lead the offeror into the areas of its proposal that require correction of amplification. However, an agency is not required to reopen negotiations to give an offeror the opportunity to remedy a defect that first appears in a revised proposal.

The discussions were unobjectionable where the agency's initial discussions noted that Sabre's proposal did not provide sufficient detail to depict all SOW requirements, which was sufficient to lead Sabre to provide a response that included a more detailed proposal. GAO also finds that the fact that Sabre's initial proposal contained little information on the DPM is irrelevant where Sabre's failure to provide complete information led to a new evaluated weakness, which, because it was introduced for the first time in its revised proposal, did not obligate the agency to reopen discussions. The protest is denied.