



# Bid Protest Weekly

brought to you by

GENERAL  COUNSEL<sup>PC</sup>  
ATTORNEYS AT LAW

*April 15, 2010*

## **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.generalcounsellaw.com](http://www.generalcounsellaw.com).

1. NAE-TECH Remediation Services, B-402158, January 25, 2010

---

**Link:** [GAO Opinion](#)

**Agency:** Department of the Army, Corps of Engineers

**Disposition:** Protest denied.

**Keywords:** Technical Evaluation; Discussions

**General Counsel P.C. Highlight:** Directly challenging the merits of an agency's technical evaluation is one of the most difficult protest grounds to win. When GAO reviews a protest related to an evaluation of proposals, it does not independently reevaluate the proposals, but rather determines whether the evaluation was reasonable.

---

The Department of the Army's Corps of Engineers issued a request for proposals (RFP) for the award of an indefinite-delivery/indefinite-quantity contract to a minimum of five small business contractors. Award was to be made on a "best value" basis and was to be determined based on price and four non-price related factors: technical capability; technical approach to sample task orders; organization/management; and past performance. The solicitation also provided that the Army would not conduct discussions during the procurement and that award would not be made to an offeror whose proposal contained a deficiency.

The Corps received fifteen proposals, including one from NAE-TECH Remediation Services. As part of its evaluation of NAE-TECH's proposal, the agency identified one deficiency in NAE-TECH's response to the sample task order for work to be performed in the U.S. and five deficiencies under the organization/management evaluation factor. Based on these ratings, the agency excluded NAE-TECH's proposal from the competitive range, a decision that NAE-TECH decided to protest.

In its protest, NAE-TECH principally contended that it did some of the tasks that the agency had listed as deficient. This included the argument that its failure to discuss certain matters was actually evidence of its "comprehensive understanding of remediation efforts." Additionally, it was claimed that the agency's assignment of a deficiency was unreasonable in light of the fact that the agency viewed as a strength NAE-TECH's discussion of other, more complex procedures associated with the sample task order.

When GAO reviews a protest related to an evaluation of proposals, it does not independently reevaluate the proposals, but rather determines whether the evaluation was reasonable. In this instance, GAO determined that it was reasonable for the Corps to assign a deficiency to NAE-TECH's decision to list the critical tasks in its proposal, instead of providing an explanation as to how the tasks would be performed. GAO was also unpersuaded by NAE-TECH's argument that it intended to provide further detail during discussions, due to the fact that the solicitation stated its intent to make the award without conducting discussions. Therefore, GAO determined that the Corps's decision to exclude NAE-TECH's proposal from further consideration was reasonable and denied NAE-TECH's protest.

**2. Irving Burton Associates, Inc., B-401983.3, March 29, 2010**

---

**Link:** [GAO Opinion](#)

**Agency:** Department of the Army

**Disposition:** Protest sustained.

**Keywords:** Page Limitations

**General Counsel P.C. Highlight:** If a Request for Proposals contains a page limitation and an offeror exceeds that page limitation, the appropriate remedy is to eliminate the extra pages and evaluate the remainder in light of the RFP requirements. If the pared-down proposal does not meet the RFP requirements, it is not eligible for award.

---

The Army Medical Research Acquisition Activity issued a task order proposal request (TOPR) for defense health information management system support services. The TOPR contemplated the issuance of a fixed-price task order to be awarded on a "best value" basis as determined by an evaluation of price, and five non-price factors: experience, technical approach, management approach, quality control approach, and past performance. Competition under the TOPR was limited to prior awardees of a multiple-award indefinite-delivery/indefinite-quantity (ID/IQ) contract for similar services. Three contractors submitted proposals, and after conducting an evaluation, the contracting officer determined that the proposal submitted by Technology, Automation & Management, Inc. (TeAM) represented the best value to the government. Irving Burton Associations, Inc. (IBA), one of the competitors, protested the award, alleging that TeAM's proposal violated the TOPR page

limitation on responsive proposals. Consequently, the agency took corrective action by reevaluating TeAM's proposal in accordance with the stated evaluation criteria, eliminating the portion of TeAM's proposal that violated the page limitation. Despite this elimination, TeAM's proposal was still determined to represent the best value to the government. IBA again protested, alleging that eliminating a portion of TeAM's proposal eliminated TeAM's transition plan and required milestones. GAO agreed, noting that the remaining portions, which did make some reference to the transition plan and milestones, was not sufficient to satisfy the TORP after enforcement of the proposal page limitation.

IBA also protested the agency's evaluation of its own proposal, contending that it received lower ratings for experience, technical approach, and management approach than it should have. GAO's response to this argument, while redacted of most of its specifics, largely agreed with IBA, asserting that the record did not reflect a reasonable basis for the evaluators' rating of IBA's proposal.

In light of its determination that the agency's evaluation of TeAM's proposal was unreasonable and its conclusion that IBA's proposal was not reasonably evaluated, GAO sustained IBA's protest. GAO then recommended that the agency conduct discussions with the offerors, request revised proposals as necessary, re-evaluate the proposals, and make a new source selection determination.

### 3. DTV Transition Group, Inc. -- Costs, B-401466.2, April 7, 2010

---

**Link:** [GAO Opinion](#)

**Agency:** Federal Communications Commission

**Disposition:** Claim for costs denied.

**Keywords:** Bid and Proposal Costs

**General Counsel P.C. Highlight:** Recovery of bid and proposal costs is dependent upon the protester providing adequate documentation that identifies and supports the amounts claimed for each individual expense (including cost data to support the calculation of claimed hourly rates for employees), the purpose for which each expense was incurred, and how the expense relates to the claim.

The Federal Communications Commission issued a solicitation for walk-in centers to provide consumer assistance related to the transition to digital television. DTV Transition Group, Inc. (DTG) protested the award under this solicitation, claiming that the FCC failed to comply with the small business set-aside provisions in the solicitation and made awards that would not meet the agency's needs. Although FAR required the agency to suspend performance of the contract pending resolution of the protest, the agency was allowed to, by regulation, and did in this case issue a determination and finding allowing performance to continue during the protest. Contract performance was largely completed during the pendency of the protest. Eventually, the FCC took corrective action by offering to pay the protester's bid and proposal costs, which was the only remedy available to the protester because the contract was largely completed. GAO then dismissed the protest, but cautioned DTG that bid and proposal costs claimed by a protestor may be recovered only to the extent that they are adequately documented and shown to be reasonable, and that claims for reimbursement must identify and support the amounts claimed, the purpose for which the expense was incurred, and how the expense relates to the claim.

Subsequently, DTG submitted a claim for costs to the FCC in the amount of \$118,500, supported by a short affidavit from its managing director that explained the costs were related to services provided by SinoPowell Capital and Yelverton Law Firm. The affidavit explained that the firms were engaged for flat fees related to the amount of the award by the FCC, with a minimum fee due to the two firms of \$118, 500. The FCC responded to DTG's request, claiming that the amount requested was not adequately documented to allow the FCC to determine what costs were actually incurred, the correlation between those costs and the preparation of the proposal, and the reasonableness of the costs. As such, the FCC requested that DTG submit additional information supporting its claim for costs. DTG responded, but did not provide any of the requested documentation, instead it explained that it believed that in good faith that it would receive at least some part of the overall awards and thus negotiated with the professionals needed to assemble a proposal and agreed to pay them a percentage of the fees awarded.

The FCC denied DTG's claim in full, concluding that DTG's response indicated that DTG had not actually incurred proposal preparation costs for any services provided by the identified firms and that, in any event, DTG had not provided adequate documentation of any proposal preparation costs. DTG then filed a claim for costs with GAO.

GAO's review of the record supported the conclusion reached by the FCC – DTG failed to provide sufficient support for its claim for costs, even after the FCC specifically requested

the necessary documents from DTG. Additionally, GAO pointed to the fact that DTG's statements raised doubts as to whether any amounts due to SinoPowell and Yelverton were incurred for the preparation of the proposal. Based on this determination, GAO denied DTG's claim for costs.

#### 4. Carthage Area Hospital Inc., B-402345, March 16, 2010

---

**Link:** [GAO Opinion](#)

**Agency:** Department of Veterans Affairs

**Disposition:** Protest denied.

**Keywords:** Cost Technical Trade-off; Past Performance

**General Counsel P.C. Highlight:** Selection of higher-rated, higher-priced proposal is unobjectionable where the selection official reasonably determined that awardee's higher technical rating outweighed the protester's lower price

---

The Department of Veterans Affairs (VA) issued a request for proposals for the operation of a community-based outpatient clinic in Jefferson County, New York. The solicitation provided for the award of a fixed-price contract that was to be awarded on a "best value" basis considering the following three evaluation factors: technical capabilities, past performance, and price. The VA received three proposals, two of which were included in the competitive range: Valor Healthcare, Inc. and Carthage Area Hospital, Inc. (the incumbent contractor). The two proposals were evaluated and the source selection authority, who compared the strengths and weaknesses assessed in the proposals. Valor's proposal was determined to be technically superior, but Carthage's proposal was acceptable and lower in price. In a cost-technical trade-off, which is an essential part of a best value determination, the source selection authority determined that Valor's technical superiority outweighed Carthage's price advantage. Carthage protested the award on several grounds.

Carthage first objected to the VA's rating of Valor under the management, experience and staffing subfactor, alleging that Valor failed to adequately describe how it would provide qualified personnel. However, GAO concluded that the record did not provide a basis upon which to object to the VA's assessment. That particular subfactor was evaluated on more

than just the staff proposed by the offeror, instead looking at offeror's scheduling methods, experience, planned organization, capability and plan to commence performance within required timeframes. Due to Valor's responsiveness to the subfactor as a whole, GAO determined that the VA's evaluation related to this charge was reasonable.

Next, Carthage claimed that it should have received a higher rating for the same subfactor due to the fact that it was the incumbent and already had staff in place. The VA countered that its evaluation examined more than just the proposed staff, and that weaknesses in other portions of Carthage's proposal related to this subfactor caused it to receive its rating. GAO agreed.

Carthage also protested the determination that the location of Valor's proposed clinic was more favorable than Carthage's. Again, GAO concluded that the record supported the VA's finding that Valor's location offered numerous strengths, causing it to receive a higher rating than Carthage.

Carthage then argued that the agency's evaluation of Valor's past performance failed to consider negative past performance information, specifically a report from the VA's Office of Inspector General that critiqued Valor's operation of another community-based outpatient clinic. In certain circumstances an agency evaluating an offeror's proposal has an obligation to consider "outside information" bearing on the offeror's proposal when it can be shown that the information in question was "simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider this information." GAO concluded that the information in question here was not "too close at hand" for the agency to ignore, and thus, the agency was not required to consider the information in its evaluation of Valor's past performance.

Based on its review of the record, and the determinations described above, GAO concluded that the VA's evaluation of the proposals in question was not unreasonable, and denied the protest.