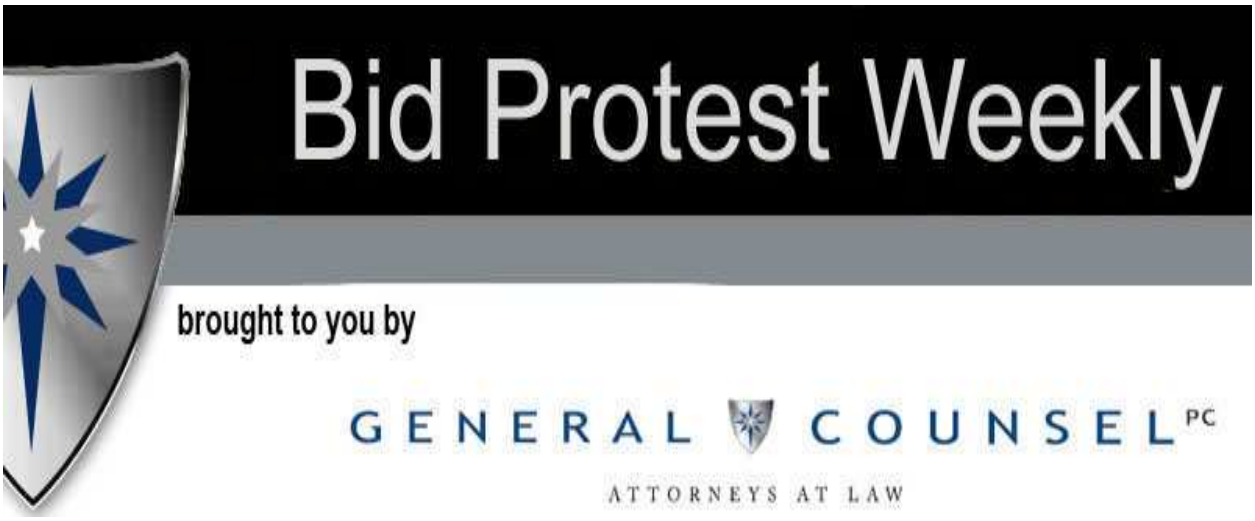

March 9, 2010

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.

1. Staker & Parsons Companies, B—402404.2, March 1, 2010

Link: GAO Opinion

Agency: Department of Transportation

Disposition: Protest denied.

Keywords: Incorporation by reference

General Counsel P.C. Highlight: Solicitation clauses incorporated by reference need not be included in full text to be enforceable or binding.

The Federal Highway Administration issued an invitation for bids for the provision of road repair and improvement in the Humboldt-Toiyabe National Forest. Bidders were required to price three contract line items (CLINs) for three separate portions of the road (Schedules A, B, and C), as well as several option CLINs. The evaluation and award was then based on the lowest priced bid for the work under Schedule C, unless sufficient funding was not available, in which case Schedule B would be used, and insufficient funding was available, at which point Schedule A would be evaluated. The solicitation also included a provision that incorporated Federal Acquisition Regulation (FAR) clause 52.217-3 by reference, which states that a provision "substantially the same" as the following should be included in solicitations with an option clause:

> The Government will evaluate offers for award purposes by including only the price for the basic requirement; i.e., options will not be included in the evaluation for award purposes.

Seven bids were received by the agency and award was made to Eagle Peak, the lowest bidder for Schedule C. Staker & Parsons (S&P), one of the unsuccessful bidders, then protested. In its protest, S&P argued that the FAR language required the agency to "insert a provision in the solicitation" containing language "substantially the same" as the operative language of the clause, but that by incorporating by reference, the agency did not insert a provision containing substantially similar language. Because the actual operative words of the clause were not included in the solicitation, S&P claims that the solicitation failed to inform bidders that award would be based on the base year schedule prices alone, rather than taking into account the option prices. When the option prices were included with the schedule prices, S&P had an overall lower bid than Eagle Peak.

GAO found this argument to be meritless. Contract law is well-settled on the premise that if an item is incorporated into a contract by reference, it is not necessary to insert the text of the item itself into the contract. To further emphasize this sentiment, GAO pointed to FAR 52.102(a), which states that clauses "should be incorporated by reference to the maximum practical extent, rather than being incorporated in full text…." For this reason, the bidders were properly aware that the option prices would not be evaluated, and as such, S&P's protest was denied.

2. Kuhana-Spectrum, B-401270, July 20, 2009

Link: GAO Opinion

Agency: Department of the Navy

Disposition: Protest denied.

Keywords: Past performance; Management planning

General Counsel P.C. Highlight: In a past performance evaluation, the agency may give greater weight to problems incurred in previous contracts that are more similar to the work at issue than to good work on contracts that are less similar to the work at issue.

The Department of the Navy issued a request for proposals (RFP) for healthcare personnel at Naval Medical Center Portsmouth (NMCP). The solicitation contemplated the award of a minimum of three indefinite-delivery/indefinite-quantity contracts, the award of which would be on a best-value basis considering the following evaluation factors: past performance, management planning and market research, and business proposal. Seventeen offerors submitted proposals, including Kuhana-Spectrum, and four awardees were chosen based on their rankings; Kuhana-Spectrum was ranked 6th and protested the awards. Kuhana-Spectrum protested on two grounds: the rating of its past performance was unreasonable and unequal in light of how the awardees were rated, and the management planning portion of its proposal was improperly downgraded. In its evaluation of the proposals, the Navy determined that Kuhana-Spectrum's past performance included both positive and negative reviews for prior contracts of similar types, including instances in which there were discrepancy reports for failing provide personnel for certain positions.

Based on this analysis, the Navy reasoned that successful or unsuccessful performance by Kuhana-Spectrum were equally probable, and as a result, justified its moderate risk rating. Kuhana-Spectrum contends that its few instances of marginal performance were not viewed in the proper context.
GAO views the evaluation of an offeror's past performance as being within the discretion of the contracting agency, and typically does not substitute its judgment, rather it will examine the record to determine whether the judgment was reasonable, adequately documented, and in conformance with the solicitation's evaluation criteria. Based on the record in this protest, GAO determined that the Navy properly considered the past performance of Kuhana-Spectrum and made a reasonable decision in assigning a moderate risk rating due to the past instances of discrepancy reports on similar contracts.

Kuhana-Spectrum's second argument related to the downgrade that it received for not providing the name and qualifications of certain personnel described in its proposal. Principally, Kuhana-Spectrum claims that identifying these individuals was not required by the contract. However, GAO stated that it is an offeror's responsibility to submit an adequately written proposal, which establishes its capabilities and merits in accordance with the solicitation's terms. Further, the RFP cautioned that the evaluators would not assume that the offerors possessed any capabilities or knowledge unless specified in the proposal. Therefore, the Navy's downgrade of Kuhana-Spectrum's proposal for this reason was reasonable and consistent with the terms of the solicitation, and Kuhana-Spectrum's protest was denied.

3. BOSS Construction, Inc., B-402143.2, B-402143.3, February 19, 2010

Link: GAO Opinion

Agency: Department of the Interior

Disposition: Protest denied.

Keywords: Delivery schedule

General Counsel P.C. Highlight: In a negotiated procurement, any proposal that fails to conform to material terms and conditions of the solicitation is unacceptable and may not form the basis for an award.

The Department of the Interior's Bureau of Reclamation (BoR) issued a solicitation for construction services on the Weber Siphon project, a project that would include the installation of equipment on the East Low Canal of the Columbia Basin Project in Washington. Proposals were to be evaluated under five non-price factors, including a critical path method (CPM) schedule, and award would be made to the proposal that provided the best value, based on both price and non-price factors. The solicitation specifically provided that the work needed to be complete and ready for use no later than 18 months following receipt of the notice to proceed. After receiving 11 proposals, BoR awarded the contract to Mowatt Construction Company, Inc., despite the fact that BOSS Construction, Inc.'s proposal had a lower price. BOSS acknowledged the fact that its CPM schedule proposed minor project completion activities that would occur 20 days after the required completion date, however, it still protested the award to Mowatt.

Upon learning of the protest, BoR announced that it would take corrective action by reevaluating BOSS's proposal. Upon reevaluation, BoR determined that BOSS should have been rated unacceptable overall because its CPM schedule was outside of the solicitation's required 18 months. BOSS then protested the findings of the reevaluation, arguing that it intentionally placed a one-month lag on the start of certain steps in its proposal because it was the only way to complete the work properly for that locale and weather conditions.

GAO disagreed, stating that a firm delivery schedule in a solicitation is a material requirement and that nay proposal that fails to meet a material term of a solicitation is unacceptable. For these reasons, GAO determined that BoR was reasonable in its rating of BOSS proposal under the CPM schedule factor and denied BOSS's protest.

4. Mission Critical Solutions v. United States, U.S. Court of Federal Claims, No. 09-864-C, March 2, 2010.

Link: U.S. Court of Federal Claims Opinion

Agency: U.S. Army

Disposition: Protest sustained.

Keywords: HUBZone Set-Aside

General Counsel P.C. Highlight: Court rules that the Contracting Officer must first decide whether an award can be made under the HUBZone program before making award of the contract under either the 8(a) program or the SDVO program.

Under the 8(a) program, an agency may make award of an 8(a) contract valued up to $3.5 million without competition, on a sole-source basis. However, 8(a) participants that are also Alaska Native Corporations are allowed to receive 8(a) sole source awards without any dollar limitation.

Mission Critical Solutions, both an 8(a) company and a HUBZone company, was the incumbent contractor on contract to provide IT support services to the Office of the Judge Advocate General, U.S. Department of the Army. Mission Critical's incumbent contract was a one-year contract with no options, valued at slightly less than $3.5 million. For the follow-on, the Army wanted to include two option years on the contract, which increased the expected value of the contract to $10.5 million. Rather than award the follow-on contract to Mission Critical or compete the contract under the 8(a) program, the Army awarded a $10.5 million contract sole-source award, without competition, to Copper River Information Technology, an 8(a) Alaska Native Corporation.

Mission Critical protested first to GAO and then to the Court of Federal Claims that the HUBZone statute, as drafted by Congress, required the Army to consider, first, whether it could compete the contract under the HUBZone program, before deciding to make an award of the contract under the 8(a) program. Both the Army and the Small Business Administration argued that the HUBZone program did not have precedent over the 8(a) program and that, in fact, the HUBZone program, the 8(a) program, and the Service Disabled-Veteran Owned (SDVO) program are on a par with each other -- one does not take precedent over the other. Consequently, the Army and SBA argued, it is in the Contracting Officer's discretion whether to select to make an award under the 8(a) program or the HUBZone program.

Mission Critical had first protested this matter to the GAO, which agreed with Mission Critical that the HUBZone statue, as drafted, placed the HUBZone program first in priority over the 8(a) program and the SDVO program. Because the GAO's opinions are only advisory, the Agency is free to decline the GAO's ruling, which it did in this case.

Mission Critical then took its case to the Court of Federal Claims, which agreed with Mission Critical and the GAO. The Court held that the HUBZone statute, as Congress drafted it, clearly requires that any contract opportunity where there are 2 or more responsible HUBZone contractors expected to submit a proposal for a fair market price must be

competed among the HUBZone contractors. If no such HUBZone contractors are eligible for the competition, then and only then can the Contracting Officer turn to the 8(a) program for award. There is no comparable mandate for either the 8(a) program or the SDVO program. The Court issued an injunction requiring the Army to determine whether there are 2 or more eligible HUBZone companies to compete for this contract award and, if so, then to compete the award under the HUBZone program.