



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. **McCarthy/Hunt Joint Venture, B-402229.2, February 16, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest sustained in part and denied in part.

Keywords: Organizational conflict of interest

General Counsel P.C. Highlight: It is the Agency's responsibility to consider and, where appropriate, take efforts to mitigate every actual or perceived organizational conflict of interest.

The Department of the Army, Corps of Engineers, issued a request for proposals (RFP) in June 2008 for the design and construction of a replacement hospital at Fort Benning, Georgia. The procurement was a two-step evaluation: first evaluating offerors' past performance and technical capabilities, and second evaluating the remaining firms on their technical proposal and price proposal. Before the procurement started, the Army awarded a contract to HSMM/HOK Martin Hospital Joint Venture (HSMM/HOK JV), which was to assist the agency with the preparation of both the design concept for the hospital and a technical review of the proposals submitted.

In May 2008, the parent company of HSMM/HOK JV, AECOM Technology Corporation (AECOM), executed a confidentiality agreement with a company that it had entered into negotiations with for a possible acquisition deal. This company was Ellerbe Becket (EB), who also was a design partner of Turner Construction Company, Inc. (Turner/Ellerbe). Turner/Ellerbe was one of the four firms selected after Phase I of the solicitation to submit price and technical proposals for the design and construction contract at Fort Benning. The Technical Review Board, with HSMM/HOK JV's participation and support, completed its work in July 2009, and shortly thereafter, the source selection authority awarded the contract to Turner based on its proposal, which included the services of EB as a subcontractor. In October 2009, EB's directors approved the AECOM merger, which was announced on October 23, 2009. McCarthy/Hunt JV (MH JV), one of the offerors that submitted proposals in the second step of the procurement then filed a protest.

In its protest, MH JV alleged that the contract was improperly awarded to Turner/Ellerbe, which had each of the three types of organizational conflicts of interest (OCI) identified at FAR Part 9.5, and that none of these were properly mitigated.

The first OCI alleged by MH JV is that the Turner/Ellerbe had an unequal access to information by virtue of its relationship with AECOM. Competitively useful information giving rise to an unequal access to information includes proprietary information beyond offerors' proposals, such as source selection information and insights into a solicitation's requirements. Because AECOM was the design contractor, and thus was familiar with the details of the procurement, it was determined that EB had unequal access to information through its relationship to AECOM, which led to an organizational conflict of interest. GAO found little evidence of AECOM's efforts to prevent disclosure to EB of competitively useful information. As a result of AECOM's position in the procurement and its ability to obtain information regarding the Army's priorities, preferences, and dislikes related to the procurement, and because the Army did not mitigate this access to information strenuously enough, GAO determined that the OCI for unequal access to information did exist.

Next, MH JV argued that Turner/Ellerbe had an unmitigated biased ground rules OCI stemming from its work on the design contract. In this respect, AECOM had special knowledge of the Army's requirements that would have enabled it to give Turner/Ellerbe an unfair advantage in the competition. Here, the Army and Turner counter with the defense that the Army closely supervised AECOM's drafting of the solicitation. However, GAO's review of the record did not establish the fact that the Army closely supervised the drafting, and even if that was the case, GAO went on to state that it was unclear why the Army's supervision would have been sufficient to prevent AECOM from using its special knowledge of the Army's requirements to give an unfair advantage to Turner/Ellerbe.

The Army and Turner also assert that there is no evidence that AECOM skewed the competition to the benefit of EB. For this proposition, GAO highlighted the burden shifting that occurs when an OCI is raised by a protestor; in particular, once an OCI is established by a protestor, it is not required to demonstrate prejudice, rather harm from the conflict is presumed to have occurred. Turner further alleged that at all times during the course of the solicitation development AECOM and EB were not in fruitful negotiations. GAO did not see reason to resolve this issue because the record did not contain evidence of AECOM's efforts to ensure confidentiality in its negotiations and that any number of AECOM employees could have known about the negotiations, whether or not they were occurring at the same time as the solicitation. As a result, GAO sustained the allegation that Turner/Ellerbe had a biased ground rules OCI.

Finally, MH JV alleged the third OCI, where a firm's work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals, also known as impaired objectivity. In the face of this charge, the Army and Turner argued that the record did not demonstrate sufficient prejudice to MH JV. GAO was inclined to agree with this assessment after reviewing the evaluations of Turner/Ellerbe by the AECOM evaluators. The fact that the AECOM evaluators were relatively critical of the Turner/Ellerbe proposal, GAO found no reasonable basis to conclude that they were biased in favor of Turner/Ellerbe, thus denying the impaired objectivity OCI allegation.

In conclusion, GAO sustained the allegations that Turner/Ellerbe had an unequal access to information and a biased ground rules OCI. Because the ordinary remedy for a biased ground rules OCI is the elimination of that contractor from the competition, GAO recommended that Turner/Ellerbe be eliminated from the competition and that the Army has to make a new award determination.

2. Cedar Electric, Inc., B-402284.2 March 19, 2010

Link: [GAO Opinion](#)

Agency: Department of Veterans Affairs

Disposition: Protest denied.

Keywords: Material amendment

General Counsel P.C. Highlight: In an Invitation for Bid, the bidder is required to acknowledge receipt of the IFB and all material amendments in order to be responsive and eligible for award.

In August 2009, the Department of Veterans Affairs (VA) issued an invitation for bids (IFB) for renovation and construction at the Lebanon VA Medical Center in Pennsylvania. Following its initial issuance, the IFB was amended eight times. Bidders for the contract were required to acknowledge each amendment when they submitted their bids, otherwise their proposals were in danger of being deemed unresponsive. Seawolf Construction Corporation submitted the lowest bid, but failed to acknowledge amendments 7 and 8. Cedar

Electric, Inc. submitted the next lowest bid, and acknowledged all of the amendments. The contracting officer waived Seawolf's failure to acknowledge amendments 7 and 8, and awarded the contract to Seawolf, after which Cedar Electric protested, first at the agency level and then to the GAO following the VA's denial.

In its response to the Agency Report, Cedar Electric did not argue that amendment 7 was material. Cedar Electric's principal did argue that amendment 8 was a material amendment that could not be waived. An amendment is determined to be material when it would have more than a negligible impact on price, quantity, quality or delivery. However, an amendment is not material where it does not impose any legal obligation on the bidder that is different from those imposed by the original solicitation, or it has a negligible impact on the relative standing of the bidders.

The amendment in question related to a schedule for finishes as part of the construction project at the Lebanon facility. The VA responded to the protest by claiming that amendment 8 is not material because the same schedule was referenced in amendment 5, which Seawolf had acknowledged. Alternatively, the VA argues that the price impact of amendment 8 is not significant in relation to the value of the total project, and thus is not material. GAO agreed with the VA. The inclusion of the schedule for finishes in amendment 8 did not constitute a change in the legal obligations of the bidders to meet the government's requirements because the bidders were on notice of this requirement by virtue of its reference in amendment 5. Because amendment 8 was not a material amendment, GAO determined that the VA acted appropriately in waiving Seawolf's failure to acknowledge this amendment, and therefore denied Cedar Electric's protest.

3. Palladian Partners, Inc., B-402003, B-402003.2, December 24, 2009

Link: [GAO Opinion](#)

Agency: Department of Justice

Disposition: Protest denied.

Keywords: Blanket purchase order; Key personnel; Resumes

General Counsel P.C. Highlight: It is the offeror's obligation to insure that all resumes submitted in response to an RFQ are responsive to the Government's requests.

After issuing a request for quotations (RFQ) to establish a blanket purchase agreement (BPA) for conference planning and logistical support services, the Department of Justice received several proposals. One of the unsuccessful bidders was Palladian Partners, Inc., who protested the decision by asserting that the Department of Justice had misevaluated its quotation by assigning it an unacceptable rating under the key personnel/professional staff factor. This factor was one of the six upon which the “best value” selection was to be based.

According to the terms of the RFQ, certain key personnel posts had to meet specific requirements based on years of experience, levels of education, and amount of training or certification. Three of the six resumes that Palladian submitted for this evaluation factor were found to be lacking by the agency for not possessing the requisite amount of years of experience, nor the level of required education.

In its review of the protest, GAO examined the record to determine whether the agency’s evaluation was reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. Based on this examination, GAO determined that the Department of Justice’s evaluation was reasonable and followed the terms of the RFQ. In particular, GAO found that the resumes submitted by Palladian in support of the key personnel factor were vague, lacking in detail, or did not comply with the terms of the RFQ on their face. Accordingly, Palladian’s protest was denied.

4. Dorado Services, Inc., B-402244, February 19, 2010

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Best value determination

General Counsel P.C. Highlight: An Agency’s best value determination is give significant deference by GAO. GAO will not reevaluate a protester’s proposal but will determine only whether the Agency evaluation was reasonable.

The Department of the Army issued a request for proposals (RFP) to award several 8(a) small business set-aside indefinite-delivery/indefinite-quantity task order contracts for design-build services for the Corps of Engineer's Mobile, Alabama customers. Dorado Services, Inc. was not one of the eight offerors that was awarded a task order contract, and after a written debriefing from the agency, Dorado filed a protest claiming that it received an unreasonably low rating for its organization factor.

By the terms of the RFP, offerors were to be evaluated on "best value" basis that considered price, past performance, organization, and past safety performance. Under the organization factor, Dorado received a "satisfactory" rating, which, when combined with the ratings on the other factors, put Dorado outside of the range of offerors that they considered offered the best value to the government. The Agency made award to the top 8 offerors out of 35 offers. Dorado's offer was ranked number 9 overall, but was the lowest in evaluated price.

The agency identified two weaknesses in Dorado's proposal that resulted in the "satisfactory" rating: (1) there was only a very general discussion of its home office and lines of authority, and its corporate structure was not adequately discussed; and (2) the discussion of the firm's capabilities and commitment to provide home office support to its design team was found to be lacking.

Because the protest alleged a challenge to the agency's evaluation, GAO's review was limited to determining whether the evaluation was reasonable and consistent with the terms of the RFP and applicable procurement statutes and regulations. For both areas of weakness identified in Dorado's proposal, GAO found that the evaluation was reasonable and consistent with the solicitation's terms. With regards to the first weakness, the proposal made reference to "three highly qualified individuals" that would lead the project delivery teams, but then went on to identify only two in any detail. This section of the proposal was also found to be vouchered in generalities and did not specifically address RFP requirements.

As for the second weakness, the proposal is absolutely silent with regard to the firm's capabilities and commitment to support its design and on-site management teams. This component was a specific requirement of the RFP, and by Dorado's failure to include it, GAO determined that the agency had awarded a proper evaluation rating, and denied Dorado's protest.

5. AllServ, Inc., B-402330, March 9, 2010

Link: [GAO Opinion](#)

Agency: Department of Veterans Affairs

Disposition: Protest denied.

Keywords: Technical and past performance factors

General Counsel P.C. Highlight: Where a protester challenges an agency's evaluation of proposals, our Office will not independently reevaluate the proposals but, rather, will examine the record to determine whether the evaluation was reasonable and consistent with the RFP and applicable statutes and regulations.

Pursuant to a request for proposals (RFP), the Department of Veterans Affairs (VA) awarded a contract to Walco, Inc. for headstone raising and realignment and turf maintenance services at Fort Sam Houston National Cemetery in San Antonio, Texas. The RFP was to be awarded on a "best value" basis and sought fixed-price proposals for a period of time from November 9, 2009 (or the date of the award, whichever was later) to September 30, 2010. The VA received 14 proposals, including one from AllServ, Inc., and based on the evaluation criteria, awarded the contract to Walco, whose proposal received the highest technical ratings, despite its price being higher than AllServ's. AllServ protested this decision.

Principally, AllServ challenged the VA's rating of its proposal as "marginal" under the technical factor, a rating that the record shows was based on a table in AllServ's proposal that showed a performance schedule different from the schedule in the RFP. This table, entitled "Monthly Hours", provided hours by labor category spread across a 12-month period that commenced in February and concluded in January. The evaluators downgraded the proposal because this table was in contrast to the specified schedule in the RFP. AllServ countered, by asserting that the table's inclusion was there to show its monthly staffing profile, rather than as a representation of the period of performance for the contract.

GAO's review of the record was in agreement with the VA's determination. Because the 12-month table was included without an explanation as to why it did not represent the period of time to complete the contract, it was reasonable for the VA to downgrade AllServ's proposal under the technical factor.

AllServ also asserted that the VA unreasonably assigned Walco a similar past performance rating, even though Walco's past performance did not include headstone realignment work. GAO was not convinced by this argument. Walco's past performance did not include headstone realignment work, but did include two prior contracts for turf renovation and landscaping services, for which it received outstanding ratings. AllServ's past performance did include one contract for headstone realignment, though the scope of the work (4,000 headstones) was deemed to have limited relevance to the present contract (54,000 headstones). Furthermore, because the RFP did not specifically require an offeror to show a certain amount of headstone-related past performance, GAO determined that there was nothing unreasonable in the agency's assignment of the same rating to both Walco and AllServ. As such, GAO denied AllServ's protest.

6. Vocus, Inc., B-402391, March 25, 2010

Link: [GAO Opinion](#)

Agency: Federal Emergency Management Agency

Disposition: Protest denied.

Keywords: Terms of the solicitation

General Counsel P.C. Highlight: if there is a discrepancy between the offered product and the stated requirement, and the offered product will meet the agency's needs, the deviation may be waived if there is no prejudice to the other offerors

Following a request for proposals (RFP), the Federal Emergency Management Agency (FEMA) issued an order to PR Newswire Association, LLC for a contact management and distribution system to support the public outreach efforts of FEMA's Office of External Affairs. Following this award, and a related debriefing, one of the unsuccessful bidders, Vocus, Inc., filed a protest. This protest challenged several aspects of PR Newswire's proposal as not satisfying the terms of the solicitation, in addition to alleging that the evaluators' score sheets were dated prior a clarification period in which FEMA met with the offerors.

In particular, Vocus claimed that PR Newswire's proposal did not offer several of the features as identified in the RFP's statement of work (SOW), including: the ability to view

contact information on a PDA; the ability to provide tracking of e-mail messages; and the ability to integrate distribution of press releases via PRWeb. FEMA responded specifically to each charge. As related to the use of information on a PDA, FEMA stated that neither proposal specifically addressed the use of a PDA to display contact information, but because PR Newswire's proposal offered the ability to share content in several electronic media, it inferred that the content would be available via PDA. Next, with regard to the ability to provide e-mail tracking, GAO found that PR Newswire's proposal specifically *did* include this feature.

Vocus also raised the issue of PR Newswire's system not offering the ability to integrate distribution of press releases via PRWeb. FEMA acknowledged that this was not contained in PR Newswire's proposal, but stated that PR Newswire's system offered an equivalent capability. Based on the responses from FEMA, and its review of the record, GAO determined that FEMA's evaluation was reasonable and complied with the terms of the solicitation.

Finally, Vocus asserted that the evaluators' scoring sheets were dated prior to a clarification period that they provided to the offerors. However, GAO concluded that the record reflected otherwise. In particular, it determined that the updated reports (from after the clarification period) drafted by the technical evaluation panel (TEP) were in fact the documents that were relied upon by the contracting officer in making the selection decision, not the individual scoring sheets (that were completed before the clarification period). Thus, GAO denied Vocus's protest on all grounds.