



*October 20, 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 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.generalcounsellaw.com](http://www.generalcounsellaw.com).

### 1. Waterfront Technologies, Inc.--Costs, B-401948.8, September 14, 2010

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

**Agency:** Department of Labor

**Disposition:** Request denied.

**Keywords:** Protest Costs

**General Counsel P.C. Highlight:** GAO will recommend reimbursement of protest costs if it sustains a protest, or where the agency unduly delays taking corrective action in the face of a clearly meritorious protest. A protest is considered clearly meritorious when a reasonable agency inquiry into the protest's allegations would show that the agency lacked a defensible legal position, that is, the protest does not involve a close question.

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Waterfront Technologies, Inc. requests that GAO recommend reimbursement of Waterfront's protest costs associated with three protests it filed challenging the award of a contract by the Department of Labor (DOL), under a request for proposals (RFP) for Enterprise IT Services to support the Office of Foreign Labor Certification system.

The RFP was issued as a total small business set-aside for section 8(a) firms and was amended five times. The RFP required offerors to hold "an interim secret facility clearance prior to the RFP closing date." Waterfront's proposal was rejected as "non-responsive" because it did not include an interim secret facility clearance and did not include the requested pricing information.

Within 30 days of the initial protest, prior to submitting an agency report, GAO's representative conducted an outcome prediction alternative dispute resolution (ADR) conference. The representative stated that lack of a facility clearance was a matter of contractor responsibility rather than "proposal responsiveness" or technical acceptability and predicted that Waterfront's protest would be sustained. GAO noted that determination of the responsibility of a small business lies not with the contracting officer but with the Small Business Administration (SBA). DOL agreed to take corrective action and to submit the matter of Waterfront's responsibility to SBA for a possible certificate of competency (COC).

Waterfront filed a second protest that the DOL had not implemented its corrective action since the COC was still pending at the SBA. The GAO dismissed this protest as premature.

Shortly after, the SBA refused to consider Waterfront’s responsiveness because “Waterfront is not in-line for the award if there was a positive decision after the COC review,” as required by the SBA regulations. Waterfront then filed its third protest alleging that DOL failed to “effectuate” its promised corrective action because the SBA refused to consider Waterfront for a COC. DOL notified GAO that it would take corrective action in response to a protest filed by another offeror. GAO dismissed Waterfront’s protest because DOL’s proposed corrective action rendered their protest academic. Following the corrective action and dismissal, Waterfront sought an award to reimburse its protest costs.

GAO will recommend reimbursement of protest costs if it sustains a protest, or where the agency unduly delays taking corrective action in the face of a clearly meritorious protest. A protest is considered clearly meritorious when a reasonable agency inquiry into the protest’s allegations would show that the agency lacked a defensible legal position, that is, the protest does not involve a close question.

Here, DOL did not unduly delay taking corrective action on Waterfront’s first two protests since the corrective action was taken prior to submission of the agency reports on those protests. With regard to the third and final protest, DOL took correction action eight days after it submitted its report. GAO finds no reason to believe that any of the grounds asserted in the third protest were “clearly” meritorious and GAO has no basis to find that Waterfront’s allegations regarding its technical and price evaluation were “clearly meritorious.” The request for reimbursement of protest costs is denied.

## 2. **Facility Services Management, Inc.--Costs, B-402757.5, September 27, 2010**

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**Link:**     [GAO Opinion](#)

**Agency:**    Department of Homeland Security

**Disposition:** Request granted.

**Keywords:**    Protest Costs.

**General Counsel P.C. Highlight:** When a procuring agency takes corrective action GAO will recommend reimbursement of protest costs if the GAO finds that the agency unduly delays taking corrective action in the face of a clearly meritorious protest. A protest is considered clearly meritorious when a reasonable agency inquiry into the protest’s allegations would show that the agency lacked a defensible legal position, that is, the protest does not involve a close question.

Facility Services Management, Inc. (FSI) requests that GAO recommend that the Department of Homeland Security reimburse its costs of filing and pursuing its protest in connection with the issuance of a blanket purchase agreement (BPA) for facility maintenance, repairs and operations services at the Coast Guard Yard in Baltimore, Maryland.

The solicitation, limited to vendors holding General Services Administration Federal Supply Schedule contracts, contemplated issuance of a fixed-price BPA for a base year, with four option years. The contract was to be awarded on a best-value basis. The solicitation included a performance work statement (PWS) that specified required experience and education requirements for key personnel.

FSI filed an initial protest challenging the selection of the awardee on several grounds, including that the awardee misrepresented the availability of its key personnel or engaged in a “bait and switch” of those personnel. FSI filed two supplemental protests raising additional grounds.

GAO advised the parties that most of FSI’s issues failed to state valid bases of protest since they were based on speculation, or were otherwise subsumed by the valid issues. Once the agency report was received, FSI filed a third supplemental protest that separately challenged the evaluation of the awardee’s key personnel and past performance. GAO requested that the agency provide a supplemental report addressing those issues and the agency notified GAO that it intended to take corrective action. FSI’s protests were dismissed as academic. A fourth protest was filed and dismissed. FSI finally submitted this request that GAO recommend reimbursement of its costs.

GAO states that it will recommend reimbursement of protest costs if the GAO sustains a protest, or where the agency unduly delays taking corrective action in the face of a clearly meritorious protest. A protest is considered clearly meritorious when a reasonable agency inquiry into the protest’s allegations would show that the agency lacked a defensible legal position, that is, the protest does not involve a close question. With respect to the promptness of the agency’s corrective action, GAO reviews the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. GAO generally does not consider it to be prompt where corrective action is taken after the due date for the agency report responding to the protest.

GAO finds that the allegations regarding the awardees’ key personnel were raised in the initial protest and the allegations were sufficiently specific that a reasonable investigation by the agency would have led it to conclude that some, if not all, of the awardees’ key personnel failed to meet the PWS requirements. Having waited until after the filing of its report and

FSI's comments and supplemental protest, GAO finds that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest assertion. Therefore, the request for recommendation for reimbursement is granted, but will not extend beyond FSI's challenge to the evaluation of the qualification of the awardees' key personnel.

### 3. Douglas County Fire District #2, B-403228, October 4, 2010

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**Link:**     [GAO Opinion](#)

**Agency:**   Department of Veterans Affairs

**Disposition:** Protest sustained.

**Keywords:**   Evaluation

**General Counsel P.C. Highlight:** When using simplified acquisition procedures, an agency must conduct the procurement consistent with a concern for fair and equitable competition and must evaluate quotations in accordance with the terms of the solicitation.

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Douglas County Fire District #2 (DCFD) protests the issuance of a purchase order under a request for quotations (RFQ) issued by the Department of Veterans Affairs (VA), for ambulance services.

The RFQ was issued as a simplified commercial item acquisition under FAR Parts 12 and 13 and sought fixed-price quotations for ambulance services for the Roseburg VA Healthcare System for a base year with four one-year option periods. The statement of work (SOW) required the contractor to furnish all necessary personnel, vehicles, management, supplies, transportation, equipment, and reports to provide emergency and non-emergency ground ambulance services for eligible beneficiaries. Additionally, the SOW contained a specific geographic area to be serviced, including Roseburg VAMC, other areas in Oregon, and possibly including Northern California and Western Washington. The selection would be made on a best-value basis considering five factors, one of which was geographic coverage.

DCFD's proposal received a "fail" rating for the geographic coverage factor, which was based on the evaluators' findings that DCFD's quotation provided no plan or supporting information regarding coverage of the geographic area set forth in the SOW. DCFD alleges that the VA unreasonably evaluated its quotation under the geographic coverage factor.

GAO states that when using simplified acquisition procedures, an agency must conduct the procurement consistent with a concern for fair and equitable competition and must evaluate quotations in accordance with the terms of the solicitation. GAO will examine the record to determine whether the agency met this standard and executed its discretion reasonably.

GAO concludes that the VA unreasonably evaluated DCFD's quotation with a "fail" rating for the geographic coverage factor for lack of a plan to cover the area where the awardee's quotation did not include any more specific information than the awardee's quotation, which was assigned a "pass" rating. In order to assess a finding of "fail," the agency was required to conclude that based on DCFD's "qualifications and experience, extreme doubt exists that the offeror will successfully perform the required effort." The agency provided no basis for a determination that "extreme doubt exists" that DCFD "could successfully perform the required effort," particularly given that DCFD was the incumbent for these services and indicated in its quotation that has provided services to the named geographical areas in the past. The protest is sustained.

#### 4. **Kiewit Louisiana Company, B-403736, October 14, 2010**

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

**Agency:** U.S. Army Corps of Engineers

**Disposition:** Protest dismissed.

**Keywords:** Discussions

**General Counsel P.C. Highlight:** Where the RFP fails to state whether discussions will be held or may not be held before award, there is no requirement that discussions actually be held before the agency makes an award.

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Kiewit Louisiana Company (Kiewit) protests the award of a contract under a request for proposals (RFP) issued by the U.S. Army Corps of Engineers for construction of improvements to the levee and floodwalls at the Causeway Bridge in Jefferson Parish, Louisiana.

The RFO advised that the agency would make award on a "best value" basis considering price and several non-price considerations. The RFP did not indicate whether the agency intended to conduct discussions. Kiewit's proposal received a marginal rating under the

technical approach/key personnel factor for failure to include certain demolition work and the agency awarded the contract to another offeror without discussions.

GAO states that an agency's intent with regard to discussions is required to be expressed in the solicitation. The Competition in Contracting Act (CICA) requires "either a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions..."

Kiewit asserts that since the RFP was silent on the issue of discussions, the agency was required to conduct discussions by default. GAO finds no basis for finding that the agency was required to conduct discussions given the RFP's silence on the point where Kiewit cites no statutory or regulatory provision, and GAO is aware of none, that establishes such a default rule. Under GAO's Bid Protest Regulations, protests based on improprieties apparent on the face of a solicitation must be filed prior to the deadline for submitting proposals. Here, it was apparent that the RFP did not include one of the two alternate clauses required to be included in the RFP to advise offerors of the agency's intention regarding discussions. Kiewit's assertion that discussions were required had to be raised, if at all, prior to the closing time for receipt of initial proposals. Since Kiewit did not protest prior to the closing time, its assertion that the agency was required to engage in discussions is untimely, and will not be considered. The protest is dismissed.

### 5. Total Health Resources, B-403209, October 4, 2010

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

**Agency:** Department of the Air Force

**Disposition:** Protest sustained.

**Keywords:** Experience Requirement

**General Counsel P.C. Highlight:** When a protester challenges an RFP specification as unduly restrictive, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs. GAO will examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny.

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Total Health Resources protests the terms of a request for proposals (RFP) issued by the Department of the Air Force for family advocacy program (FAP) services.

The RFP, issued as a commercial item acquisition set aside for section 8(a) small business firms, provided for the award of a fixed-price contract for family and community health services at 21 Air Force bases across the western and southwestern United States. Award would be made on a best value basis, considering technical capability and price. The RFP stated that offerors must show two years of experience providing FAP services to be technically acceptable. The agency subsequently amended the solicitation to require that, where an offeror proposes a prime/subcontractor teaming arrangement, the prime contractor itself must have two years of FAP experience. Total Health protests that the RFP's requirement for two years of experience providing FAP services at the prime contractor level unduly restricts competition, particularly among section 8(a) firms.

GAO states that in preparing a solicitation, a contracting agency is required to specify its needs in a manner designed to achieve full and open competition, and may include restrictive requirements only to the extent necessary to satisfy the agency's legitimate needs. The experience of a technically qualified subcontractor may be used to satisfy experience requirements for a prospective prime contractor. However, consistent with its solicitation, an agency may consider only the offeror's experience if the agency has legitimate reasons for concluding that the successful offeror itself must possess the relevant experience in order to ensure successful performance of the contract.

Additionally, where a protester challenges a specification as unduly restrictive, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs. GAO will examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny.

Here, despite specific inquiry from GAO, the agency does not address why the two-year, FAP experience requirement cannot be satisfied by proposing a subcontractor or other teaming member. The agency's arguments and explanation address only the importance of the FAP program and the need for an experience requirement. Given the agency's failure to explain why its experience requirements cannot be satisfied by a subcontractor or other teaming partner, GAO finds that the RFP's requirement that the prime contractor have two years of FAP experience is unduly restrictive of competition. The protest is sustained.