



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. COB EventLizenz GmbH, B-401999.2, January 12, 2010

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Solicitation requirement

General Counsel, P.C. Highlight: In a challenge to the terms of a solicitation as overly restrictive of competition, where a solicitation requirement relates to national defense or human safety, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and/or effectiveness.

COB EventLizenz GmbH (COB Event) protested the terms of a request for proposals (RFP), issued by the Department of the Army for Civilians on the Battlefield (COB) in Hohenfels, Germany, as unduly restrictive. COB role players are part of a training program that prepare U.S. armed forces for scenarios that they will likely face on the real-world battlefield. In preparation for their existing contract's expiration, the Army began acquisition planning for a follow-on contract in late February 2008, issued a solicitation in February of 2009, conducted a competition for a replacement contractor, and forwarded its evaluation for internal review in early May of 2009. However, that review brought to light solicitation flaws, which led to the cancellation of the solicitation at the beginning of September 2009, the same month in which the incumbent task order was to expire. In order to ensure continuity of the COB program, the Army sought and received approval to proceed with a bridge contract on a sole source basis, and published its intent to award such a contract to the incumbent contractor on Federal Business Opportunities (FedBizOpps), due to the contracting officer's belief that only the incumbent could provide the required management for the exercises beginning in October. Four firms responded to this posting, indicating that they could perform the necessary services without interruption or excessive cost and the Army decided to conduct a limited competition.

For purposes of the limited competition, the Army issued an RFP to those firms that indicated that they would be capable of performing. COB Event did not submit a proposal, but instead protested the terms of the solicitation in an agency-level protest, complaining that the vetting requirements for the COBs was unduly restrictive of competition, and that the solicitation should have required compliance with German law pertaining to temporary employment. The vetting requirements referred to by COB Event were a part of the

“technically acceptable” analysis that was to be conducted by the Army in awarding the contract. As part of this analysis, offerors were required to self-certify that their firms could provide “vetted COBs in place for the start of the contract,” where fully vetted COBs meant that the COBs had undergone a German Polizi and Military Intelligence investigation within the last 180 days and it was still valid.

The Army dismissed the agency-level protest because SST GmbH (the incumbent contractor) had already filed a protest with GAO involving the same solicitation. The Army then overrode the Competition in Contracting Act (CICA) stay against contract award and awarded the contract to Optronics, a contract that was terminated on the same day after Optronics advised that it could not fulfill the requirements of the contract. The contract was then awarded to SST GmbH, who was next in line for the award. COB Event then protested to GAO, raising the same complaint as the agency-level protest.

When a protest challenges a specification in a solicitation as being unduly restrictive, it is up to the procuring agency to show that the specification is reasonably necessary to meet its needs, a threshold that is then held to a “logical scrutiny” standard. GAO determined that when, as in this instance, “...a requirement relates to national defense or human safety, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and/or effectiveness.” Because fully vetted COBs were necessary to this solicitation, and due to the security and safety factors inherent in civilians having access to military operations, COB Event’s protest was denied. Furthermore, the short timeline in which to provide vetted COBs was also not an unreasonable requirement because the existing contract was nearing expiration and the troops were preparing for imminent deployment.

2. Chant Engineering Company, Inc., B-402054, December 29, 2009

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Small business set-aside; Limitation on Subcontracting

General Counsel P.C. Highlight: Whether an offeror will meet the limitation on subcontracting requirement is a contract administration issue that GAO will not consider unless the proposal on its face should lead the Agency to conclude that the offeror cannot or will not meet the limitation on subcontracting requirement.

Chant Engineering Company, Inc. (Chant) protested the issuance of a purchase order to Clover Industries, Inc. (Clover) by the U.S. Army Corps of Engineers. The purchase order was the result of a request for quotations (RFQ) issued by the Army as a small business set-aside for the rehabilitation of a hydraulic system in Michigan. The RFQ included the Limitation on Subcontracting clause, FAR § 52.219-14.

Chant claimed in its protest that Clover's quotation did not comply with the "50% rule contained in the Limitation on Subcontracting clause. After reviewing Clover's proposal, GAO concluded that nothing on the face of Clover's quotation indicated an intent not to comply with the Limitation on Subcontracting clause. Whether Clover will actually comply with the requirement in its performance is a contract administration requirement that GAO will not consider. Protest denied.

3. **JRS Management, B-401524.2, January 12, 2010**

Link: [GAO Opinion](#)

Agencies: Department of Justice, Bureau of Prisons

Disposition: Protest Denied.

Keywords: Requirements contract

General Counsel, P.C. Highlight: Although a minimum order amount may not be included in the Solicitation, the promise to order all of the Government's requirements for particular services at a particular location is sufficient consideration for the award of a requirements contract.

The Federal Bureau of Prisons (BOP) issued a solicitation in May of 2009 for the award of a fixed-price requirements-type contract for the provision of dental assistant and pharmacy technician services. In the solicitation, the agency reserved the right to make two requirements contract awards if it was determined to be advantageous to the government, in which case there would be separate indefinite delivery/requirements-type contracts, one for dental assistant services and the other for pharmacy technician services.

JRS Management protested the terms of this solicitation, claiming that the right to award two requirements-type contracts renders illusory the consideration necessary for an enforceable requirements contract. GAO disagreed. A requirements contract lacks consideration where the Government disclaims any obligation to order all its requirements from the contractor, thus rendering the contract illusory and unenforceable. In this case, the RFP contained the necessary promise to order all its requirements for the stated services at a particular location from the awardee. That by itself was sufficient consideration to support the award of one or more requirements contract. Protest denied.

4. **Bruce Bancroft – Agency Tender Official; Sam Rodriguez – Designated Employee Agent, B-400404.7, B-400404.8, B-400404.9, B-400404.10, B-400404.11, November 17, 2009**

Link: [GAO Opinion](#)

Agency: Department of the Navy

Disposition: Agency Tender Official's protest sustained in part and denied in part;
Designated Employee's protest denied.

Keywords: Evaluation record

General Counsel P.C. Highlight: An agency that fails to adequately document its evaluation of proposals in writing bears the risk that its determinations will be considered unsupported, and absent such support, our Office may be unable to determine whether the agency had a reasonable basis for its determinations.

In 2006, the Navy decided to conduct a competition under OMB Circular A-76 to compare the cost of continued in-house performance of certain bulk fuel storage and distribution services compared to obtaining those services from an outside contractor. As part of this competition, the Navy issued a request for proposals (RFP), which required the successful offeror to provide all personnel, equipment, tools, and materials necessary to perform bulk fuel storage and distribution services at the Marine Corps Air Station, Miramar, California. The solicitation provided historical estimates for workload, including hours and staffing needs based on statistics from the preceding three years. Award of the contract was to be made to the public or private entity whose proposal represented the lowest-priced, technically acceptable offer to the government. Six offerors submitted proposals by the 2007 closing date, including Phoenix Management, Inc. (PMI) and the Agency Tender Official (ATO).

After its initial evaluation, the Navy established a competitive range (including the PMI and ATO proposals) and conducted discussions with the offerors related to weaknesses and deficiencies. In particular, the Navy's technical evaluation board (TEB) discussed with PMI deficiencies related to its quoted time and staffing requirements for the fuel sampling and testing tasks, which varied widely from the historical numbers provided by the Navy. PMI revised its proposal by changing its proposed figures, however, these were still drastically different than those quoted by the Navy. Despite this continued discrepancy, the TEB reviewed the revised proposals and, without written explanation, determined that PMI had adequately corrected its deficiencies. The contract was then awarded to PMI, after which the ATO and Designated Employee Agent (DEA) filed a series of protests with GAO. The Navy announced its intent to take certain corrective action including amending the RFP and holding additional discussions with the offerors, leading GAO to dismiss the initial ATO and DEA protests.

During these discussions, the ATO attempted to revise its estimates related to the fuel sampling and testing tasks, but the TEB determined that their proposed hours were inadequate to meet the stated requirements of the solicitation. PMI was again awarded the contract leading the ATO and DEA to again protest GAO, arguing that, among other things, the Navy's evaluation was unreasonable and that its discussions were not meaningful.

GAO disagreed with several of the Navy TEB's assertions, especially those in which it seemed that their analysis of PMI's responses differed steeply from their analysis of the ATO's responses, despite both offerors sharing similar deficiencies. Additionally, the Navy's evaluation record was found to be inadequate in its support of its determinations related to PMI. The Navy argued that not much needs to be documented where the proposal allegedly meets (as opposed to failing to meet) the RFP requirements. GAO stated that an agency's evaluation of proposals must be adequately documented in order to establish the reasonableness of its determinations. GAO then sustained the ATO's protest

In an instance where such a protest is sustained, the GAO would normally recommend that the procuring agency reopen discussions and reevaluate the proposals. However, the current defense appropriations act prevents continuation beyond 30 months of any A-76 cost study of the sort at issue here. Since that time has lapsed, and any re-evaluation would violate the A-76 time limitation, the GAO recommended terminating PMI's contract and that no further action be taken.