



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. MFM Lamey Group, LLC, B-402377, March 25, 2010

Link: [GAO Opinion](#)

Agency: Overseas Private Investment Corporation

Disposition: Protest denied.

Keywords: Past performance evaluation; Protest jurisdiction

General Counsel P.C. Highlight: The Competition in Contracting Act, which requires full and open competition for federal government procurements and provides the basis for GAO's jurisdiction to hear bid protests, presumptively applies to all agencies of the executive branch of the federal government.

The Overseas Private Investment Corporation (OPIC), a U.S. Government executive branch agency, issued a request for proposals (RFP) for the award of a time-and-materials contract for planning, promotion, and logistics support for an international business and investment conference. The proposals were to be evaluated based on two factors: technical capability and past performance. OPIC received four proposals, two of which were from MFM Lamey Group, LLC and MFMci, LLC. These two companies are separate, successor companies to MFM Group, Inc., which was split in 2008 by mutual agreement of its owners.

MFMci was awarded the contract and MFM Lamey filed an agency-level protest, which was denied by OPIC. MFM Lamey then protested to the GAO alleging that OPIC's past performance evaluation was unreasonable.

Preliminarily, OPIC alleged a series of jurisdictional and scope of review questions. In the first instance, OPIC challenged GAO's authority to review the protest on the basis that the contract at issue was funded with non-appropriated funds. However, GAO countered this claim and provided that its bid protest jurisdiction is based on the threshold of whether the procurement at issue is being conducted by a federal agency, where the definition of a federal agency (as drawn from the Federal Property and Administrative Services Act) is any executive department or independent establishment in the executive branch of the government, and any wholly-owned government corporation.

In the second instance, OPIC also alleged that even if the procurement was within GAO's bid protest jurisdiction, GAO's review of the protest was limited to reviewing the reasonableness

of the agency's procurement actions because the basic procurement statutes (principally, the Competition in Contracting Act) are not applicable to OPIC. GAO concluded that the procurement in question was subject to the requirements of CICA and that OPIC had not identified any statute that expressly exempts it from CICA. Furthermore, GAO also found that the acquisition was funded with appropriated funds and is therefore subject to the Federal Acquisition Regulation.

After dismissing the jurisdictional and scope questions raised by OPIC, GAO examined the substantive issues raised by MFM Lamey in its protest. In particular, MFM Lamey alleged that MFMci was credited for past performance that was attributable to MFM Lamey and contends that "since the awardee's and protester's split from MFM Group, Inc., the awardee has not provided international conference planning services for any U.S. Government agency... upon which OPIC could reasonably rely in making its award decision." OPIC responded that its past performance evaluation judgments were based upon conferences and events that took place after the firms split from the MFM Group.

In GAO's review of the record, it determined that the past performance questionnaires submitted by MFMci's clients described nine international conferences that MFMci performed in 2009, and that these performances were consistently rated the highest possible rating. GAO concluded that this sufficiently supported OPIC's evaluation, which was found to be reasonable, and thus denied MFM Lamey's protest.

2. CFS-INC, JV, B-401809.2, March 31, 2010

Link: [GAO Opinion](#)

Agency: General Services Administration

Disposition: Protest denied.

Keywords: Timely proposal submission; Government office closings

General Counsel P.C. Highlight: Even though federal employees were allowed a delayed arrival and unscheduled leave, a delayed arrival time or allowance of unscheduled leave does not mean that the government had not resumed normal processes for the purposes of calculating the time for submission of proposals.

As part of a request for proposals (RFP), the General Services Administration included a provision that stated that if an emergency or unanticipated event interrupted normal government processes, the time specified for receipt of proposals would be extended to the same time of day as specified in the RFP on the first work day on which normal government processes resume. The original submission deadline of September 3, 2009 was extended to February 9, 2010 at 2:00 p.m. Eastern Time by a GSA-issued amendment.

Due to major winter storms in the Washington D.C. area of February 5 and 6, and again on February 9 and 10, federal agencies in the Washington D.C. area were closed from Monday February 8 through Thursday February 11. On February 12, federal agencies in Washington D.C. reopened, but federal employees were allowed to arrive for work up to two hours later than normal due to the continued weather situation. On the same day, when GSA opened, the contracting officer determined that under the RFP provision stated above, the due date for receipt of proposals was extended from February 9 at 2 p.m. to February 12 at 2 p.m. CFS-INC, JV submitted its proposal on February 12 at 2:24 p.m. and it was rejected as late. CFS protested this rejection, alleging that “normal government processes” could not be said to have resumed on a day when the federal agency was operating under a 2-hour delay.

GAO denied the protest. GAO held that, even though federal employees were allowed a delayed arrival, a delayed arrival time or allowance of unscheduled leave does not mean that the government had not resumed normal processes. In fact, the Office of Personnel Management recognizes situations that allow for delayed arrival as distinct from those situations where federal agencies are closed.

3. Hunter Contracting Company, B-402575, March 31, 2010

Link: [GAO Opinion](#)

Agency: Department of Homeland Security, Bureau of Customs and Border Protection

Disposition: Protest denied.

Keywords: Timely bid submission; Inclement weather delay

General Counsel P.C. Highlight: It is an offeror’s responsibility to deliver its proposal to the proper place at the proper time

The Department of Homeland Security issued a request for proposals (RFP) for comprehensive tactical infrastructure maintenance and repair along the southwest U.S. border. The RFP required offerors to submit proposals to the Bureau of Customs and Border Protection Office in Arlington, Virginia by 3 p.m. on February 12, 2010. Due to severe weather conditions, federal agencies in the Washington D.C. area were closed from February 8-11, 2010, and reopened on February 12, 2010 with a two hour delay. Hunter Contracting Company submitted its proposal through the U.S. Postal Service's Next Day Noon Express offering, with an expected delivery on February 11, 2010. Because of the weather, Hunter's proposal was not received until the morning of February 16, 2010, and was rejected as late. Hunter protested this decision by the agency.

In its protest, Hunter argued that its proposal should have been accepted under Federal Acquisition Regulation (FAR) § 15.208(d), which provides that when an emergency or unanticipated event interrupts normal government processes, the time specified for receipt of proposals is extended to the same time of day as specified in the RFP on the first work day on which normal government processes resume. GAO disagreed, stating instead that February 12 was the first work day following the interruption on which normal government processes resumed, despite the two hour delay. The Bureau was in fact open the entire day on February 12 and had an individual in place to receive proposals starting at 8 a.m. on that day. Because Hunter's proposal was not received on February 12, GAO determined that the agency was proper in rejecting it for being untimely and denied Hunter's protest.

4. Superior Gunitite, B-402392.2, March 29, 2010

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Ambiguity in solicitation

General Counsel P.C. Highlight: When a dispute arises as to the actual meaning of solicitation language, the GAO resolves the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation, not just focusing on single provisions.

The Army Corps of Engineers issued a request for proposals (RFP) for the rehabilitation of sewers in the Metropolitan Sewer District (MSD) of St. Louis, Missouri. The RFP was issued as a small business set-aside and contemplated the award of a fixed-price contract to the firm submitting the lowest priced, technically acceptable proposal. The solicitation stated that the Corps intended to award the contract without conducting discussions, unless it was deemed to be in the best interest of the government to do so, and that, therefore, the initial proposals should include the offerors' best terms from a price and technical standpoint. A clause from the Federal Acquisition Regulation (FAR) was also included, which stated that the government intended to conduct discussions with offerors whose proposals have been determined to be within the competitive range. The RFP also included instructions for preparing proposals that informed offerors that they should include a price proposal, and a copy of the MSD certification.

The Corps received four timely proposals, including one from Superior Gunitite. The Superior Proposal included a price proposal and an MSD certification, but failed to include a technical proposal. Superior's proposal was found to be technically unacceptable. Superior argued that the Corps had unreasonably found its proposal to be technically unacceptable because the RFP did not require offerors to submit a technical proposal as part of their initial proposal submissions. In its interpretation, Superior contends that it only required the submission of a price proposal and a current certification with the MSD, and that it would have an opportunity during discussions to demonstrate its technical acceptability.

When GAO reviews protests of alleged improper evaluations, it examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement statutes and regulations. As part of this review, GAO looks to see whether the solicitation's provisions are definite and free from ambiguity, so that competition is permitted on a common basis. If a dispute arises as to the actual meaning of language in a solicitation, GAO resolves the matter by reading the solicitation as a whole to see whether it is susceptible to two or more reasonable interpretations, a determination that would find the solicitation to be ambiguous.

Here, GAO determined that the only reasonable interpretation of the RFP was that the offerors were required to submit technical proposals as part of their initial proposal submissions. The RFP provided that the Corps would evaluate the information submitted to determine if it is technically acceptable and meets the minimal requirements. The fact that the solicitation included the patent ambiguity related to the issue of whether it would conduct discussions did not relieve Superior of the responsibility to file a complete proposal. Because Superior's proposal did not provide the technical information requested by the RFP,

the agency reasonably found Superior's proposal to be technically unacceptable, and Superior's protest was denied.

5. **Eagle Home Medical Corporation, B-402387, March 29, 2010**

Link: [GAO Opinion](#)

Agency: Department of Veterans Affairs

Disposition: Protest sustained.

Keywords: NAICS code; Small business set-aside

General Counsel P.C. Highlight: An agency is bound to follow the determinations made by the SBA's Office of Hearings and Appeals regarding the applicable NAICS code for a specific procurement.

A request for proposals (RFP) issued by the Department of Veterans Affairs for this small business set-aside initially assigned North American Industry Classification System (NAICS) code 532291, Home Health Equipment Rental, to the procurement, which was for the provision of home oxygen equipment rental and services to VA beneficiaries. The NAICS code scheme is used by the federal government to identify and classify specific categories of business activity and is used to determine the applicable size standard. The VA contracting officer for this procurement subsequently changed the NAICS code to 339112, Surgical and Medical Instrument Manufacturing, based upon a U.S. Court of Federal Claims decision in Rotech Healthcare, Inc. v. United States.

Prior to the due date for proposal submissions, Eagle Home Medical Corporation filed an appeal with the Small Business Administration's Office of Hearings and Appeals (OHA), arguing that the contracting officer's re-designation of the NAICS code was unreasonable because the code did not best describe the principal purpose of the procurement. The OHA granted the appeal, and determined that because the RFP requirements meant the contractor must deliver both supplies and services it was more prudent for NAICS code 532291 to be used, as it covers all services necessary to make home health care equipment functional. The OHA decision distinguished Rotech from the procurement at issue because Rotech was decided on a different issue related to a non-manufacturing rule. The VA received OHA's

decision before the proposal due date, but chose not to amend the solicitation. Eagle then protested.

As a preliminary issue, the Small Business Act vests the authority to establish and approve small business size standards exclusively with the SBA, and federal agencies are generally bound to follow the SBA's determination. Specifically, NAICS code designations made by authorized contracting officers may be appealed to the OHA and any formal NAICS code designations made by the OHA are final and binding on the parties.

The VA countered Eagle's protest by claiming that the OHA decision impermissibly disregarded the Rotech decision. GAO, however, agreed with the OHA's determination that Rotech was distinguishable based on the limited nature of the inquiry in that case. GAO went on to determine that there was a timely NAICS code appeal filed with the OHA, and OHA made a reasoned determination based on its review of the solicitation requirements that the NAICS code designation should be 532291. Based on these determinations, GAO concluded that the VA was required to comply with the decision of the OHA. As such, GAO recommended that the RFP be amended in a manner consistent with the OHA decision and that Eagle be reimbursed its costs for filing and pursuing the protest.