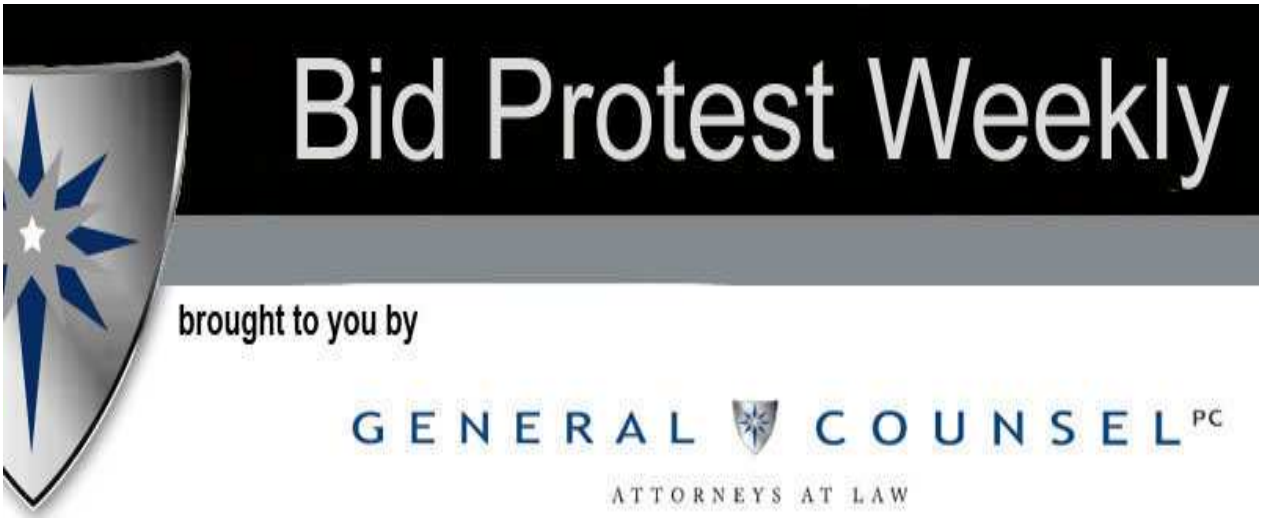

December 22, 2009

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. Voith Hydro, Inc., B-401244.2, B-401771, November 13, 2009

Link: GAO Opinion

Agencies: Department of the Interior

Disposition: Protests denied.

Keywords: FAR Part 12 and FAR Part 15

Voith Hydro, Inc. protested the terms of two Department of the Interior Requests for Proposals (RFPs) for generator and excitation systems for the Folsom and the Nimbus power plants in California. Voith claimed that the RFPs, which were issued as negotiated procurements under Federal Acquisition Regulation (FAR) Part 15 as construction contracts, should have been issued in accordance with the terms of FAR Part 12, Commercial Item Acquisitions.

The RFPs provided for the award of fixed-price construct contracts on a best value basis considering the evaluation factors as set forth in the solicitations. Voith previously filed a protest with the GAO, challenging the terms of the Folsom RFP. In that protest, Voith argued that the Interior Department's determination that it would award a contract for construction was unreasonable, and that the solicitation thus improperly included a number of provisions related to construction contracting in accordance with part 36 of the FAR. In its view, Voith felt that the items and work being solicited were commercial items and services, and that the solicitation should have been issued as a commercial item acquisition under part 12 of the FAR. In response, the Interior Department stated that it took corrective action by re-examining its "procurement approach," and "conduct further market research and analysis to determine whether commercial items are available that could meet [the agency's] requirements." In addition, the Interior Department decided that if it found that commercial items were appropriate it would cancel the solicitation and solicit the requirement in accordance with FAR Part 12.

The GAO dismissed this first protest in response to the corrective action. Following its corrective action, the Interior Department concluded that the Folsom Power Plant project

should not be solicited as a commercial item acquisition under FAR Part 12, but rather, as a Negotiated Procurement under FAR Part 15, and thus informed Voith and the other firms that had submitted proposals of its determination.

Voith re-filed its protest alleging that the acquisition did not involve "construction," as that term is defined in the FAR. In Voith's view, the Interior Department was required to issue the solicitations as commercial item acquisitions in accordance with FAR Part 12, rather than as Negotiated Procurement under FAR Part 15. More particularly, it alleged that the actual items and services that are required to be furnished under the RFPs meet the definition of "commercial item" as set forth in the FAR.

The GAO began by stating that the contracting agency has the primary responsibility for determining its needs and the best method of accommodating them, and that this principle applies to the contracting format used to purchase items that the agency has determined necessary, and that the GAO will not object to an agency's determination in this regard unless the protester shows that it is clearly unreasonable. As it relates here, FAR Part 12 prescribes policies and procedures unique to the acquisition of commercial items and implements the preference for the acquisition of commercial items that meet the needs of an agency. FAR Part 12 was intended to establish acquisition policies more closely resembling those of the commercial marketplace as well as other considerations necessary for proper acquisition planning, solicitation, evaluation, and award of contracts for commercial items.

As such, agencies are required to conduct market research pursuant to FAR Part 10 to determine whether commercial items are available that could meet the agency's requirements. If market research establishes that the government's needs can be met by a type of item (including services) customarily available in the commercial marketplace that would meet the definition of a commercial item, the contracting officer is required to solicit and award any resulting contract using the policies and procedures in FAR Part 12. This determination of whether or not a product or service is a commercial item is at the discretion of the agency, and is given great deference by the GAO.

Here, the GAO found that the Interior Department's determinations that the work and items required under the RFPs should be acquired under a construction contract, and cannot be acquired as commercial items using FAR Part 12, to be reasonable. The Interior Department

found that, while there are vendors that manufacture and install equipment similar to that being acquired here, such equipment would have to be custom manufactured or built based upon unique specifications to such an extent that it cannot be considered as commercial items or, when designed and built, cannot be considered "of a type" available in the commercial marketplace given the unique requirements of the complete system sought here.

2. **Solar Plexus, LLC, B-402061, December 14, 2009**

Link: GAO Opinion

Agencies: Department of Agriculture

Disposition: Protest dismissed.

Keywords: State and local requirements; Permits and responsibilities

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Solar Plexus, LLC (Solar) protested the awarding of a contract by the Department of Agriculture, U.S. Forest Service, under a request for proposals (RFP) for the supply and installation of three separate solar-powered systems in Missoula, Montana. The relevant RFP stated that the award would be made on the basis of the offer most advantageous to the government, price and other factors considered, and that technical factors and past performance, when combined, would be twice as important as price.

After the proposals were initially evaluated, the contracting officer established a competitive range consisting of the five highest-rated proposals, including the proposals submitted by Solar Plexus and Oasis Montana. The contracting officer then conducted discussions with these five firms. After reviewing the offerors' responses to the discussion questions, the offerors were then ranked, with the two highest-rated firms (one of which was Oasis Montana) receiving equal ratings. Of the two highest-rated firms, Oasis Montana submitted the lower price, and the award was made to Oasis Montana. In its notice to unsuccessful offerors, the Agency incorrectly stated the award amount. But the award amount was correctly stated when the award notice was posted on the FedBizOpps website. Solar Plexus then filed an agency-level protest, which was denied, followed by this protest to the GAO.

In this protest, Solar Plexus alleged that the award was improper because Oasis Montana is not a registered construction contractor and, according to Solar Plexus, Montana law requires a company to be registered as a construction contractor in order to complete the installation of the solar-powered systems sought under the RFP. Based on this argument, it was asserted that the award was therefore in violation of the RFP, which states that "[t]he Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract." Additionally, Solar Plexus points to the RFP's "Permits and Responsibilities" clause, FAR § 52.236-7, which states that "[t]he Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work."

However, the GAO found that Solar Plexus' arguments did not provide a basis to sustain the protest. Although the RFP calls for compliance with state law through its "Permits and Responsibility" and other similar clauses, normally, general solicitation provisions mandating that the "contractor" comply with the requirements of state laws, codes, and regulations do not require that a bidder or offeror demonstrate compliance prior to award. Rather, compliance with applicable state or local requirements is a contract performance or contract administration requirement that may be satisfied during contract performance and does not affect the contract award or contract formation decision. Oasis Montana's compliance going forward was deemed to be a matter of contract administration and not contract formation, and therefore outside the bounds of GAO's bid protest jurisdiction under GAO Rule 21.5(a).

3. **Enterprise Information System, B-401037.5, B-401037.6, December 1, 2009**

Link: GAO Opinion

Agency: U.S. Patent and Trademark Office

Disposition: Protest denied.

Keywords: Best value; Interested party, Standing to Protest

Enterprise Information System (EIS) protested the award of a contract to Evolver, Inc. under a request for proposals issued by the US Patent and Trademark Office (USPTO). EIS argued

that the USPTO failed to hold meaningful discussions and improperly evaluated Evolver's proposal.

The RFP provided for a "best value" award based on an evaluation of the following factors (in descending order of importance): experience, technical approach, management approach, past performance, and price. Four offerors responded to the solicitation. An award was made to EIS, after which VMD Systems Integrators, Inc., an unsuccessful offeror, challenged the award in a protest filed with the Court of Federal Claims. The USPTO took corrective action in response to that protest and held a new round of discussions and permitted offerors to submit new final proposal revisions. EIS's final proposal revision, priced at $91,491,055.13, was rated above average for all non-price factors, while Evolver's, priced at $73,662,436, was rated above average for experience, technical approach, and past performance, and average for management approach. Following a best value determination, the USPTO awarded the contract to Evolver.

EIS maintained that it was misled by the USPTO during discussions. In particular, during the reopened discussions, the agency advised EIS and all other offerors as follows:

> In addition to the Independent Government Estimate (IGE) of $118,755,530.58, the USPTO also utilized a Representative Current Contract Price (RCCP) comprised of labor rates from the incumbent contract and the same representative labor mix used for the IGE as part of its price analysis. The RCCP is $90,864,828.
>
> Recognizing the IGE and RCCP are both estimates, please provide rationale for being able to effectively meet the requirements of the RFP and effectively recruit, hire, and retain highly qualified employees with your proposed rate structure. When an offeror's evaluated price is below the IGE and the RCCP, the USPTO may interpret this as a risk to successful performance of the requirements under the RFP.

In responding to this discussion question in its final proposal revision, EIS lowered its price, from $92,432,285 to $91,491,055.13. EIS asserts that, because the discussion question advised that a proposed price below the IGE and RCCP could be interpreted as a performance risk, it was misled into believing that it could not lower its price, which was already approaching the RCCP.

The GAO stated that a procuring agency may not coerce or mislead an offeror during discussions, including with respect to its price. In this instance, the USPTO did not mislead EIS. The plain language of the question, on which EIS predicated its argument, alerted offerors that if they proposed a price below the RCCP, they should explain how they would be able to perform and hire and retain qualified personnel at that price.

EIS made its own decision not to reduce its price significantly, which does not reflect an effort to mislead by the USPTO.

Finally, EIS claimed that the USPTO unreasonably evaluated the performance risk inherent in Evolver's low labor and overhead rates, and that Evolver's proposal should not have been rated above average under the management factor. However, under GAO's rules only an interested party may protest a federal procurement. An interested party is defined as a party that would be next in line for award if its protest is sustained. In this case, there was an intervening offeror, one that was higher rated technically and lower priced, that would have been in line for award if the protester's challenge to the award were sustained, therefore the protester's interest is too remote to qualify it as an interested party. Consequently, GAO dismissed EIS's protest for lack of standing to challenge the award to Evolver.

4. Navistar Defense, LLC; BAE Systems, Tactical Vehicle Systems LP, B-401865; B-401865.2; B-401865.3; B-401865.4; B-401865.5; B-401865.6; B-401865.7, December 14, 2009

Link: GAO Opinion

Agency: Department of the Army

Disposition: Protest sustained.

Keywords: Past performance; Capability evaluation

Navistar Defense and BAE Systems protested the award of a contract to Oshkosh Corporation, under a request for proposals (RFP) issued by the Department of the Army, U.S. Army Tank-Automotive and Armaments Command, for production of the family of medium tactical vehicles

(FMTV). Following the Army's award of the contract to Oshkosh, Navistar and BAE challenged the Army's evaluation of the offerors' technical and price proposals, and contended that the selection decision was flawed. The protest focused on whether the Army reasonably applied a solicitation criterion that existing production capabilities would be viewed as having less risk than those that do not currently exist. The protest also examined whether Navistar and BAE's past performance were properly evaluated in spite of the Army's inability to produce a record that demonstrates its basis for evaluation. The evaluation record lacked any recognition of the risks associated with the fact that Oshkosh did not have in place all the production facilities required to perform the contract. The record also failed to show consideration of all elements of Navistar's and BAE's past performance. These gaps were not adequately explained in a fact hearing that GAO held during the pendency of the protest.

As such, the GAO recommended that the Army reevaluate the offerors' proposals under the capability evaluation factor, conduct a new evaluation of Navistar's past performance that adequately documents the Army's judgments, and make a new selection decision. If at that point, Oshkosh is not found to offer the best value, the GAO has instructed the Army to terminate Oshkosh's contract for the convenience of the government.

5. **GIBBCO, LLC, B-401890, December 14, 2009**

Link: GAO Opinion

Agency: Federal Emergency Management Agency

Disposition: Protest denied.

Keywords: Commercial items

General Counsel P.C. Highlight: Challenges over whether a product is considered to be a commercial item is largely within the discretion of the contracting agency. These determinations are given great deference by the GAO and are very difficult to overturn on protest without significant evidence that the decision by the contracting agency is unreasonable.

GIBBCO LLC protested the terms of solicitation, issued as a commercial item acquisition by the Department of Homeland Security, Federal Emergency Management Agency, for alternative housing units for disaster victims. In this protest, GIBBCO claimed that the

solicited units were not commercial items and that FEMA did not provide sufficient time for vendors to submit responses. The GAO found that FEMA had gone through the proper steps to determine the solicited units to be commercial items. Additionally, because the procurement was conducted under the FAR Subpart 12.6 Streamlined Procedures For Commercial Items, the GAO examined whether FEMA was allowed to require submission of proposals in less than 30 days. On this issue, the GAO determined that FEMA was only required to provide the potential offerors with a reasonable opportunity to respond. As such, both grounds of GIBBCO's protest were denied.

6. **Gas Turbine Engines Inc., B-401868.2, December 14, 2009**

Link: GAO Opinion

Agencies: U.S. Army Material Command

Disposition: Protest denied.

Keywords: Meaningful discussion

General Counsel, P.C. Highlight: Discussions, in the context of a FAR Part 15 Negotiated Procurement must be shown to be meaningful. That is, they may not be misleading and must identify potential deficiencies or weaknesses in the proposals that could be reasonably addressed by the offerors. Thus, it's important to consider whether an agency has met its responsibility of leading an offeror into the areas of concern in the proposal and whether the agency has imparted sufficient information to afford the offeror a fair and reasonable opportunity to correct these deficiencies or mistakes.

In a protest by Gas Turbine Engines, Inc. (GTE) of the award of a contract to Prototype Engineering & Mfg., Inc., under a request for proposals issued by the U.S. Army Materiel Command for maintenance and overhaul of Flutter Dampener Assemblies that are used on the UH-60 Helicopter, the GAO denied the protest because the record did not establish a reasonable possibility that GTE was prejudiced by the lack of meaningful discussions. GTE's primary complaint was that the Army engaged in inadequate and misleading discussions by failing to inform GTE that the agency considered the firm's proposed price to be unreasonably high. Here, GTE's proposed price was substantially higher than the awardee's, and GTE argued that the awardee could not adequately perform the contract at the awardee's proposed low price. This argument was dismissed, and because the record did not

show a reasonable possibility that GTE was prejudiced by the Army's failure to conduct meaningful discussions, the protest was denied.

7. **Lockheed Martin Systems Integration-Owego; Sikorsky Aircraft Company**, **B-299145.7; B-299145.8, December 15, 2009**

Link: GAO Opinion

Agency: Department of the Air Force

Disposition: Requested modification is denied.

Keywords: Bid and Proposal Costs (B&P Costs)

General Counsel, P.C. Highlight: GAO will not recommend an Agency pay a protester's bid and proposal costs (B&P Costs) following a successful protest, so long as the Agency follows the GAO's corrective action recommendation and the successful protester has a reasonable opportunity to compete following the protest, even where the Agency ultimately cancels the procurement for reasonable cause.

Lockheed Martin (LM) and Sikorsky Aircraft Company requested that the GAO modify its recommendation from a previous decision in which it sustained protests by LM and Sikorsky challenging corrective action undertaken by the Department of the Air Force in response to an earlier decision. The original protest had been against the Air Force's award of a contract to the Boeing Company under a request for proposals. In particular, LM and Sikorsky requested reimbursement of their Bid and Proposal Costs (B&P Costs). Following its determination in August of 2007 against the Air Force's award of the contract to the Boeing Company, the GAO recommended that LM and Sikorsky be reimbursed the costs of filing and pursuing their protests. In June of 2009, the Air Force cancelled the original solicitation, in light of which, LM and Sikorsky request a modification of the recommendation to include reimbursement of their costs of preparing their proposals. Because the Air Force properly implemented the GAO's initial recommended corrective actions, LM and Sikorsky participated in the reopened solicitation, and the cancellation of the solicitation was not unreasonable or otherwise improper, it was determined that LM and Sikorsky's requests for reimbursement of their B&P Costs were denied.