



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.generalcounsellaw.com.

1. **DynCorp International, LLC, B-402349, March 15, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest sustained.

Keywords: Task order request for proposal; Indefinite-delivery/indefinite-quantity contracts

General Counsel P.C. Highlight: An agency may not issue a task order that is outside the scope of the original ID/IQ contract. The fact that there may be some small overlap in the services in the task order with those required under the ID/IQ contracts does not permit an agency to purchase other services under the ID/IQ contracts that were not reasonably contemplated when the ID/IQ contracts were issued.

In 2007, the Department of the Army awarded five indefinite-delivery/indefinite-quantity (ID/IQ) contracts to five different firms. These ID/IQ contracts were the result of a request for proposals (RFQ) for program and operations support for the Department of Defense Counter Narcoterrorism Technology Program Office, an office that provides technology to federal agencies and partner nations engaged in counter-drug and counter-narcoterrorism operations. The scope of the work to be performed under the ID/IQ contracts, as stated in the performance work statement, was narrowly limited to providing the “necessary goods and services required ... to support the counter-narcoterrorism mission...” While these goods and services were to be provided worldwide, the performance work statement also stated that the current “primary countries of interest” were Colombia and Afghanistan. The solicitation for the ID/IQ contracts also included three sample task orders that included sample performance work statements, in order to illustrate representative task order requests that would be awarded to the ID/IQ contract holders.

Following the award of the ID/IQ contracts, the Army issued two task order requests. DynCorp International, LLC, which does not hold one of the ID/IQ contracts with the Counter Narcoterrorism Technology Program Office, protested the issuance of these task order requests as being outside the scope of the underlying ID/IQ contracts.

The first task order request sought mentoring and training services for the Afghan Ministry of the Interior and Afghan National Police, while the second task order request sought facility maintenance and logistics support for the first task order request. (in particular, support for the Afghan National Police Development Program at 15 bases in Afghanistan). While the Afghan National Police consists of a variety of organizations related to law enforcement, safety, security and counter-insurgency activities, only two of these organizations have a mission directly involving counter-drug operations. A portion of the task order requests sought 100 mentors, with approximately 30 designated as key personnel; however, only one of these mentors was to provide training for the Afghan Border Police, the only included organization involved in counter-narcoterrorism operations. In fact, none of the descriptions of the mentoring and training tasks included in the task order requests described or mentioned responsibilities directly related to counter-narcoterrorism. As such, DynCorp alleged that the proposed task orders were outside the intended scope of the underlying ID/IQ contracts and should not have been issued.

GAO has always had jurisdiction over protests that allege that the task order increased the scope, period, or maximum value of the contract under which it was issued. Therefore, GAO had jurisdiction to consider DynCorp's protest. In determining whether a task order is beyond the scope of the contract, GAO and the courts look to whether there is a material difference between the task order and the original ID/IQ contract.

The Army countered DynCorp's allegations by stating that there was a nexus between the counter-insurgency activities (as described in the task order requests) and counter-narcoterrorism (as described in the underlying ID/IQ contracts) because the insurgency in Afghanistan is funded by drug trafficking, and therefore, any counter-insurgency organization is necessarily involved in countering illegal drug trafficking. The Army also argued that the language of the ID/IQ contracts was broad enough to include training for all police and Interior Ministry activities, and is not limited to counter-narcoterrorism.

GAO's review of the record determined only a small portion of the requested training services in the first task order request related to counter-narcoterrorism or supported the counter-narcoterrorism mission of the Counter Narcoterrorism Technology Program Office. The fact that a small number of the requested services overlapped with those required under the ID/IQ contracts was not enough to permit the Army to purchase those services that were not reasonably contemplated when the ID/IQ contracts were issued. Furthermore, GAO's review of the task order request for facilities maintenance relating to the first task order request revealed an even larger disconnect between the original ID/IQ contracts and the task order request, with the latter essentially representing a logistics contract to provide dining facilities, maintain water systems, provide HVAC services, and provide medical services.

GAO dismissed the Army's argument that the services sought by the task order requests were within the scope of the ID/IQ contracts because the Afghan insurgency is largely funded by drug trafficking. Following a review of the ID/IQ contracts and the task order requests, the GAO concluded that the ID/IQ contract was narrowly tailored and did not provide for counter-insurgency support. GAO also rejected the Army's argument that the sample task order requests provided in the solicitation for the ID/IQ contracts did not put potential offerors on notice that training outside of counter-narcoterrorism training could be provided. GAO's review of the three sample task order requests in the ID/IQ revealed a clear connection between the activities or technology requested and counter-narcoterrorism operations.

As such, GAO sustained DynCorp's protest, and recommended that the Army cancel the task order requests and either conduct a full and open competition for the services, or prepare the appropriate justification required by Competition in Contracting Act (CICA) to limit the competition.

2. **Rapiscan Systems, Inc., B-401773.2, B-401773.3, March 15, 2010**

Link: [GAO Opinion](#)

Agency: Department of State

Disposition: Protest sustained.

Keywords: FSS contract; Contract line item; Micro-purchase threshold

General Counsel P.C. Highlight: Offeror cannot use a micro-purchase line item in a FSS buy where the actual cost of the line item is incorporated elsewhere and the amount appears to exceed the micro-purchase threshold.

The State Department issued a request for quotations (RFQ) to award a purchase order for gamma ray vehicle and cargo inspection systems. The terms of the RFQ limited potential vendors to those holding a GSA Federal Supply Schedule (FSS) contract for certain required items. In particular, the RFQ included eight contract line items (CLINs) that offerors were required to comply with in order to merit consideration for the purchase order. The initial

purchase order was awarded to Rapiscan Systems, Inc., which had submitted the lowest priced, technically acceptable quote. This issuance to Rapiscan was protested by Science Applications International Corporation (SAIC), which alleged that Rapiscan's FSS contract did not list all eight of the required items at the time the order was issued. This protest was sustained by the GAO, after which the State Department determined that all of the required items were included on SAIC's FSS contract and issued the purchase order to SAIC. Rapiscan protested this award on the basis that SAIC's FSS contract did not include three of the required items.

The FSS program, as overseen by GSA, provides agencies with a simplified process for obtaining commonly used commercial supplies and services, but one that satisfies all requirements for full and open competition. When an agency announces its intention to order from an existing FSS contractor, all items quoted and ordered are required to be within the scope of the vendor's FSS contract. The sole exception to this requirement is for items that do not exceed the micro-purchase threshold of \$3,000, because these items can be purchased outside the normal competition requirements in any case.

Rapiscan's protest challenged SAIC's compliance with CLIN 7 (freight), a requirement that the State Department conceded was not a part of SAIC's FSS contract, but was nevertheless proper because the quoted price for this item did not exceed the \$3,000 micro-purchase threshold. SAIC's initial quote indicated that freight was an open market, rather than an FSS contract, item and showed a unit price of \$6,832. It then submitted a revised quote that showed the same price, but indicated that the price would be discounted \$6,832, resulting in a CLIN 7 price of \$0. The quote also indicated that the price for CLIN 7 would be included in the unit price of Item #1, a shift of the initial quoted price from CLIN 7 to CLIN 1. GAO concluded that, while SAIC's quote showed a price of \$0 for freight, that this was deceptive, and that the actual \$6,832 price for freight would be folded into the price for CLIN1 and therefore would exceed the \$3,000 micro-purchase threshold. Once it was determined that freight was not included on SAIC's FSS contract, the purchase order could not be properly issued to SAIC.

Based on this determination, GAO sustained Rapiscan's protest. It then recommended that the State Department cancel the purchase order and, if possible, issue a new order to the vendor next in line under the terms of the solicitation. If there are no acceptable quotations, the State Department is to cancel the RFQ and re-solicit its requirements.

3. Saif Industries, B-402426, March 16, 2010

Link: [GAO Opinion](#)

Agency: Defense Logistics Agency

Disposition: Protest denied.

Keywords: Government surplus material

General Counsel P.C. Highlight: A protester must demonstrate that the Agency evaluation was unreasonable in order for GAO to sustain its protest. Mere disagreement with the evaluation is not sufficient to support sustaining the protest.

The Defense Logistics Agency (DLA) issued a request for quotations (RFQ) for the purchase of sleeve bearings to be used in Ohio Class nuclear submarines. The RFQ specifically stated that vendors who were offering government surplus materials were required to provide additional information as stated in the solicitation. Government surplus materials are those items that were once owned by the government, were sold as surplus, and are now being offered for sale back to the government. The solicitation stated that vendors offering these products had to include supply information about the original manufacturer of the parts, the agency that initially sold the part to the vendor, percentages of the parts that had been inspected for corrosion or defects, and any specifications or drawings if the parts were originally manufactured pursuant to such.

Saif Industries submitted a timely quote in response to this RFQ, however, its submission did not include any of the representations for government surplus materials discussed above, as required by the solicitation. DLA contacted Saif regarding this deficiency, and requested that it supply the missing information. Saif then submitted a copy of the RFQ's government surplus materials clause, with a majority of the required information completed. DLA found this supplemented material to still be insufficient and it notified Saif of its decision. Saif filed an agency level protest that was denied, and then followed with a protest to GAO.

In its protest, Saif largely challenged DLA's determination as unreasonable, alleging that DLA did not properly examine its surplus documentation. GAO's review of a protest that challenges an agency's evaluation is limited to ensuring that the agency's evaluation was reasonable and consistent with the solicitation's criteria, and with procurement statutes and

regulations. Here, it was established that DLA found Saif's surplus materials certification failed to provide several pieces of information, as required by the RFQ. Specifically, Saif did not include information related to the percentage of parts that had been inspected for corrosion or defects, and it did not provide a copy of the specifications or drawings to which the bearings were originally created. Thus, DLA was not able to determine whether Saif's products complied with the latest revision of the drawing. Because the RFQ required specific information from vendors related to government surplus materials, and because this information was not sufficiently provided by Saif, GAO determined that DLA's evaluation, and rejection, of Saif's quotation was reasonable and consistent with the solicitation. GAO denied Saif's protest.