



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 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.generalcounselaw.com.

1. Sherman Plaza, Inc., B-402310.6, August 4, 2010

Link: [GAO Opinion](#)

Agency: Department of Veterans Affairs

Disposition: Protest denied.

Keywords: Proposal Evaluation; discussions

General Counsel P.C. Highlight: GAO reviews challenges to an agency's evaluation of offers only to determine whether the agency's evaluation conclusions were reasonable and consistent with the solicitation's evaluation factors and applicable procurement laws and regulations. A protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable.

Sherman Plaza, Inc. (Sherman) protests the award of a lease by the Department of Veterans Affairs (VA), under a solicitation for offers (SFO), for office space to be occupied by the VA's Consolidated Patient Account Center (CPAC).

The SFO sought offers for the award of a 20-year lease for office space in Madison, Wisconsin. Offerors were to propose space in existing buildings that provides 380 dedicated parking spaces, access to public transportation, and other amenities. The SFO stated that the lease would be awarded on a best value basis considering price, technical quality, operations and maintenance plan, and evidence of capability to perform prior to award.

The awardee proposed to provide 389 parking spaces in a two story building, while Sherman proposed 387 parking spaces in a one story building. A five-member technical evaluation board (TEB) assigned point scores for each factor. The awardee received the highest score. Sherman filed four protests challenging the evaluation of offers. The VA subsequently advised GAO that it would take corrective action, including amending the SFO, seeking final revised offers, evaluating the offers, and making a new selection decision.

In accordance with the corrective action, the VA issued an amendment, which revised the award factors and subfactors. The amendment advised offerors that "this is the final submission for this procurement, and there will be no modifications, clarification, negotiations, or discussions upon receipt of your proposal." Sherman and the original awardee submitted revised offers and the awardee again received the highest score.

Sherman's proposal was the least desirable since it was located within an active retail shopping center on a major highway, which raised concerns about security, parking, and traffic congestion. The awardee's offer was "far superior" with regard to energy efficiency, and included a more detailed plan for operations and maintenance than any of the other offers.

GAO states that it reviews challenges to an agency's evaluation of offers only to determine whether the agency's evaluation conclusions were reasonable and consistent with the solicitation's evaluation factors and applicable procurement laws and regulations. A protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable.

Sherman argued that the awardee's offer was materially deficient since it did not demonstrate its compliance with the SFO requirement for 380 dedicated parking spaces. Even though the awardee proposed 389 parking spaces, the building housing the parking is shared by two tenants, including one with 20 employees. GAO's review of the record shows that the awardee did provide a plan and short narrative to show how it would satisfy the SFO parking requirements and that the VA was aware of the other tenant. GAO finds that the agency had a reasonable basis to conclude that the awardee's offer demonstrated that it would meet the SFO requirements.

Sherman also asserts that: (1) the awardee would have to expand its parking site to meet the needs of both tenants and the expansion would infringe on neighboring floodplain/wetland areas; and (2) the awardee received an almost perfect score under the quality of site evaluation subfactor even though the awardee did not guarantee the minimum 380 parking spaces. However, the VA submitted a Federal Emergency Management Agency (FEMA) map showing that the offered site was outside the floodplain/wetland areas. The record also indicates that the score assigned under the quality of site evaluation subfactor was based on the facts that the awardee's property was located by a bus stop, was adjacent to a major highway, was accessible to bike and walking trails, was located near restaurants, and provided a natural setting. GAO finds that Sherman had not shown that the evaluation of the awardee's proposal was unreasonable.

Next, Sherman asserts that the agency could not reasonably re-award this lease without holding discussions with Sherman. But, the SOF, as modified following the corrective action, stated that the VA would not hold discussions or seek additional submissions. GAO states that Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals be filed prior to that time. GAO states that the protest here, which challenges the announced ground rules for the post-corrective action competition, i.e. that it would not hold any further discussions with

any offerors, constitutes a challenge to the terms of the solicitation. GAO concludes that the allegations brought by Sherman are untimely. The protest is denied.

2. **Nilson Van & Storage, Inc., B-403009, August 19, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Preaward/Postaward Requirements

General Counsel P.C. Highlight: Usually, a certification requirement listed in the Performance Work Statement (PWS) in an RFP may be satisfied after award and prior to the beginning of performance and is not a precondition to submitting a proposal.

Nilson Van & Storage, Inc. (Nilson) protests the award of a contract, under an invitation for bids (IFB), issued by the Department of the Army (Army), for the preparation, shipment and/or storage of personal property of Department of Defense personnel.

The performance work statement (PWS) of the IFB advised bidders that “prospective contractors” engaged in interstate transportation “shall be approved and hold authorization in their own name by the Interstate Commerce Commission, or, if engaged in intrastate transportation, a certificate issued by the appropriate state regulatory body will be required.” The IFB also provided that Federal Acquisition Regulation (FAR) §52.247-2, which provides that the “offeror shall furnish to the Government, if requested, copies of the authorization before moving the material under any contract awarded,” was applicable.

Nilson argues that the awardee is not eligible for award because it does not have Interstate Commerce Commission or Department of Transportation approval as a “for hire carrier,” and does not have approval, either federal or state, for the transportation of household goods, as required by the IFB. Nilson’s argument is based on its interpretation of the IFB that that bidders were required to possess the authorizations prior to receiving award. GAO does not agree with this interpretation; rather, it states that the IFB made the authorization requirement applicable only to the awardee, and only after the award. The requirement was set forth in the PWS, the portion of the IFB that established the requirements that the contractor must meet in performing the contract. The requirement also applied to “prospective contractors,” not to bidders, another indication that the requirement was part of contract performance. The

requirement applied to the contractor, rather than to all bidders, and thus was not intended as a prerequisite to receiving award. The protest is denied.

3. **JBG/Naylor Station I, LLC, B-402807.2, August 16, 2010**

Link: [GAO Opinion](#)

Agency: General Services Administration

Disposition: Protest denied.

Keywords: Terms of a Solicitation

General Counsel P.C. Highlight: A contracting agency has the discretion to determine its needs and the best method to accommodate them. 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 they are necessary to satisfy the agency's legitimate needs.

JBG/Naylor Station, LLC (JBG), protests the terms of a solicitation for offers (SFO), issued by the General Services Administration (GSA), for the lease of office space to house portions of the Department of Homeland Security (DHS).

The procurement was for a total of 1,136,000 rentable square feet of office space, to be apportioned among no more than five buildings, to house three main DHS components. The agency originally posted a request for information (RFI) on the Federal Business Opportunities (FedBizOpps) website seeking market feedback from potential sources concerning GSA's procurement strategy. The RFI, which did not identify DHS as the lease occupant, intended to "assess the availability of suitable space and to assist the Government in establishing the methodology by which suitable space will be procured." The requirement was for "existing and/or new construction," and the estimated occupancy date was the second half of calendar year 2013.

Shortly after the final acquisition plan was approved, the agency posted an expression of interest (EOI) on FedBizOpps to gauge the level of interest from potential sources for essentially the same requirements in the RFI. However, the EOI did identify DHS as the user agency, used the same estimated occupancy date, and stated that the "Government will also consider new construction that...can provide occupancy consistent with the estimated occupancy date."

The agency issued the SFO, which in relevant part required that offers contain approvals for the offered site so that no other approvals would be required to construct and/or occupy the offered building. The SFO also included the requirement that prior to award of the lease, all offerors were to provide evidence of all building permits necessary to renovate, construct, and/or modify all offered buildings.

Nilson alleges that the SFO improperly limited competition by effectively precluding an offer of new construction. GAO states that a contracting agency has the discretion to determine its needs and the best method to accommodate them. 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 they are necessary to satisfy the agency's legitimate needs. Where a protester challenges a requirement as unduly restrictive, the agency has the responsibility to establish that the requirement is reasonably necessary to meet its needs. The issue is whether the agency's explanation is reasonable. Mere disagreement with the agency's judgment does not show that the judgment is unreasonable. The fact that a requirement may be burdensome or even impossible for one firm to meet does not make it objectionable if the requirement properly reflects the agency's needs.

For the requirement regarding the estimated occupancy dates, the agency developed a project schedule weighing a number of considerations against DHS's desire to achieve consolidation of its offices as soon as possible. These considerations included the length of time that a procurement of this size requires, whether there would be sufficient existing space in the market to satisfy the requirement, how long to allow for construction, and the termination date of existing leases. The occupancy dates were driven by current lease expiration dates and what would be least costly in terms of vacancy risk.

Regarding the SFO permit requirements, the agency calculated that site plan approval would take an estimated one-two years for new construction, and the design and completion of construction documents through permit approvals could take that long again. An offeror starting from bare ground could require two to four years to obtain permits and would still need time for construction. Because the total space requirement must be available within about 36 months, the agency considered timely delivery of the space achievable for an offeror proposing new construction, but only if construction began immediately after award. GAO states that the agency reasonably explained the nexus between its need to have new leases in place for timely occupancy and the requirement that offers include site plans and certain permits and that offerors produce permits by a certain date. The requirements were necessary to meet the agency's needs. The protest is denied.

4. **International Management Services, Inc., B-402645.2, August 25, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Terms of the Solicitation

General Counsel P.C. Highlight: Specifications must be sufficiently definite and free from ambiguity so as to permit competition on an equal basis. An ambiguity exists if a solicitation requirement is subject to more than one reasonable interpretation when read in the context of the solicitation as a whole.

The Department of the Army (Army) issued a request for proposals (RFP), for postal operations services at multiple locations in Afghanistan under a fixed-price performance-based contract. The RFP sought proposals to perform mail handling services at Army Post Offices at Baghram Air Field and Kandahar Air Field for a base year and four option years. The performance work statement (PWS) in the RFP set forth a base requirement, that is, the volume of mail. The RFP also provided for offerors to submit prices for increased volumes of mail, referred to as surge levels. The Army also issued an amendment, which provided an explanation of surge pricing.

International Management Services, Inc. (IMSI) alleges that the terms of the RFP are improperly ambiguous because it is not clear when the contractor will be entitled to additional compensation under a surge request due to increased mail volume. GAO states that specifications must be sufficiently definite and free from ambiguity so as to permit competition on an equal basis. An ambiguity exists if a solicitation requirement is subject to more than one reasonable interpretation when read in the context of the solicitation as a whole.

GAO agrees with the Army that the RFP, as amended, provided that the Army will give advance notice to the contractor before activating the surge request, and states that the contractor will be entitled to surge pricing on the first day of surge service execution. IMSI does not show that the RFP is defective just because it does not address, to its satisfaction, the particular situation.

Regarding the difference between the mail volume in the pricing matrix and the historical figures in the RFP, IMSI provides no basis to question the Army's position that this data is accurate historical information, and that offerors can reasonably prepare their proposals for the higher volume in the pricing matrix by considering the overall volume requirements at each airfield. IMSI argues that mail volume at individual post offices has fluctuated and the need to adjust to fluctuations is a risk that offerors may be required to bear. GAO states that it is within the discretion of an agency to impose substantial risk on the contractor and minimal administrative burden on the agency. IMSI fails to provide persuasive support for its claim that the risk of mail volume fluctuations imposes an undue risk. The protest is denied.

5. **Edmond Computer Company; Edmond Scientific Company, B-402863; B-402864, August 25, 2010**

Link: [GAO Opinion](#)

Agency: Department of Veterans Affairs

Disposition: Protests denied.

Keywords: Small Business Set-Asides; GSA Federal Supply Schedule (FSS) Program

General Counsel P.C. Highlight: FAR Part 19, pertaining to small business programs and set-aside requirements, does not apply to BPAs or orders placed against FSS contracts.

Edmond Computer Company and Edmond Scientific Company protest the terms of a request for quotations (RFQ), issued by the Department of Veterans Affairs (VA), to vendors holding General Services Administration (GSA) Federal Supply Schedule (FSS) contracts. Edmond Computer is a firm that is both a service-disabled veteran-owned small business (SDVOSB) and an FSS holder, and Edmond Scientific is a firm that is both a veteran-owned small business (VOSB) and an FSS holder. Both firms allege that the competition should be limited to small business participation and conducted outside of the FSS program.

The RFQ was issued pursuant to FAR part 8 procedures, and contemplates the issuance of a single blanket purchase agreement (BPA) against the successful vendor's FSS contract. The solicitation is not set aside for small businesses, SDVOSBs, or VOSBs. The protesters contend that the decision to conduct this competition among FSS vendors using FAR part 8 procedures violates the small business set-aside requirements of the Small Business Act. The FAR provision that is cited implements the Act by generally requiring an agency to set aside

acquisitions with an anticipated dollar value of more than \$100,000, such as the one here, for small businesses where there is a reasonable expectation of receiving fair market prices from at least two small business concerns (the so-called “Rule of Two”).

GAO states that the regulations implementing the Small Business Act and GSA’s FSS Program expressly anticipate and exclude FSS buys from set-aside requirements. In this regard, the FAR provisions pertaining to FSS contracting, provide that FAR Part 19, pertaining to small business programs, does not apply to BPAs or orders placed against FSS contracts. Nothing in the Small Business Act suggests or requires that the Rule of Two take precedence over the FSS program. To the contrary, the implementing regulations for the small business set-aside program and the FSS program expressly provide that set-aside requirements for the program do not apply to FSS buys. GAO concludes that the Small Business Act and its implementing regulations do not impose a requirement on agencies to first evaluate whether a solicitation should be set-aside for small businesses before purchasing goods or services through the FSS program. The protests are denied.