



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. **Photonics Optics Tech, Inc., B-402967, July 28, 2010**

Link: [GAO Opinion](#)

Agency: Department of Air Force

Disposition: Protest denied.

Keywords: SBIR

General Counsel P.C. Highlight: Where an agency is conducting an SBIR procurement, it has substantial discretion to determine whether it will fund a proposal. In light of such discretion, GAO's review of an SBIR procurement is limited to determining whether the agency violated any applicable regulations or solicitation provisions, or acted in bad faith.

Photonics Optics Tech, Inc. (Photonics) protests a Department of Air Force (Air Force) decision not to fund its Phase II proposal under the Department of Defense's Small Business Innovation Research (SBIR) program.

The SBIR solicitation lists research topics and has three phases: Phase I, to determine the scientific, technical, and commercial merit of ideas; Phase II, to perform the principal research and development effort resulting in a well-defined, deliverable prototype; and Phase III, during which a small business must obtain private and public funding to develop the prototype into a viable commercial product for sale to military and/or private sector markets.

Photonics had been awarded a phase I contract and the Air Force advised, under its standard SBIR procedure, that Photonics could submit a phase II proposal. The phase II proposal reflected various strengths, but also contained several weaknesses. The Phase II proposal was denied funding.

GAO states that where an agency is conducting an SBIR procurement, it has substantial discretion to determine whether it will fund a proposal. In light of such discretion, GAO's review of an SBIR procurement is limited to determining whether the agency violated any applicable regulations or solicitation provisions, or acted in bad faith.

Based on GAO's review of the record, it found that Photonics generally disagreed with the evaluation of its proposal, but failed to specifically address some of the criticisms, and failed to establish that the agency's assessments were unreasonable. For example, with regard to the

Air Force's criticism that the proposal failed to substantiate Photonic's estimates regarding market potential, Photonics stated that it was "confident that due to the innovativeness of the proposed product over the state-of-the-art technology, the product will attract continued government and industrial investment to develop the full-fledged commercial product." The Air Force identified and documented its assessment of various weaknesses in Photonic's proposal, consistent with the solicitation's evaluation criteria. The protest is denied.

2. AMEC Earth & Environmental, Inc., B-401961; B-401961.2, December 22, 2009

Link: [GAO Opinion](#)

Agency: U.S. Coast Guard

Disposition: Protest sustained.

Keywords: Construction Design-Build; Discussions

General Counsel P.C. Highlight: It is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful, equitable, and not misleading.

The U.S. Coast Guard (Coast Guard) issued a request for proposals (RFP) for design-build and construction services for the Department of Homeland Security. The RFP contemplated the award of up to five indefinite-delivery/indefinite-quantity (ID/IQ) contracts. The contracts were to be awarded for a one-year base period, plus six one-year option periods. Estimated cost of the construction services was between \$3 million and \$100 million, with a \$500 million ceiling.

The Coast Guard used a two phase solicitation and selection process under Federal Acquisition Regulation (FAR) Subpart 36.3 (Two Phase Design-Build Selection). Awards were to be made to the firm offering the best value to the government considering six technical factors and price. The technical factors were: technical approach; particular project execution strategies; preliminary project schedule; preliminary quality control plans; small business utilization; and demonstration of participation in E-verify.

AMEC's protest deals with factors two and three. For factor two, offerors were required to provide a narrative addressing, "the project site specific conditions at Cape May, NJ, foundation and long and short term settlement issues, environmental, and complications

related to doing work in the New Jersey area.” AMEC’s proposal identified the project site as potentially a wetland and the Coast Guard issues a risk rating as moderate.

For factor three, offerors were required to provide, among other things, a narrative describing their scheduling capabilities, planning organization, and a description of the equipment and “software/hardware” the offerors intended to use in performance of the seed project. AMEC received a satisfactory with moderate risk rating based on the weakness of using Microsoft Project, a software program which is not the most applicable for managing the design and build process of construction projects.

The Coast Guard, during discussions, asked AMEC to address the above weaknesses and to submit a revised proposal. Upon further explanation, AMEC’s risk rating was moved to “low” for both factor two and factor three. However, the agency ultimately did not select AMEC for award.

GAO states that the record reflects that the agency’s discussions with AMEC with respect to factor three were flawed. GAO states that it is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful, equitable, and not misleading. Here, the Coast Guard’s technical evaluation team identified a weakness in AMEC’s use of Microsoft Project and in its discussions with AMEC, the agency’s questions were focused on specific features of the software. By being asked to only address specific questions regarding the particular features of Microsoft Project, AMEC could not have reasonably understood the true nature of the agency’s concerns about the software. The agency’s discussions were materially misleading.

GAO also finds that the agency’s consideration of the wetlands issue under evaluation factor two was improper. The provision in the RFP essentially required offerors to perform due diligence regarding the nature of the agency’s requirements and to incorporate their findings in their proposals. AMEC advised the agency that the project site may be a wetland and the record indicates that the other offerors did not specify this potential concern in their proposals. The Coast Guard’s failure to clarify the wetland issue was contrary to the fundamental principle that a solicitation must provide for the submission of proposals based on a common understanding of the agency’s requirements.

GAO sustains the protest and recommends that the agency reopen the competition and hold meaningful discussions with AMEC, and other offerors, and request final proposal revisions and evaluate the revised proposals according to the terms of the solicitation. Additionally, the agency should reimburse AMEC the costs of filing and pursuing its protest.