



# 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](http://www.generalcounselaw.com).

1. East West, Inc., B-400325.7; B-400325.8, August 6, 2010

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**Link:** [GAO Opinion](#)

**Agency:** Department of Health and Human Services

**Disposition:** Protest denied.

**Keywords:** Procurement Integrity; Prejudice

**General Counsel P.C. Highlight:** Proof of actual prejudice is an essential part of any viable protest. Without a showing of actual prejudice, the protest will be dismissed.

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East West, Inc. (East West) protests the award of a contract, issued by the National Institutes of Health (NIH), for custodial services at NIH buildings.

The RFP contemplated the award of a five-year indefinite-delivery/indefinite-quantity contract to the offeror whose proposal represented the best value to the government, considering technical, cost/price, and past performance. Following the receipt of the initial proposals, the contracting officer (CO) ultimately established a competitive range of five proposals and invited the firms to submit revised price proposals. East West responded by reducing its proposed price. Another offeror was selected for award.

The day after the decision was signed, the agency project officer met with the awardee's personnel to discuss various concerns and to offer an unofficial notice of award (contingent on receiving final authority to make an award). The awardee's project manager asked to meet with staff members of the other two offerors, but this request was denied by the CO. East West contacted the contract specialist to complain that the project manager had visited its offices and interviewed its employees anyway. The contract specialist responded that no official award had occurred even though a decision had been made and was not sure why a staff member from the awardee's company had visited East West.

East West requested a debriefing and filed a protest following the official award. The protest was dismissed as premature since it was filed before the debriefing was received. East West then filed a second protest after receiving the debriefing. NIH took corrective action by suspending contract performance and conducting an investigation of the alleged procurement integrity violations. East West's protest was dismissed.

The CO conducted an investigation and found no evidence that the awardee had received source selection or procurement sensitive information, or that it had become privy to information that gave it a competitive advantage. The awardee was again selected to receive the contract.

East West contends that NIH officials committed a procurement integrity violating by sharing “procurement-related” information with the awardee regarding the contract award prior to making an official award. GAO states that the Procurement Integrity Act prohibits any present or former official of the United States from “knowingly” disclosing contractor bid or proposal information or source selection information before the award of a contract. Source selection information includes bid and proposal prices, source selection and technical evaluation plans, technical and cost/price evaluations, competitive range determinations, rankings of bids/proposals, and reports/evaluations of source selection panels, boards, or advisory councils.

GAO’s review of the record fails to demonstrate that a prejudicial procurement integrity violation occurred. There is no evidence that an agency official disclosed East West proposal information to the awardee. The agency admitted to giving notice before it had actual authority to make award, which arguably was a violation, but the GAO found that this disclosure did not prejudice East West. Because proof of prejudice is necessary for pursuit of a protest, the GAO denied the protest.

## 2. **Hardiman Remediation Services, Inc., B-402838, August 16, 2010**

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**Link:** [GAO Opinion](#)

**Agency:** Department of the Army

**Disposition:** Protest denied.

**Keywords:** Unacceptable technical approach

**General Counsel P.C. Highlight:** It is the offeror’s responsibility to submit an adequately written proposal for the agency to evaluate.

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Hardiman Remediation Services, Inc. (Hardiman) protests the elimination of its proposal as unacceptable under a request for proposals (RFP), issued by the Department of the Army, for commercial demolition services.

The RFP sought proposals for award of at least three and up to five fixed-price, indefinite-delivery/indefinite-quantity (IDIQ) multiple award task order contracts for demolition services. The RFP identified four evaluation factors: (1) technical/management approach, (2) past performance, (3) price, and (4) utilization of small business. Hardiman's proposal was eliminated from the competitive range because it received an unacceptable rating for specialized experience and task order technical approach subfactors of the technical/management approach factor as well as a marginal rating for the management approach subfactor. It challenges the unacceptable ratings.

GAO states that the evaluation of proposals is a matter within the discretion of the procuring agency, since the agency is responsible for defining its needs and deciding on the best methods of accommodating them. GAO will question the agency's technical evaluation only where the record shows that the evaluation does not have a reasonable basis or is inconsistent with the RFP. It is the offeror's responsibility to submit an adequately written proposal for the agency to evaluate. The agency reasonably evaluated Hardiman's proposal as unacceptable where Hardiman failed to demonstrate the breadth and depth of experience in performing the work described in the RFP and the proposal only reflected a generic discussion of how it would accomplish demolition work required by the RFP. The generic discussion was not what the RFP required and was insufficient to demonstrate that firm's depth and breadth of experience and technical approach to execute each phase of the task order project. The protest is denied.

3. **Eggs & Bacon, Inc., B-402591.2, August 13, 2010**

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**Link:** [GAO Opinion](#)

**Agency:** Department of the Army

**Disposition:** Protest denied.

**Keywords:** Cost/Technical Trade Off

**General Counsel P.C. Highlight:** Mere disagreement with the agency's determinations as to the relative merit of competing proposals and its judgment as to which proposal offer the best value, does not establish that the valuation or source selection was unreasonable.

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The Department of the Army (Army) issues a request for proposals (RFP) for event production services. The RFP sought proposals for a contractor to furnish all non-military personnel, equipment, tools, materials, and supervision to perform pre-production,

production, and event production services for the Spirit of America 2010 program. The RFP contemplated award of a fixed-price contract to the offeror whose proposal was determined to represent the best value to the government based on technical capability, past performance, relevant experience, personnel skill/experience, and price. The non-price factors, combined, were significantly more important than price. The RFP also advised that award would be made without engaging in discussions.

Eggs & Bacon, Inc. (EBI) submitted its proposal in response to the RFP. Both EBI and the awardee were rated equally on each non-price factor. But EBI did not receive the award because, with non-price factor scores equal to the awardee, EBI was higher priced than the awardee's. After receiving a debriefing, EBI protested the award to GAO and, in response, the agency took corrective action to re-evaluate the proposals.

The proposals were re-evaluated and the source selection authority lowered the overall evaluation rating for the awardee's proposal under the technical capability factor, but still determined that the price offered by the awardee was fair and reasonable and that the cost savings associated with View One's proposal outweighed the technical advantages associated with EBI's proposal. The awardee's proposal was again selected for award.

GAO reviews challenges to an agency's evaluation of proposals only to determine whether the agency acted reasonably and in accord with the solicitation's evaluation criteria and applicable procurement statutes and regulations. An agency may properly select a lower-rated, lower-priced proposal, even where price is less important, where it reasonably concludes that the price premium involved in selecting the higher-rated proposal is not justified. The Army provided a detailed record of its evaluation of proposals, the selection decision, and the proposal submitted by both offerors.

GAO's review of the record shows nothing to lead it to conclude that the agency's findings and conclusions for each proposal were unreasonable. For example, under the personnel skill/experience factor, the record shows that both proposed project managers were judged to have most, but not all, the required experience and therefore, each offeror's proposal was assigned a rating of marginal under that factor. Mere disagreement with the agency's determinations as to the relative merit of competing proposals and its judgment as to which proposal offer the best value, does not establish that the valuation or source selection was unreasonable.

As to the best value determination, the record shows that the agency was aware of the relative merits and comparative prices when it performed the tradeoff. The tradeoff was made comparing the relative merits of the EBI proposal with those of the awardee's proposal, and

considering as well, the price difference. It is clear that the agency understood the difference between the two proposals and reasonably decided to award the contract to the other offeror because of what the agency views as the price premium associated with EBI's higher-rated proposal. GAO states that there is no basis to object to the agency's source selection decision. The protest is denied.

#### 4. JBlanco Enterprises, Inc., B-402905, August 5, 2010

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**Link:**     [GAO Opinion](#)

**Agency:**   Department of the Air Force

**Disposition:** Protest denied.

**Keywords:**   Price Calculation Error

**General Counsel P.C. Highlight:**   An offeror has the responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. The offeror must affirmatively demonstrate the merits of its proposal, and risks the rejection of its proposal if it fails to do so.

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The Department of the Air Force issued a request for proposals (RFP) for the repair and replacement of roofs at the United States Air Force Academy. The RFP was set aside for eligible section 8(a) firms, provided for the award of a fixed-price, indefinite-delivery/indefinite-quantity (ID/IQ) contract for a base and four option years. Offerors were informed that award would be made to a technically acceptable offeror on the basis of a past performance-price tradeoff. The RFP stated that the agency did not intend to conduct discussions or provide offerors with an opportunity for proposal revisions.

JBlanco Enterprises, Inc. (JBlanco) submitted a proposal that was found technically unacceptable since its required technical volume did not demonstrate compliance with the specification's instructions for preparation of the demonstration project. Specifically, the RFP instructions required the offeror to apply a multiplier at one point in the price calculations, JBlanco applied the multiplier at a different point in the price calculation. JBlanco argues that its noncompliance was only a minor error that the firm should have been permitted to clarify.

GAO states that an offeror has the responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. The offeror must affirmatively demonstrate the merits of its proposal, and risks the rejection of its proposal if it fails to do so. JBlanco did not submit a technical proposal that clearly demonstrated its ability to satisfactorily calculate prices as instructed. GAO does not agree that the failure to demonstrate its capability to properly prepare task order proposals could be waived as a minor error or corrected through clarifications. The error implicates JBlanco's ability to properly prepare its task order proposals and GAO finds no basis to question the reasonableness of the agency's determination. The protest is denied.

5. **Sig Sauer, Inc., B-402339.3, July 23, 2010**

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**Link:** [GAO Opinion](#)

**Agency:** Bureau of Alcohol, Tobacco, Firearms and Explosives

**Disposition:** Protest denied.

**Keywords:** Technical Evaluation

**General Counsel P.C. Highlight:** An agency is accorded considerable discretion in making such a subjective judgment as to what best meets its needs, particularly where, as here, the judgment involves matters of human life and safety.

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Sig Sauer, Inc. protests the rejection of its proposal under request for proposals (RFP), issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for semi-automatic handguns.

Offerors were instructed to submit written proposals and sample handguns, in both standard and compact sizes, to be evaluated in three phases. Under phase I, the handguns were to be evaluated on a pass/fail basis for compliance with the RFP's specifications. Under phase II, ATF planned to perform a live-fire assessment of the guns, consisting of four parts. Offerors were informed that offers "deemed most suitable for performance" would continue to phase III. The RFP provided for the award of a single or multiple indefinite-delivery, indefinite-quantity (IDIQ) contract to the offeror whose proposal was found to represent the best value after the phase III evaluation.

Sig Sauer, Smith & Wesson Corp., and Glock, Inc. submitted proposals that were evaluated as passing phase I. During phase II, a record was kept of any stoppages or malfunctions that occurred during the live fire testing. The records show that ATF agents recorded 58 stoppages with Sig Sauer's full-size and compact pistols, 13 of which were considered to be gun-induced and 45 shooter-induced. The source selection board recommended that Sig Sauer's handgun be excluded from further consideration as unacceptable with respect to reliability. The contracting officer agreed.

Sig Sauer protested, challenging the agency's phase II live-fire assessment. ATF took corrective action, stating that it would reconsider its phase II evaluations. ATF did not reconvene the source selection board or re-evaluate proposals. The contracting officer reviewed the live-fire assessment record, the phase II incident reports, and the declarations made during the original protest. The contracting officer found that Sig Sauer's proposal was appropriately excluded due to the significant number of malfunctions.

Sig Sauer challenges the live-fire testing assessment, arguing that the source selection board substituted its own judgment for that of the agents that performed the testing. GAO states that in reviewing protests challenging the evaluation of proposals, it will not conduct a new evaluation or substitute our judgment for that of the agency but examine the record to determine whether the agency's judgment was reasonable and in accord with the RFP evaluation criteria. GAO affords particular deference to the technical expertise of agency personnel regarding judgments that involve matters of human life and safety. GAO finds that the agency's assessment of Sig Sauer's proposal was reasonable and consistent with the RFP's evaluation criteria. The RFP provided that "[r]atings on the proposed [shooters' tests], any stoppages or parts breakages during testing, and the written evaluations will be recorded and used to evaluate each model." The record supports ATF's assertion that it considered these things when it affirmed the source selection board's earlier determination to exclude Sig Sauer. GAO agrees that the agency reasonably concluded that the stoppages provided a more significant measure of the guns' reliability than the adjectival ratings for reliability assigned by individual shooters.

Sig Sauer asserts that ATF placed too great an emphasis upon reliability in determining which offers should continue to phase III. GAO disagrees since the RFP provided that only those offers which were "deemed most suitable for performance to the Government" would be included in the phase III evaluation. GAO finds that the agency could reasonably rely upon its concerns about the reliability of Sig Sauer's handguns to exclude its proposal from the final phase. The protest is denied.