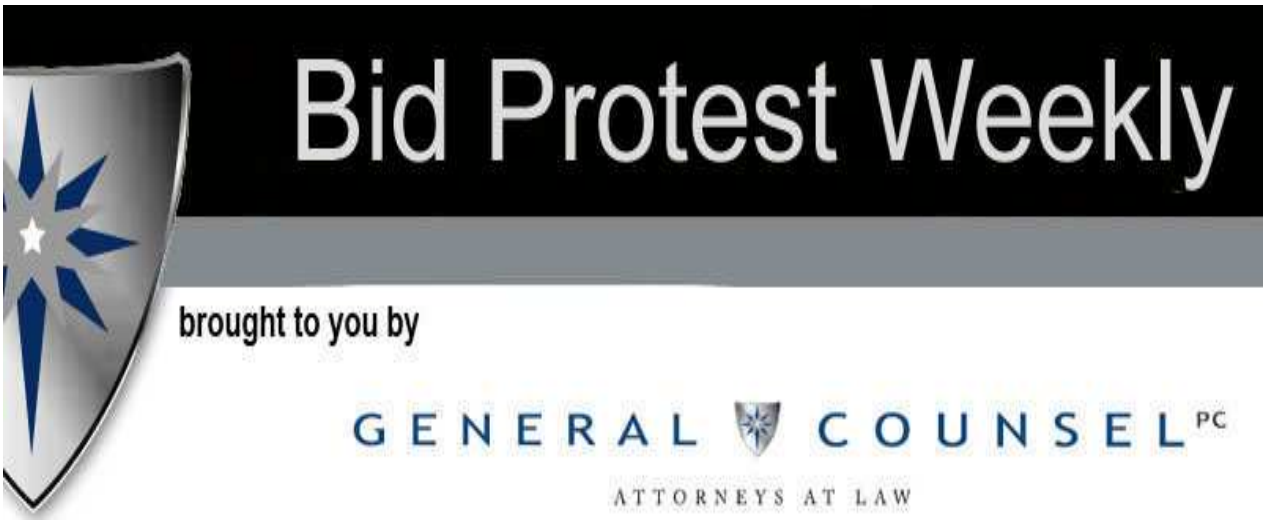

May 19, 2010

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. Nutriom, LLC, B-402511, May 11, 2010

Link: GAO Opinion

Agency: Defense Logistics Agency

Disposition: Protest denied.

Keywords: Option Exercise

General Counsel P.C. Highlight: GAO will not question an agency's exercise of an option under an existing contract unless the protester shows that the agency failed to follow applicable regulations or that the determination to exercise the option, rather than conduct a new procurement, was unreasonable.

Following a request for proposals (RFP) for the award of a fixed-price, indefinite-quantity contract for a base year with four option years for a dehydrated egg mix, the Defense Logistics Agency (DLA) received three offers, including Nutriom and, the eventual awardee, Oregon Freeze Dry ("OFD"). The initial award was not protested.

After OFD completed the base year of the contract and prior to DLA exercising the second option year, Nutriom informed DLA that it had made an investment in new production equipment that would allow it to offer its product at a lower price than OFD's price for the next option period. DLA conducted a market survey, weighing several factors, such as Nutriom's ability to continually provide the product at its stated lower market price and OFD's excellent past performance, quality history, and conformance to contractual terms, conditions, and price. The CO reasoned that "Due to the urgency of the current requirement, resoliciting is not an option since there is no guarantee that Nutriom's product could meet the 2[-percent] moisture requirement and that their price will be lower than the current contract price." The CO concluded that exercising the option in OFD's contract and not resoliciting the requirement was still the most advantageous to DLA. Nutriom protested the CO's decision not to reprocure and to exercise OFD's option.

As a general rule, option provisions in a contract are exercisable at the discretion of the government. GAO will not question an agency's exercise of an option under an existing contract unless the protester shows that the agency failed to follow applicable regulations or that the determination to exercise the option, rather than conduct a new procurement, was unreasonable. GAO found no basis to question DLA's exercise of the option in OFD's contract where the record showed that DLA had specifically considered Nutriom's lower

price due to the new manufacturing process, but that the process had not yet been tested. GAO denied the protest.

2. Najilaa International Catering Services, B-402434; B-402434.2, April 23, 2010

Link: GAO Opinion

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Technical Evaluation; Price Realism

General Counsel P.C. Highlight: A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable.

The Department of the Army issued a request for proposals (RFP) to award a fixed-price indefinite-delivery/indefinite-quantity (ID/IQ) contract for a base year and four option years for the mobilization, lease, operation, and demobilization of dining facilities (DFACs) for soldiers and civilian personnel in Kuwait. Najilaa International Catering Services (Najilaa) was not awarded the contract and challenges the agency's evaluation of proposed staffing levels and associated pricing of the awardee, who was also the incumbent, and claims that the agency failed to conduct meaningful discussions with Najilaa regarding the perceived excessive staffing plan.

The contract was to be awarded based on a "best value" basis that considered mission capability, strategic plans, past performance, and price. Offerors were notified in the RFP's performance work statement (PWS) that services likely would expand or decrease during performance of the contract and to provide for greater flexibility and to limit risk, the contractor would assume the risk related to the uncertainty of the food service requirements. Also, the PWS provided that the contractor must be capable of operating the DFACs 24-hours, seven days a week, and must provide sufficient workforce to prepare, serve, clean, and maintain the facilities.

Although Najilaa's proposal received ratings of acceptable overall under the mission capability factor and excellent for the lesser-weighted strategic plans factor, no past performance information had been submitted and so the agency assessed an unknown risk rating for that factor. The agency found Najilaa's DFAC staffing excessive for the meal service requirements anticipated by the RFP and Najilaa was asked to provide its rationale for the staffing levels. Najilaa responded that it felt the labor quantities to be necessary to meet the PWS requirements, but the agency found this explanation insufficient. Najilaa's final proposed price was $157 million. The awardee/incumbent's final proposed price was $60 million.

In reviewing a protest against an agency's evaluation of proposals, GAO will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria. A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable. In its review of the record and denial of the protest, GAO found that Najilaa unreasonably interpreted the PWS's staffing requirements. GAO stated that although the PWS required the contractor to provide staffing at maximum feeling levels when the agency required, this need was anticipated as infrequent and atypical. GAO found that Najilaa was unreasonable in assuming that offerors were required to propose operations at maximum feeding levels for the entire five-year period.

As to Najilaa's contention that the agency failed to adequately assess the realism of the awardee's price, the GAO found that, in this case, a fixed-price contract does not require an agency to conduct a price realism evaluation. The RFP did not specifically require a price realism evaluation and did not require offerors to provide cost or pricing data.

Finally, GAO did not resolve the issue of whether the agency failed to conduct meaningful discussion with Najilaa, since the record was clear that Najilaa did not suffer competitive prejudice and Najilaa did not have a substantial chance of receiving the award. GAO stated that Najilaa never explained, specifically, how it would have changed its proposal to decrease staffing levels. GAO denied the protest.

3. FAS Support Services, LLC, B-402464; B-402464.2; B-402464.3, April 21, 2010

Link: GAO Opinion

Agency: Department of Air Force

Disposition: Protest denied.

Keywords: Suspension and Reinstatement

General Counsel P.C. Highlight: The FAR prohibits an agency from awarding a contract to a debarred or suspended contractor. But, if the contractor's suspension ends prior to award, the contracting officer may, but is not required to, consider an offeror's proposal for award. The CO must exercise this discretion to exclude the offeror following reinstatement reasonably.

Pursuant to a request for proposals (RFP), the Department of the Air Force awarded a contract to Vinnell Brown & Root LLC (VBR) and denied the award to FAS Support Services, LLC (FAS) for base operation and maintenance services at facilities in Turkey and Spain.

The RFP advised offerors that proposals would be evaluated on the basis of three factors: price; technical acceptability; and performance confidence. The RFP also stated that the agency would award the contract to the lowest-priced offeror whose technically-acceptable proposal received a performance confidence score of substantial confidence and if no offeror received this score, the agency would make a "best value award decision."

Initially, the Air Force received proposals from two offerors, FAS and VBR. FAS, at the time, was a joint venture between two other corporations, one of which was Taos/Agility (Taos). Both initial proposals received the substantial confidence scores. However, VBR received a technical acceptability score of unacceptable following revisions. The Source Selection Authority recommended award to FAS.

On the same day that this determination was made, the Defense Logistics Agency (DLA) announced the contract suspension of a number of companies and their affiliates, including Taos. As Taos was one of the two FAS joint venture partners, the Air Force advised FAS that its proposal was excluded from further consideration. The Air Force then opened discussions with VBR. Following VBR's final proposal revision, the Agency found VBR's proposal to be acceptable. VBR had submitted the lowest price of $285 million, compared to FAS's proposal of $300 million.

Prior to award but after VBR's reevaluation, FAS informed the contracting officer (CO) that DLA had lifted the suspension based on FAS's statement that it would divest itself of Taos' ownership in the joint venture. FAS requested that its proposal be returned to the competition.

The CO denied FAS the chance to be reinstated citing two reasons: (1) reinstatement would cause unacceptable delay to the procurement because FAS would need to "substantially revise" its proposal to explain who would be doing the work Taos had been assigned to do under the previous proposal; and (2) FAS did not have a reasonable chance for award VBR had a significantly price and FAS would have to make substantial revisions to its proposal to make it acceptable.

GAO's review of the record was in agreement with the Air Force's determination. The decision whether to reinstate an offeror into a competition following the lifting of a suspension is within the discretion of the CO. GAO found the Air Force's refusal to reinstate FAS's proposal reasonable because the record indicated that the removal of Taos as a joint venture partner would require the Air Force to conduct a new evaluation of FAS's past performance and to determine the extent to which FAS's technical proposal relied on the resources of Taos. The CO stated that VBR had addressed all of the technical acceptability concerns during discussions while FAS remained suspended and the agency was ready to proceed with the award. The CO further said that negotiating with FAS would take an estimated six months.

As to the argument that the agency abused its discretion in conducting discussions with VBR after FAS was suspended and that the agency treated the offerors unequally by refusing to reopen the competition, the GAO stated that FAS was no longer an interested party to raise these additional issues since the Air Force's rationale for declining FAS's reinstatement was reasonable. GAO denied FAS's protest.

4. DB Consulting Group, Inc., B-401543.2; B-401543.3, April 28, 2010

Link: GAO Opinion

Agency: NASA

Disposition: Protest denied.

Keywords: Price evaluation; discussions

General Counsel P.C. Highlight: An agency is under no obligation to hold discussions regarding an offeror's comparatively high price since the agency is not required to advise a firm that its price is too high unless the price is so high as to preclude an award.

Following a request for proposals (RFP) for the award of an indefinite-delivery/indefinite quantity (ID/IQ), fixed-price, incentive fee contract to perform an array of information technology support services during a five-year effective ordering period, the National Aeronautics and Space Administration (NASA) awarded the contract to ASRC Primus (ASRC). One of the unsuccessful offerors, DB Consulting Group, Inc. (DB), protested the award of the contract on the bases that NASA misevaluated proposals, failed to provide adequate discussions, and made an unreasonable source selection decision.

The RFP provided that the award would be made on a "best value" basis considering price, mission suitability, and past performance. Price was the least significant factor. After receiving several proposals, NASA established a competitive range of three offerors and assigned each proposal with a specific point scoring for the non-price factors.

In its review of the record, GAO found that although the record did not contain an explanation of how the point scores were determined, the record did show that NASA evaluated the proposals as provided for in the RFP by preparing extensive narrative materials that outlined the strengths and weaknesses of each. GAO found no basis to object to the scoring of proposals.

DB asserted that NASA misevaluated ASRC's past performance where one of ASRC's subcontractors was found by the NASA Inspector General to have an improper organizational conflict of interest in an earlier contract. GAO's review of the record showed that the argument was without merit where the contract in question was not relevant since it was not for products and services similar to those being solicited, as stated in the RFP.

GAO also found that NASA was under no obligation to hold discussions regarding DB's comparatively high price since an agency is not required to advise a firm that its price is too high unless the price would preclude the award. GAO found nothing in the record to show that DB's price was unreasonably high so as to preclude an award.

Finally, GAO stated that it would not evaluate whether DB and ASRC's proposals were evaluated disparately since, even if DB's proposal was assigned additional credit, the contract would still be awarded to ASRC based on ASRC's lower price. GAO denied the protest.

5. J2A2 JV, LLC, B-401663.4, April 19, 2010

Link: GAO Opinion

Agency: Department of Veteran Affairs

Disposition: Protest sustained.

Keywords: Experience Requirements

General Counsel P.C. Highlight: Generally, the experience of a technically qualified subcontractor may be used to satisfy definitive responsibility criteria relating to experience for a prospective prime contractor. An exception to the rule exists, however, where the solicitation provides that only the prime contractor's experience will be considered.

The Department of Veteran Affairs (VA), under request for proposals (RFP), awarded a contract for construction services, to Specialized Veterans, LLC (Specialized). J2A2 JV, LLC (J2A) was not awarded the contract and asserts that the awardee's proposal should have been rejected for failure to comply with certain solicitation requirements pertaining to experience.

The RFP, which was set aside for service-disabled veteran-owned small businesses, provided for award to the offeror who submitted the lowest priced, technically acceptable proposal. To be technically acceptable, VA looked at construction management, past performance, and proposed schedule. Thirteen offerors submitted proposals and J2A's proposal was the tenth lowest in price, while Specialized's proposal was fifth lowest in price. For various reasons, the first four firms were disqualified and Specialized was awarded the contract.

J2A asserted that Specialized's proposal should have been rejected because Specialized did not meet the RFP requirement for five years of experience as a general contractor and in building golf courses or similar earthwork projects and the RFP requirement of corporate experience with contracts similar in size and scope. Specialized argued that it met the experience requirement through its subcontractors.

Generally, the experience of a technically qualified subcontractor may be used to satisfy definitive responsibility criteria relating to experience for a prospective prime contractor. An exception to the rule exists, however, where the solicitation provides that only the prime contractor's experience will be considered.

GAO concluded that it was improper for the evaluators to consider the experience of Specialized's proposed subcontractors for purposes of determining compliance with the five year requirement. The RFP required that the "general contractor" have this experience, which meant Specialized as the general contractor had to have this experience and not its subcontractors. Given this interpretation of the RFP, GAO found that Specialized, which

was started in 2009, did not have the required five years of experience as a general contractor or five years experience building golf courses.

6. DynaLantic Corporation, B-402326, March 15, 2010

Link: GAO Opinion

Agency: United States Army

Disposition: Protest denied.

Keywords: Size protest

General Counsel P.C. Highlight: The SBA's decision in a size protest is binding on GAO in deciding protest allegations raised by a protester at GAO.

Pursuant to a request for proposals (RFP), the United States Army (Army) awarded a contract to Fidelity Technologies Corporation (Fidelity) and denied the award to DynaLantic Corporation (DynaLantic) for an MI-17 CT helicopter flight training device simulator (FTD).

The RFP, as a total small business set-aside, sought to award a fixed-price contract for the FTD based on a "best value" basis considering technical, management, past performance, and price, in descending order of importance. Seven proposals were received resulting in an award to Fidelity after the Army found that DynaLantic's proposal had a lower management rating and a slightly higher price than Fidelity's.

DynaLantic filed a protest with the Small Business Administration (SBA), challenging the small business size of Fidelity concurrently with this GAO bid protest. However, the SBA found that Fidelity qualified as a small business because, contrary to DynaLantic's allegations, it held that Fidelity was the manufacturer of the MI-17 CT FTD it was furnishing. GAO held further that the SBA decision finding that Fidelity was the manufacturer for purposes of its status as a small business is binding on GAO because the SBA has conclusive authority to determine small business size status for federal procurements. Further, GAO stated that its review of the record provided no basis to question the SBA decision otherwise.

As to DynaLantic's assertion that its proposal was evaluated unequally and unfairly when compared to Fidelity's proposal because the Army assigned DynaLantic a weakness for the proposal's plan to manufacture the FTD in the United States, GAO stated that the Army's

finding that DynaLantic had no previous experience manufacturing this particular FTD was indeed a weakness. But, GAO's review of the record also showed that the evaluation team was correct in assigning a significant strength to Fidelity's proposal where it had established a process to monitor and meet the delivery schedule, which increased the likelihood that the company would provide accurate simulation of the MI-17 CT aircraft. While GAO did state that Fidelity's proposal may have a less desirable approach in one area than DynaLantic's proposal, the record showed that Fidelity's proposal had numerous other strengths that contributed to its outstanding rating. DynaLantic was correctly denied the contract since its technical proposal had fewer strengths, a more risky approach, and a higher price.