



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

1. U.S. Aerospace, Inc., B-403464; B-403464.2, October 6, 2010

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

**Agency:** Department of the Air Force

**Disposition:** Protest denied.

**Keywords:** Timely Proposal submission

**General Counsel P.C. Highlight:** It is an offeror's responsibility to deliver its proposal to the proper place at the proper time; proposals that are received after the exact time specified are "late" and must generally be rejected. The agency official responsible for receiving bids or proposals is determinative with regard to the time a bid or proposal is received, absent a showing that the agency official's declaration was unreasonable.

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U.S. Aerospace, Inc. (USAI) protests the Department of the Air Force's rejection of the proposal USAI submitted in response to a request for proposals (RFP) for the KC-X tanker modernization program. The agency rejected USAI's proposal on the basis that it was not received by the submission deadline.

The agency issued the RFP seeking proposals for the KC-X tanker modernization program. The RFP clearly advised offerors that proposals must be received at "1755 Eleventh Street, Building 570, Wright-Patterson AFB [Air Force Base], OH," by 2:00 p.m. on July 9, 2010. The parties agree that USAI's messenger delivered USAI's proposal to a contracting officer's representative (COR) at some time during the afternoon of July 9 and that, at that time, the COR gave the messenger a receipt indicating that the proposal was received at 2:05 p.m. The agency gave USAI formal notice that its proposal was considered late and would not be considered.

USAI's messenger reportedly arrived at one of the base entrances, but was denied entry and told that he needed to have someone from the office to which he was delivering documents call the gate to authorize his admission. The messenger also stated that the gate guard gave him directions to 1755 Eleventh Street, building 570, that he followed those directions, and that "[u]pon turning onto Eleventh Street as instructed, [he] noticed the address provided did not exist, as the road dead ended into a building."

The messenger then stated that he received a call on his cell phone from the contracting officer's representative (COR). The messenger stated that he told the COR where he was, that

the COR told him to wait there, and that he (the COR) would come to the messenger's location and "take the bid to Building 570 before the deadline." The messenger asserted that, a few minutes later, the COR pulled alongside the messenger's car. The messenger further stated that he told the COR that he had USAI's proposal but that, rather than taking the proposal, the COR instructed the messenger to follow him (the COR) to a parking lot near building 570, which the messenger did. The messenger stated that when he got out of the car at the parking lot, he handed USAI's proposal to the COR, who placed it on the messenger's car while he (the COR) made two telephone calls. The messenger stated that the COR then advised the messenger that he (the COR) wanted to sign a receipt, instructed the messenger to accompany the COR inside the lobby of building 570, where the COR obtained a blank receipt, completed it to show that the proposal had been received at 2:05 p.m., and gave a copy to the messenger.

USAI pursued and GAO considered the following allegations: (1) that the Air Force actually received USAI's proposal by 2 p.m.; (2) if the proposal was in fact late, the delay associated with the messenger's admission to the AFB and the gate guard's alleged misdirection were the paramount cause of the late submission; and (3) that the proposal was "under the Air Force's control" prior to the time set for receipt of proposals.

The GAO determined that USAI offered no evidence to support its assertion that its proposal was timely other than its messenger's representations regarding the timing of events prior to proposal submission, and the messenger's conclusion that "the proposal was submitted by 2 p.m."

GAO states that the declaration of the agency official responsible for receiving bids or proposals is determinative with regard to the time a bid or proposal is received, absent a showing that the agency official's declaration was unreasonable. Here, as discussed above, the agency COR specifically concluded that USAI's proposal was not received until 2:05 p.m., advised USAI's messenger of that determination, and provided the messenger written notification reflecting the 2:05 p.m. receipt. USAI's messenger did not dispute the accuracy of the COR's determination at that time. Consistent with the time reflected on the USAI email, the COR's cell phone records show that the first call he placed to the messenger was made at 1:59 p.m. The COR then drove to the messenger's location, spoke with him, directed the messenger to follow him (the COR) back to the building 570 parking lot, and drove to that lot--at which point the messenger handed the proposal to the COR. GAO finds nothing unreasonable in the agency's determination that the proposal was received after the 2 p.m. deadline.

USAI next asserts that the "street address listed on the RFP does not exist (or, incredibly, the address still exists, even though the street no longer does), and that the Air Force maps of Area B are wrong. . . . [T]he pertinent section of Eleventh Street was removed years ago; a

new building was built where the road used to be, and the street now dead ends more than a block before Building 570. It is impossible to find [building 570] without already knowing where it is.” USAI asserts that the maps provided by the agency are incorrect.

GAO states that it is an offeror's responsibility to deliver its proposal to the proper place at the proper time; proposals that are received after the exact time specified are "late" and must generally be rejected. The late proposal rules include limited exceptions under which late proposals may be considered. GAO has held that a late hand-carried offer may be considered for award if the government's misdirection or improper action was the paramount cause of the late delivery and consideration of the offer would not compromise the integrity of the competitive process. Nonetheless, even in cases where the late receipt may have been caused, in part, by erroneous government action, a late proposal should not be considered if the offeror significantly contributed to the late receipt by not doing all it could or should have done to fulfill its responsibility.

Here, USAI has not demonstrated that the alleged government misdirection and/or delays associated with its messenger's entry at gate 19B was the paramount cause of the late delivery of USAI's proposal. To the contrary, the record indicates that, even accepting USAI's assertions that the gate guard provided inaccurate directions which delayed the submission of USAI's proposal, USAI's own actions significantly contributed to the late submission of its proposal. It was USAI's decision to attempt entry to Wright-Patterson AFB, a secure military facility, at gate 19B--a gate designated for admission of personnel with military credentials--rather than at gate 1B--the entrance at which visitors without military credentials were directed to arrive. In addition to its decision to attempt entry at a gate not designated for use by non-military visitors, USAI's messenger arrived at the entrance gate with less than an hour remaining before proposals were due, did not obtain advance approval for entry, and failed to previously ascertain the location of, and directions to, the building designated for proposal submission. On this record, GAO concludes that USAI's own actions were significant contributing factors to the late receipt of its proposal. USAI's protest that the agency was required to accept its proposal because of the government's actions is denied.

Finally, USAI protests that USAI's proposal was "under Air Force control" prior to the 2 p.m. closing time. GAO states that in determining whether a late-submitted proposal was "under the Government's control" prior to the time set for receipt of proposals, it is clear that an offeror must, at a minimum, have relinquished physical custody of the proposal. This requirement is an obvious necessity in order to preclude any potential that an offeror could alter, revise, or otherwise modify its proposal after other offerors' competing proposals have been submitted.

Here, as discussed above, USAI's messenger did not relinquish physical custody of its proposal until it handed the proposal to the COR in the parking lot outside of building 570.

As also discussed above, the agency reasonably determined that such transfer of physical custody did not occur until after the 2 p.m. proposal submission deadline. Accordingly, the GAO determined that the proposal was not under the Government's control prior to the time set for receipt of offers. The protest is denied.

## 2. **Structural Associates, Inc., B-403085; B-403085.2, September 21, 2010**

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

**Agency:** Department of the Army

**Disposition:** Protest denied.

**Keywords:** Technical Evaluation

**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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Structural Associates, Inc. (SA) protests the award of a contract under a request for proposals (RFP) issued by the Department of the Army, U.S. Army Corps of Engineers, for construction of improvements to aircraft fueling facilities.

The RFP contemplated the award of a fixed-price contract for construction services to the offeror whose proposal represented the "best value," considering price, past performance and key construction subcontractor. The past performance factor included two subfactors: company specialized experience and quality of past performance. For the company-specialized-experience subfactor, the RFP required offerors to provide detailed information in 13 specific categories regarding at least three, but no more than five, recent, relevant projects. The RFP included a form that could be used as a template for providing the detailed information required; alternatively, offerors could provide the information required in a format of their own choosing. Offerors were required to provide information detailing: "Your Role and Construction Type Work Your Company Self-Performed" for each of the listed projects. The solicitation advised Offerors that the agency would perform a proposal compliance review to ensure that all required information had been included in the proposal. A contract would not be awarded to an offeror whose proposal had been assigned a deficiency.

The protester's proposal received a deficiency where it failed to provide the "Construction Type Work your Company Self-Performed" on four of the five submitted projects, in

accordance with proposal submission requirements in the RFP. The source selection authority determined that the agency could not make award to SA under the terms of the RFP.

SA asserts that its proposal did contain information describing the work that it had self performed. GAO states that in considering protests challenging an agency's evaluation of proposals, it will not reevaluate proposals; instead, it will examine the agency's evaluation to ensure that it was reasonable and consistent with the terms of the solicitation, and applicable procurement laws and regulations. Since an agency's evaluation is dependent on the information furnished in a proposal, it is the offeror's responsibility to submit an adequately written proposal for the agency to evaluate. Agencies are not required to adapt their evaluation to comply with an offeror's submission, or otherwise go in search of information that an offeror has omitted or failed adequately to present.

Here, the overall evaluation was reasonable and consistent with the RFP. SA's proposal included no clear indication as to the "Construction Type Work" it self performed. While SA asserts that the agency nevertheless could have deduced the work SA self performed by comparisons of the overall descriptions of the projects with statements of the subcontracted work, or by reference to general statements of accomplishment, GAO agrees with the agency that it simply was unclear from the proposal what "Construction Type Work" SA self performed on those projects. For example, SA notes that for a project for a fueling system and concrete airfield paving at Langley Air Force Base, Virginia, the listing in the general "PROJECT HIGHLIGHTS" box stated as follows: "Placed 82,000 sf on concrete airfield pavement within an active airfield." While SA asserts that this describes the work SA self performed, GAO finds reasonable the agency's position that there is no clear, unambiguous indication from the proposal whether this work was self performed by SA or subcontracted. The protest is denied.

**3. Powerhouse Design Architects & Engineers, Ltd., B-403174; B-403175; B-403176; B-403177; B-403633; B-403647; B-403648; B-403649, October 7, 2010**

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

**Agency:** Department of Veterans Affairs

**Disposition:** Protests sustained.

**Keywords:** SDVO set aside requirements

**General Counsel P.C. Highlight:** Procurements for Architect-Engineering (A/E) services are not exempt from the Veteran's Administration requirement for setting aside contracts for veteran-owned companies.

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Powerhouse Design Architects & Engineers, Ltd. protests the terms of eight Sources Sought Notices (SSN) issued by the Department of Veterans Affairs (VA) for architect-engineering (A/E) services.

The procurements were conducted pursuant to the Brooks Act and its implementing regulations, set forth at Federal Acquisition Regulation (FAR) subpart 36.6. In accordance with those regulations, the agency issued SSNs on the FedBizOpps website publicizing its need for A/E services. Powerhouse timely challenged the terms of the SSNs, which were issued on an unrestricted basis.

The sole protest issue is whether the agency was required to set aside these A/E procurements for service-disabled veteran-owned small business (SDVOSB) concerns. The protester asserts that the agency's failure to do so violated the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. sections 8127-8128 (Supp. III 2006) (VA Act). In relevant part, 38 U.S.C. sect. 8127(d), captioned "use of restricted competition," provides as follows:

“ . . . a contracting officer of [the VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.”

The statute also sets out an order of priority for the contracting preferences it establishes, providing that the first priority for contracts awarded pursuant to 38 U.S.C. sect. 8127(d) shall be given to SDVOSB concerns.

The VA issued regulations implementing the Act which, as relevant here, state that with exceptions, “the contracting officer shall set aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that (1) Offers will be received from two or more eligible SDVOSB concerns and; (2) Award will be made at a reasonable price.”

The VA argued that the Brooks Act requirement that Federal agencies negotiate contracts for A/E services on the basis of demonstrated competence and qualifications for the type of

professional services required makes A/E services exempt from SDVO set-aside requirements. GAO sees nothing in the VA Act or the VA regulations that exempts A/E procurements from the set-aside requirement. The GAO notes that the Brooks Act, which prescribes procedures for conducting A/E procurements with a particular focus on how price is to be considered, is silent with respect to set-asides; nothing contained in it or its implementing suggests a reasonable basis for asserting that A/E procurements are exempt set-aside requirements. The protests are sustained.

4. **CIGNA Government Services, LLC, B-401068.4; B-401068.5, September 9, 2010**

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

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

**Disposition:** Protests denied.

**Keywords:** Organizational Conflict of Interest

**General Counsel P.C. Highlight:** The responsibility for determining whether an organizational conflict of interest (OCI) exists rests with the procuring agency. In making this determination, the FAR expressly directs contracting officers to examine the particular facts associated with each situation, paying consideration to the nature of the contracts involved, and further directs contracting officers to obtain the advice of counsel and appropriate technical specialists before exercising their own sound discretion in determining whether an OCI exists.

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CIGNA Government Services, LLC (CIGNA) protests the award of a contract by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), to Palmetto GBA, LLC, pursuant to a request for proposals (RFP) to perform Medicare claims administration services.

CMS published the solicitation at issue, seeking proposals to perform a cost-plus-plus-award-fee contract as the Medicare Administrative Contractor (MAC) in a geographic area identified as "jurisdiction 11" for a 1-year base period and four 1-year option periods. The solicitation also provided that conflict of interest/compliance program proposals would be evaluated "to determine if an offeror is free, to the greatest extent possible of all conflicts of interest," stating that no adjectival ratings would be assigned. The solicitation stated that, in



determining best value, the agency would "assess the relative risks associated with each offeror's proposal and potential performance."

CIGNA protested that CMS's awarding the jurisdiction 11 MAC contract to Palmetto created an OCI between Palmetto and a Palmetto affiliate, Q<sup>2</sup> Administrators, which had been awarded a contract to perform as the qualified independent contractor (QIC) for jurisdiction 11. Following the protest, CMS advised GAO that it was taking corrective action in response to CIGNA's protest, and that such action would include reevaluating proposals; reopening discussions, if necessary; and making a new award determination. The agency contracting officer who was responsible for the procurement at that time, prepared a 20-page document titled "Organizational Conflict of Interest Review for Palmetto GBA" identifying three possible areas of conflict of interest.

The agency re-opened discussions with the offerors and requested final proposal revisions from each offeror. Based on information provided, the contracting officer determined that, of the three potential OCIs, two did not create OCIs at all, and that one potential OCI was not considered a significant OCI and could be waived under the provisions of FAR § 9.503. The contracting officer prepared and submitted a written waiver request outlining the extent of the conflict, specifically including a detailed discussion of her bases for concluding that the conflict was not significant and that a waiver would be in the best interests of the government. The requested waiver was subsequently executed by the head of the contracting activity.

CIGNA protested again that Palmetto's performance created unfair, unmitigated, and unallowable OCIs that the contracting officer failed to reasonably recognize. CIGNA maintained that Palmetto's prior performance under those contracts mandate its exclusion from this competition.

The situations in which OCIs arise, as addressed in FAR subpart 9.5 and the decisions of GAO, can be broadly categorized into three groups. The first group consists of situations in which a firm has access to nonpublic information as part of its performance of a government contract and that information provides a competitive advantage in a later competition. The second group consists of situations in which a firm, as part of its performance of a government contract has, in some way, set the ground rules for another contract competition, thereby skewing the competition in its own favor. The third group consists of situations where a firm's ability to render impartial advice to the government would be undermined by the firm's competing interests.

The responsibility for determining whether a conflict exists rests with the procuring agency. In making this determination, the FAR expressly directs contracting officers to examine the particular facts associated with each situation, paying consideration to the nature of the

contracts involved, and further directs contracting officers to obtain the advice of counsel and appropriate technical specialists before exercising their own sound discretion in determining whether an OCI exists. Where an agency has given meaningful consideration to whether an OCI exists, GAO will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable.

GAO cannot conclude that the contracting officer unreasonably determined that Palmetto's performance created an OCI. That is, the record shows that the contracting officer followed the FAR direction to consider the particular facts involved, including the nature of the contracts at issue, and to obtain the advice of counsel and the assistance of technical specialists before exercising her sound discretion. While GAO agrees that the matters presented raise legitimate concerns regarding Palmetto's involvement in activities that relate to the performance of the MAC contracts, CIGNA has failed to explain persuasively how any of Palmetto's activities or access to information pursuant to performance of its contracts provided Palmetto a competitive advantage in competing for the jurisdiction 11 MAC contract. GAO concludes that the contracting officer's decision did not reflected an abuse of her discretion.

CIGNA also protested that it was improper for the agency to waive the OCI created by the fact that Palmetto will review Medicare claims submitted by UCI-MA, a Palmetto affiliate. Contracting officers must identify potential OCIs as early in the acquisition process as possible, and generally must avoid, neutralize or mitigate significant conflicts prior to award. However, the FAR further establishes that, as an alternative to avoidance, neutralization, or mitigation, an agency head or designee may execute a waiver. Here, the contracting officer prepared and submitted a written waiver request that outlined the extent of the conflict and provided a detailed discussion of the bases for her conclusions that the conflict was not significant and that waiver would be in the best interests of the government. The requested waiver was duly executed by the head of the contracting activity, as authorized by FAR § 9.503. GAO reviewed the record, both with regard to CMS's compliance with the FAR procedural requirements regarding waiver, as well as the substance of the contracting officer's waiver request, and find no basis to question the agency's compliance with the FAR requirements or the reasonableness of the agency's actions. The protests are denied.