



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. **ManTech Systems Engineering Corporation; TWD & Associates, Inc., B-401542.6, B-401542.7, December 22, 2009**

Link: [GAO Opinion](#)

Agency: Naval Sea Systems

Disposition: Recommended Payment of Attorney's Fees, Protest Costs

Keywords: Costs and Fees

General Counsel, P.C. Highlight: GAO will recommend an Agency pay the protester's costs and attorney's fees where the protester is successful in its protest, including when the Agency unduly delays taking corrective action in the face of a clearly meritorious protest.

ManTech Systems and TWD & Associates requested that GAO recommend the reimbursement of the protesters' attorney's fees relating to their challenge of the issuance of a task order to Alion Science and Technology Corporation. The Naval Seas Systems Command (NSSC) originally issued a task order to Alion based on its conclusion that Alion's proposal offered the best overall value to the government considering cost and several non-cost evaluation criteria. Following a challenge by ManTech and TWD, alleging that NSSC had misevaluated Alion's cost proposal, GAO conducted an "outcome prediction" alternative dispute resolution procedure, during which a GAO attorney advised NSSC that it had misevaluated Alion's cost proposal.

In line with these findings, the GAO attorney advised NSSC that it should either amend the solicitation to more accurately reflect its expectations, or obtain revised proposals and make a new selection decision. Based on GAO's recommendations, NSSC took corrective action by reconsidering its needs, amending the solicitation if necessary, obtaining revised proposals, and making a new source selection decision. As a result of the corrective action taken by NSSC, ManTech and TMD requested the reimbursement of the costs of filing and pursuing their protests.

In their written opinion, GAO noted its practice of reimbursing a protester's costs of pursuing a protest where the agency unduly delays taking corrective action in the face of a clearly meritorious protest, thereby causing the protestor to expend unnecessary time and resources to obtain relief. Undue delay has been understood as taking corrective action after the Agency responds to the protest through an Agency Report. In this instance, GAO noted that corrective action came after the issuance of the Agency Report and that the protest was

clearly meritorious. Therefore, GAO recommended payment of the protesters' costs and fees.

2. W. Gohman Construction Co., B-401877, December 2, 2009

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Taking Exception to RFP Requirements

General Counsel P.C. Highlight: An Agency may not accept a proposal that takes exception to the Agency's stated requirements.

W. Gohman Construction protested the award of a contract under a Department of the Army request for proposals (RFP) for the construction of a readiness center in Minnesota. The RFP was issued as a small business set-aside and contemplated the award of a fixed-price construction contract. A note in the RFP advised offerors that temporary utilities related to the project would be the responsibility of the contractor.

The contract was to be awarded to the "best value" proposal considering the specified evaluation factors and price. After the proposals were submitted, the source selection board determined that Gohman had qualified its offer by stating that its price did not include fees for water and sewer access. In response, the Army declared Gohman ineligible for the award. Gohman filed an agency level protest, stating that the SAC/WAC fees were not required, but this was denied by the Army.

The protester then protested to GAO. GAO agreed with the Agency. The GAO said the solicitation was clear in that offerors were to pay the cost of all utilities during construction and that Gohman's proposal price specifically excluded the costs of sewer and water access. Because Gohman's price proposal took exception to the RFP requirements, Gohman's proposal was not capable of being accepted by the Government.

3. **GCC Enterprises, Inc. v. U.S. and Ironclad Services, Inc., U.S. Court of Federal Claims, No. 09-465C, December 23, 2009.**

Agencies: U.S. Army Corp of Engineers

Disposition: Protest Denied.

Keywords: Best value; Source Selection Authority

General Counsel, P.C. Highlight: In considering a bid protest, a Court will not reevaluate proposals or substitute its opinion for the Source Selection Authority, but will only consider whether the decisions made were reasonable in light of the RFP requirements.

GCC submitted a proposal in response to a Request for Proposals from the Army Corps of Engineers to perform emergency roofing repairs on an as needed basis, which was set aside for Service Disabled Veteran-Owned Companies. Technical merit was considered significantly more important than price. A number of proposals, including GCC's, were ordered by the Source Selection Authority to be reevaluated because he found that there were major discrepancies between the evaluation board's treatment of several of the evaluation factors. Following the reevaluation, the SSA determined that Ironclad had the best overall technical proposal and awarded the indefinite delivery/indefinite quantity contract to Ironclad Services, Inc.

GCC decided to challenge this decision at the U.S. Court of Federal Claims on the grounds that the reevaluation was an abuse of discretion by the SSA and that the final technical-price tradeoff was unreasonable.

The Court noted that, in a best value procurement as present in this case, the agency is granted wide deference in making its evaluation and final decision. Further, the Court does not re-evaluate proposals or sit as a super Source Selection Authority in a bid protest to the Court of Federal Claims. The Court will "confine its review to determining whether the agency's decision was arbitrary and capricious." The Court reviewed the initial Source Selection Evaluation Plan, the RFP, and the evaluation documents. The Court determined in this case that the Source Selection Authority had proper authority to order a reevaluation and that the resulting reevaluation and award decision was reasonable. The Court denied GCC's protest. The Court therefore granted the Government's motion for judgment on the administrative record.

4. Cummins Power Systems, LLP, B-402079.2, January 7, 2010

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Bid restrictions; Cancellation

General Counsel P.C. Highlight: An Agency is free to cancel an IFB, even after bid opening, where the Agency determines that the IFB is overly restrictive and that the agency could enhance competition by loosening the restrictions and still meet its requirements.

The Department of the Army originally issued an invitation for bids (IFB) restricted only to Onan-brand engines with a limitation that the competition be restricted to Onan-certified distributors; Fermont was awarded the contract and Cummins challenged, stating that Fermont was not eligible because it is not a certified distributor of Onan engines. In response to the protest, the Army cancelled the IFB and stated that it would reissue it without the certified distributor restriction. Cummins then protested the cancellation of the IFB. The GAO noted that an agency's desire to obtain enhanced competition by materially modifying specifications to make them less restrictive constitutes a valid and compelling reason for canceling an IFB under FAR § 14.404-1. Although Cummins may be prejudiced by the cancellation, the Army's desire in this case to obtain enhanced competition relaxing the standards is both reasonable and acceptable.