



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. **Simba USA, LLC; New Western Supply, LLC, B-401971; B-401971.2, December 28, 2009**

Link: [GAO Opinion](#)

Agencies: Department of the Army

Disposition: Protests denied.

Keywords: Domestic production requirement; Offeror Representations

General Counsel, P.C. Highlight: An Agency will not look behind an offeror's representation that it will meet the contract requirements unless there is some affirmative reason to do so.

Simba USA, LLC and New Western Supply, LLC protested the Department of the Army's issuance of a task order to Windhaven International, Inc. to provide 60,000 cotton velour terry beach towels to be used in connection with the Army's recruiting activities. The protesters argued that Windhaven could not comply with the solicitation's domestic production requirement. In particular, the solicitation stated that the towels must be "USA Made." When an offeror responds to a solicitation by representing that it will furnish products that comply with a solicitation's domestic production requirements, the offeror is contractually obligated to comply with such representation. It follows that an agency may properly rely on this representation when making its source selection decision, unless the agency has reason to believe that a firm will not or cannot provide compliant products, in which case the agency must go beyond the firm's representations in order to verify compliance.

Here, after receiving 35 quotations, the contracting office contacted Windhaven to confirm that its quotation was in fact "100% American Made." Windhaven responded affirmatively and provided a certificate as proof. Furthermore, after receiving notice of these protests, the Army contacted Windhaven again requesting additional information regarding Windhaven's representations. In response, Windhaven provided a detailed list of its sources/suppliers for each component of its intended product.

Based on the record, the GAO saw no basis on which to question the Army's reliance on Windhaven's representations about its domestic production, and therefore dismissed the protests.

2. **Coastal Environments, Inc., B-401889, December 18, 2009**

Link: [GAO Opinion](#)

Agency: Department of the Army, Corps of Engineers

Disposition: Protest sustained.

Keywords: Best value determination; Tradeoff Decision

General Counsel, P.C. Highlight: In a best value procurement, the Agency must consider the price of all acceptable offerors, even where the lower priced offeror does not achieve the highest technical rating.

Coastal Environments, Inc. (Coastal) protested the Department of the Army's award of a contract to Ecological Communications Corporation (ECC) based on the Army's evaluation of proposals and its decision to award ECC the contract despite ECC's higher proposed price.

The request for proposal (RFP) in this protest was issued as a small business set-aside for the provision of professional marine, terrestrial, and historic culture resource investigation services in Texas and Louisiana. Award of the contract was to be made to the offeror whose proposal was determined to represent the "best value" to the government, after considering technical factors and price. After the proposals were received, they were rated on their non-price factors, and then assessed based on their levels of risk. Finally, the agency calculated a total evaluated price for each offeror using a series of metrics. At that point, the contracting officer, acting as the source selection authority (SSA), reviewed the evaluations and performed a price/technical tradeoff between the two highest rated technical proposals, after which the SSA selected ECC by concluding that "due to the highly specialized nature of the work...ECC's technical superiority" justified paying a slightly higher price. Coastal challenged several aspects of the agency's evaluation of proposals. The GAO sustained Coastal's challenge to the cost-technical tradeoff.

The Agency had evaluated ECC and one other offeror as "Good" on non-price factors. It evaluated Coastal as "Acceptable" on non-price factors, but Coastal's price was 18% lower than ECC's price. the Agency's final decision only considered the two "Good" offerors and their cost difference, it did not consider other acceptable offers with much lower prices, including Coastal's "Acceptable" rating combined with its much lower price. Even though price was stated to be of less importance than the non-price factors, an agency is still required to meaningfully consider cost or price to the government in making its selection. In

particular, when the agency selects a higher-priced proposal that has been rated technically superior to a lower-priced but acceptable one, the decision must be supported by a rational explanation of why the higher-rated proposal is superior and why its technical superiority warrants a price premium.

GAO recommended that the agency perform and document a new price/technical tradeoff analysis, and that if ECC's proposal was not found to reflect the best value to the government that its contract and award should be terminated.

3. TMM Investments, Ltd., B-402016, December 23, 2009

Link: [GAO Opinion](#)

Agency: Department of Veterans Affairs

Disposition: Protest denied.

Keywords: Meaningful discussions

General Counsel P.C. Highlight: In discussions, the Government does not have to give you specific details about your proposal deficiencies so long as they lead you to areas of your proposal that need attention or amplification.

TMM Investments, the incumbent contractor for the lease of a building shell to the Department of Veterans Affairs (VA), challenged the VA's award of the lease to Alpine 259 Partners, Ltd. The solicitation sought offers for the lease of a building shell to house a community-based outpatient clinic, and include numerous requirements and specifications related to the design and size of the leasable area. The offerors were informed that the award would be made on a "best value" basis considering three factors, where the technical quality and offeror's qualifications/past performance factors, when combined, were more important than price.

TMM's proposal offered the same space that the VA currently occupies, with an offer to build-out the current space to meet the agency's needs, but also noting that its current space did not meet all of the solicitation's requirements. After the VA included TMM, Alpine and another offeror in the competitive range, it informed each that it would seek clarification of each proposal on several areas. Following the submission of final proposal revisions, the VA

determined that TMM's revised proposal did not offer the best value to the government because it failed to meet the contract requirements for certain specifics. And, even though its proposal was priced higher than TMM's, Alpine was awarded the contract because it offered the best proposed layout for the space.

TMM protested on the basis that the VA did not conduct meaningful discussions, and in particular, that the VA's request for certain clarifications was inadequate to put TMM on notice that the agency had found certain deficiencies.

The GAO disagreed, finding that the VA had in fact conducted meaningful discussions and that an agency is not required to "spoon-feed" an offeror during discussions, but need only lead the offeror into the areas of its proposal that need amplification. Furthermore, the GAO stated that TMM failed to show that it was prejudiced – that it could have or would have met the specifications if it had been completely informed of the problem. Thus, the GAO determined that the VA had reasonably based its source selection decision on the relevant considerations and that TMM's protest was denied.

4. Baron Services, Inc., B-402109, December 24, 2009

Link: [GAO Opinion](#)

Agencies: Department of Energy

Disposition: Protest dismissed.

Keywords: Subcontract protest

General Counsel, P.C. Highlight: GAO has no jurisdiction to consider a protest of a subcontract award, even if the Agency approves the award, unless the Agency largely conducts the evaluation of the subcontractor proposal and directs the prime's award decision.

Baron Services, Inc. protested the decision of Battelle Memorial Institute, a prime contractor for the Department of Energy (DOE), not to award it a subcontract for radars to support DOE's Pacific Northwest National Laboratory (PNNL). PNNL is a Federally Funded Research and Development Center that is Government-owned but managed and operated by Battelle under a prime contract with the DOE pursuant to Federal Acquisition Regulation (FAR) subpart 17.6. When Baron was not awarded the subcontract for the radars it protested

to the GAO. DOE then moved to dismiss the protest because the award of a subcontract by Battelle on behalf of the DOE was not a procurement conducted by “a Federal Agency,” which would have evoked GAO’s bid protest jurisdiction.

Under the Competition in Contracting Act (CICA), the GAO has jurisdiction to resolve bid protests concerning solicitations and contract awards that are issued “by a Federal agency.” Formerly, GAO would consider prime contract awards of a subcontract if conducted “by and for the government.” Following a series of court decisions, the GAO concluded that its jurisdiction did not generally extend to awards made by prime contractors acting “by and for” the government. However, the GAO continues to take jurisdiction where it finds that a subcontract essentially was awarded “by” the government with prime contractor assistance. This determination is based on an assessment of the totality of the circumstances, including what party was responsible for the preparation of the solicitation, the receipt and evaluations of proposals, the conduct of discussions, the selection of a prospective awardee, and the conduct of responsibility determinations. Instances in which the agency effectively “took over” the procurement, leaving to the prime contractor only the procedural aspects of the procurement are typically found to be procurements “by” the government.

Here, the protester argued that DOE actually conducted the procurement with Battelle’s assistance. Based on the facts, GAO concluded that Battelle, not the DOE, handled all the meaningful aspects of the procurement, including the preparation of the solicitation and evaluation criteria, the evaluation of offers and the selection of the awardee. The DOE’s approval of the issuance of the RFP does not demonstrate that the DOE took over the procurement. Thus, the GAO dismissed Baron’s protest because this procurement was not conducted by the government.