



Bid Protest Weekly

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ATTORNEYS AT LAW

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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. **Emergent BioSolutions Inc., B-402576, June 8, 2010**

Link: [GAO Opinion](#)

Agency: Department of Health and Human Services

Disposition: Protest denied.

Keywords: Contract Modifications; Contract Administration

General Counsel P.C. Highlight: GAO generally will not consider protests against modifications to an awarded contract, because such matters are related to contract administration and are beyond the scope of our bid protest function. An exception to the general rule is where a protester alleges that a modification is beyond the scope of the original contract, because, absent a valid sole-source determination, the work covered by the modification would be subject to the statutory requirements for competition.

Emergent BioSolutions Inc. (Emergent) protests the issuance of a modification to a contract by the Department of Health and Human Services (HHS) with PharmAthene, Inc. (Pharm) regarding the development and manufacture of a recombinant protective antigen (rPA) anthrax vaccine.

Pharm was awarded an original Phase 1 contract in September 2002, related to the development of an rPA anthrax vaccine. In 2003, HHS issued a request for proposals (RFP), for the award of one or more cost-plus-fixed-fee contracts for the continued development, testing, and production of the vaccine. The RFP contained a FAR clause, Changes-Cost Reimbursement, applicable to research and development contracts. HHS awarded this Phase 2 contract to Pharm as well. Between 2003 and 2009, HHS modified Pharm's Phase 2 contract on 17 occasions.

Again in 2009, HHS posted a notice announcing intent to again modify the Phase 2 contract and Emergent submitted a statement of interest in response. Emergent also stated its concern that the modification was beyond the scope of the original contract. HHS stated that all aspects of the modification were already required by the objectives of Pharm's Phase 2 contract.

GAO generally will not consider protests against modifications to an awarded contract, because such matters are related to contract administration and are beyond the scope of our

bid protest function. An exception to the general rule is where a protester alleges that a modification is beyond the scope of the original contract, because, absent a valid sole-source determination, the work covered by the modification would be subject to the statutory requirements for competition. GAO will look to whether there is a material difference between the modified contract and the contract that was originally awarded.

GAO examined the record in this case and determined that no material difference exists between the original contract and the modification. GAO stated that the scope of most R&D contracts is often flexible because of unanticipated changes due to the lack of definitiveness of the government's requirements. Also, the scope of work contained in the RFP was broadly defined and therefore, the RFP and original contract reasonably contemplated that there would be changes and setbacks in performance.

GAO stated that the original objectives of Pharm's Phase 2 contract have not changed and the modification in question merely continues rather than alters the original contract objectives. GAO also thinks that the solicitation for the original contract adequately advised offerors of the potential for the type of changes that occurred during the course of contract performance. The protest is denied since GAO concluded that no material difference exists between the original contract and the modification.

2. **Brican Inc., B-402602, June 17, 2010**

Link: [GAO Opinion](#)

Agency: Department of Veterans Affairs

Disposition: Protest sustained.

Keywords: Technical Evaluation

General Counsel P.C. Highlight: A contracting agency must treat all offerors equally and evaluate their proposals evenhandedly. GAO will examine the record to determine whether the agency's judgment was reasonable, in accord with the evaluation factors set forth in the RFP, and whether the agency treated offerors equally in its evaluation of their respective proposals and did not disparately evaluate proposals with respect to the same requirements.

The Department of Veterans Affairs (VA) issued a request for proposals (RFP), for the construction of a radiology imaging center. The RFP, issued as a service-disabled veteran-

owned small business set-aside, sought proposals for construction services to expand and replace the radiology imaging center at the VA Medical Center.

Brican, Inc. was denied award after the SSEB rated its proposal under the past performance factor as unacceptable with moderate overall risk, because Brican did not have at least three projects of similar size, scope, and complexity involving image center construction. Also, although the awardee did not identify or propose to use a shielding subcontractor in its proposal, the descriptions of the two imaging center construction projects provided for the past performance evaluation reveals that the awardee used the same shielding subcontractor that Brican proposed.

A contracting agency must treat all offerors equally and evaluate their proposals evenhandedly. GAO will examine the record to determine whether the agency's judgment was reasonable, in accord with the evaluation factors set forth in the RFP, and whether the agency treated offerors equally in its evaluation of their respective proposals and did not disparately evaluate proposals with respect to the same requirements.

GAO finds that the VA did not reasonably evaluate Brian's proposal in accordance with the RFP's requirements and evaluation factors. Brican proposed an experienced subcontractor, who was the same subcontractor identified in the awardee's proposal. Although the RFP specifically provided for consideration of past performance/experience of major subcontractor's, there is no evidence that the agency considered the past performance/experience of Brican's shielding contractor. Additionally, the record establishes that the VA did not reasonably evaluate the awardee's proposal under the past performance factor where the record shows that the awardee did not satisfy the RFP requirement for three completed imaging center construction projects. GAO sustains the protest.

3. Contrack International, Inc., B-401871.5; B-401871.6; B-401871.7, May 24, 2010

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest sustained.

Keywords: Past Performance

General Counsel P.C. Highlight: The evaluation of an offeror's past performance is within the discretion of the contracting agency, and GAO will not substitute its judgment for reasonably based past performance ratings.

Contrack International, Inc. protests the award of a contract to Zafer Contracting Construction and Trade Company, Inc. (Zafer), under a request for proposals (RFP), issued by the Department of the Army, for the design and construction of an ammunition supply point. The RFP provided for the evaluation of proposals on a “best value” basis looking at experience, past performance, project management plan, and price.

Zafer’s original proposal was higher-rated and lower-priced and therefore, the best value to the government. Contrack challenged the evaluation of its and Zafer’s past performance, asserting that the Army failed to consider adverse performance information regarding Zafer’s past construction projects. The Army decided to take corrective action by amending the RFP to allow revised proposals. Contrack’s revised proposal, evaluated by a newly appointed SSEB, was rated satisfactory under the past performance factor and Zafer’s revised proposal received the same excellent evaluation rating under past performance as its initial proposal.

GAO stated that the evaluation of an offeror’s past performance is within the discretion of the contracting agency, and GAO will not substitute its judgment for reasonably based past performance ratings. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation’s evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination of the offeror’s past performance, including relevant information close at hand or known by the contracting personnel.

Where, as here, the record showed that Zafer’s excellent past performance rating was primarily based upon two performance ratings for projects, but three reports provided overall ratings of satisfactory or marginal, and indicated that Zafer had a number of performance problems, GAO found that the Army’s past performance evaluation did not meet the standard discussed above. The Army made no effort to investigate the merits of the negative reports. GAO stated that it has no basis to find reasonable the Army’s assessment of an excellent rating for Zafer under the past performance factor and sustained Contrack’s protest on that basis.

4. Dorado Services, Inc., B-401930.3, June 7, 2010

Link: [GAO Opinion](#)

Agency: Department of the Air Force

Disposition: Protest denied.

Keywords: Past Performance

General Counsel P.C. Highlight: The evaluation of an offeror's past performance is within the discretion of the contracting agency, and GAO will not substitute its judgment for reasonably based past performance ratings.

The Department of the Air Force (Air Force) issued a request for proposals (RFP) for refuse and recycling services for an Air Force base. Dorado Services, Inc. was not awarded the contract and protests the Air Force's evaluation of the past performance factor.

The RFP was issued as a commercial services acquisition under FAR Part 12. The contract was to be fixed-price for a one-year base period with four one-year option periods. Award was to be based on an integrated assessment of the past performance and price of technically acceptable proposals. The Air Force was to look at relevant and recent contracts of bidders to assess the past performance of each bidder. Dorado's proposal was found to be technically acceptable and received a rating of substantial confidence for past performance. However, another bidder's proposal was lower in price and that bidder was awarded the contract.

The evaluation of an offeror's past performance is within the discretion of the contracting agency, and GAO will not substitute its judgment for reasonably based past performance ratings. GAO will review the evaluation and award decision to determine if they were reasonable and consistent with the evaluation criteria and procurement statutes and regulations.

GAO found that the agency's assessment of a substantial confidence rating to the awardee's proposal under the past performance factor was reasonable and consistent with the terms of the solicitation since the awardee received satisfactory to exceptional ratings on all of its relevant contracts and positive comments from references. There were no meaningful differences in what both proposals had to offer, but the awardee's proposal was lower in price. GAO found that the assessment made by the Air Force was not unreasonable. The protest is denied.

5. **CapRock Government Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., B-402490; B-402490.2; B-402490.3; B-402490.4; B-402490.5, May 11, 2010**
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Link: [GAO Opinion](#)

Agency: Department of Defense

Disposition: Protests denied.

Keywords: OCI; Organizational Conflicts of Interest

General Counsel P.C. Highlight: Contracting officials must avoid, neutralize or mitigate potential significant OCIs so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity and an unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract.

CapRock Government Solutions, Inc. (CapRock), ARTEL, Inc. (ARTEL), and Segovia, Inc. (Segovia) protest the award of a contract to Intelsat General Corporation, under request for proposals (RFP), issued by the Department of Defense (DoD), for performance of the Navy's Commercial Broadband Satellite Program (CBSP).

The RFP sought proposals to support the Navy's CBSP and anticipated award of a single indefinite-delivery/indefinite-quantity (ID/IQ) contract for a base year and four option years. Proposals would be evaluated on the basis of price, technical approach, and past performance. Five proposals were received and were evaluated by the agency's source selection evaluation board (SSEB). The source selection authority (SSA) also reviewed the assessments and concluded that Intelsat's advantages under two of the subfactors, and its higher-rated past performance, merited award over CapRock's higher ratings for a different subfactor and its lower price.

CapRock, ARTEL, and Segovia assert that the agency improperly evaluated Intelsat's past performance, and CapRock and ARTEL each argue that their own past performance should have been rated higher. The evaluation of an offeror's technical proposal, and its past performance, is a matter within the agency's discretion. 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 and applicable procurement statutes and regulations.

The record shows that the agency credited both Intelsat and its partners for performance under the highly relevant contracts and that these references were the basis for a green overall rating, as well as the agency's judgment that Intelsat had the best overall past performance. GAO thinks these judgments were reasonable and consistent with the terms of

the solicitation. The record showed no evidence that CapRock or ARTEL's past performance should be rated higher.

GAO states that the SSA is required to exercise independent judgment in making a reasonable and adequately-documented source selection decision and the SSA has broad discretion in determining the manner and extent to which technical and cost evaluation results are used, is permitted to make an independent evaluation of offerors' proposals, and may disagree with or expand upon the findings of lower-level evaluators provided the basis for the evaluation is reasonable and documented in the record. Therefore, CapRock's assertion that the agency's evaluation of its technical proposal was unreasonable under several subfactors is without merit where the record shows that the SSA viewed Intelsat's proposal as superior to CapRock's proposal with regard to technical approach and although CapRock disagrees with the judgment of the SSA, it has not shown it to be irrational or inconsistent with the solicitation criteria.

ARTEL argues that the award to Intelsat was tainted by an organization conflict of interest (OCI) arising from the awardee's knowledge of the other offeror's costs for certain satellite resources. GAO finds that the allegations, even if true, would not constitute an OCI. Contracting officials must avoid, neutralize or mitigate potential significant OCIs so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity and an unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract. ARTEL complains that the awardee had access to certain cost information arising from ARTEL's negotiations with Intelsat for the use of satellite resources that were under Intelsat's exclusive control. GAO states that these types of negotiations between competitors do not give rise to an OCI. GAO denies the protests.