



Bid Protest Weekly

brought to you by

GENERAL  COUNSEL^{PC}
ATTORNEYS AT LAW

February 2, 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.generalcounselaw.com.

1. American Security Programs, Inc., B-402069, B-402069.2, January 15, 2010

Link: [GAO Opinion](#)

Agencies: General Services Administration

Disposition: Protest sustained.

Keywords: FSS contract

General Counsel, P.C. Highlight: When a concern arises that a vendor is offering services outside the scope of its GSA Schedule contract, the relevant inquiry is not whether the vendor is willing or able to provide the services that the agency is seeking, but whether the services or positions offered are actually included on the vendor's GSA Schedule contract. If they are not actually included in the GSA Schedule contract, the offeror is not eligible for award of a task order.

The General Services Administration (GSA) issued a request for quotations (RFQ) under Federal Supply Schedule (FSS) 84 for construction site security services to ensure that the finished facility would obtain sensitive compartmented information facility (SCIF) accreditation from the Defense Intelligence Agency (DIA). American Security Programs, Inc. (ASP), the protestor, and Coastal International Security, Inc. (CIS), the awardee, were two of the three total vendors that responded to the RFQ. After the task order was issued to CIS, ASP protested on the basis that CIS was ineligible for the award because it did not offer all the services required by the RFQ on its FSS contract.

The FSS program, as overseen by GSA, provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services, but one that still satisfies all requirements for full and open competition. An agency can choose to order items using GSA FSS procedures, but all items or services must be within the scope of the vendor's existing FSS contract. In this protest, ASP claimed that one of the services listed in the RFQ, Construction Site Security Program Management services, was outside the scope of CIS's FSS contract. ASP distinguishes the tasks required for this service as being professional and consulting in nature, rather than the rest of the enumerated required services, which dealt more with protective services.

In instances where a protest alleges that certain services (or supplies) are outside the scope of a vendor's FSS contract, GAO must determine whether the services are actually included on the vendor's contract as reasonably interpreted. Here, GAO determined that the services

required by this particular RFQ exceeded those that CIS currently had on its existing GSA Schedule contract. The site-specific plan and ability to coordinate with related agencies were outside the scope of the supervisory positions that CIS described, and therefore, GAO stated that CIS's quotation should not have been viewed as having met the RFQ's requirements. GAO then recommended that the agency issue the task order to the vendor that was next in line for selection and recommended that ASP's costs of filing and pursuing the protest be reimbursed.

2. American Warehouse Systems, B-402292, January 28, 2010

Link: [GAO Opinion](#)

Agency: General Services Administration

Disposition: Protest denied.

Keywords: Construction services; GSA schedule; beyond the scope

General Counsel, P.C. Highlight: An order placed through the awardee's schedule contract may not include any item or services that are not already included on the awardee's GSA schedule contract.

American Warehouse Systems (AWS) protested the issuance of an order to FedSource, Inc. under the firm's General Services Administration (GSA) schedule contract on the basis that the order included labor services that were not on FedSource's GSA schedule contract.

The acquisition was to be conducted in accordance with Federal Acquisition Regulation (FAR) subpart 8.4, which governs the Federal Supply Schedule (FSS) program. The RFQ required that vendors hold GSA "Schedule 56" contracts for "Building Materials/Industrial Services and Supplies," but also identified that the supplies and services could be supplied under certain "applicable" Special Item Numbers (SIN). The RFQ stated that award would be made on a best value basis, considering technical, past performance, and price factors.

After the order was placed with FedSource, AWS protested by stating that FedSource's GSA contract did not contain the applicable SIN to install the product, and therefore the agency could not purchase the services from FedSource. In particular, AWS argued that the installation of the mezzanine structure in question must be considered to be "construction" and that the procurement of the services from FedSource through SIN 361-30, which does

not include construction, was inappropriate. AWS argued further that labor must be provided under SIN361-32, “Installation and Site Preparation for Pre-Engineered/Prefabricated Buildings and Structures,” which does include construction and which is not included in FedSource’s GSA contract.

While it is improper for an agency to use FSS procedures to purchase items that are not listed on a vendor’s GSA schedule without conducting a competition, GAO held that that was not the case here. Due to the specific qualifications in the RFQ, GSA sought the installation of a free-standing mezzanine system that did not require construction, alteration, or repair of a building structure, rather it required that the structure be bolted to the floor. GAO held that general reference in the RFQ to International Building Code design and references to applicable codes and standards did not transform the order into one for construction services. Furthermore, GSA’s contracting officer had contacted representatives from other agencies and from FedSource and AWS prior to issuing the RFQ, all of which concluded that the services were assembly rather than construction. For the above reasons, GAO denied AWS’s protest.

3. JND Thomas Company, Inc., B-402240, January 28, 2010

Link: [GAO Opinion](#)

Agency: Army Corps of Engineers

Disposition: Protest denied.

Keywords: Unbalanced bidding

General Counsel P.C. Highlight: In a bid that includes separate line items, each line item must be reasonably and fairly priced and cannot be overstated or understated in a way that gives the contractor excessive advanced payments, even where the overall price is fair and reasonable. But, the Government is free to accept an unbalanced bid if a risk analysis shows that there is not an unacceptable level of risk involved in accepting the bid. FAR § 15.404-1(g)

After issuing an invitation for bids (IFB), the U.S. Army Corps of Engineers awarded a contract to CJW Construction, Inc. for excavation and dredging related work at Camp Pendleton in California. JND Thomas Company, Inc., the second lowest bidder, protested

that the awardee's bid was materially unbalanced and posed an unacceptable risk to the government.

Generally, unbalanced pricing exists where the prices of one or more line items are significantly overstated or understated, despite an acceptable total evaluated price. In the present case, JND asserted that for certain items CJW's figures were higher than other bidders' prices and higher than the agency's independent government estimate (IGE). JND also claimed that CJW's figures for certain line items were lower than the IGE and all other bids and insufficient to cover the cost of performing the work. Where the overstated line items are at the front end of a contract and the understated ones at the back end, the contractor receives more money early in the contract, essentially as advance payments, and creates a risk that the understated items at the end of the contract will not be completed or not performed adequately.

GAO did not find any evidence of unbalanced bidding here. While some prices were higher than JND's and the IGE's bids, CJW's prices were not the highest of all the bidders. For the prices that JND claimed were too low, GAO accepted CJW's explanation that it would cover its costs through the sale of salvaged material.

Even in instances where a bid is determined to be unbalanced, an agency need not reject the bid if it determines that the award of the contract will not result in the government paying an unreasonably high price for the performance or otherwise present an unacceptable level of risk. Here, the Corps of Engineers performed a risk assessment based on past-performance and based on estimates made by CJW in its bid. It concluded that there was not a significant risk of non-performance and not a significant risk of paying unreasonably high prices by awarding the contract to CJW. As such, JND's protest was denied.

4. **Kiewit Texas Construction L.P., B-402090, B-402090.2, January 12, 2010**

Link: [GAO Opinion](#)

Agencies: Corps of Engineers

Disposition: Protest denied.

Keywords: Timely performance

General Counsel, P.C. Highlight: An evaluation based on what is stated in the proposal, including ambiguities or unclear language, is reasonable. An Agency cannot be expected to know what might have been intended in a proposal if it is not clearly stated.

In September of 2009, the Army Corps of Engineers issued a request for proposals (RFP) for levee repairs in Galveston, Texas. The solicitation was for firms that held contracts under a multiple award task order contract and was for the issuance of a fixed-price task order, the awardee being the firm that submitted a technically acceptable and lowest priced bid. Kiewit Texas Construction L.P. submitted the lowest priced proposal, but it was rejected on the basis of being technically unacceptable for failing to demonstrate the ability to schedule and accomplish timely completion of the work. Thereafter, Environmental Chemical Corporation (ECC), the next lowest bidder, was issued the order and Kiewit filed a protest with GAO.

In its proposal, Kiewit proposed a start date two months after it expected contract award and three months after the Agency's anticipated award date. This factor, in conjunction with its inability to propose a timeline within which the work would be completed in 90-days from receiving a notice to proceed, was the basis for the Corps rejecting Kiewit's proposal. In its initial protest, Kiewit argued that since its proposal stated that it accepted the RFP's terms, which included a requirement to start performance according to certain time constraints, that this should weigh in favor of Kiewit meeting technical acceptability. Kiewit also claimed that because firms were not told of the anticipated dates for issuance of the task order, or the notice to proceed, that the agency had applied an unstated evaluation factor by finding its proposal technically unacceptable. In a supplemental protest, Kiewit further stated that the RFP did not require the projected work to be done within 90-days of the notice to proceed, but rather it allowed a firm to choose to show that it could perform all the work within a 150-day period.

GAO found that Kiewit's assumption that the start date for the project would be 3-months from issuance of the task order was unreasonable, and, since it was unsupported by any explanation for its proposed timeline in the proposal, it was not a sufficient ground on which Kiewit could allege that the agency was unreasonable in its evaluation. Based on its inability to explain its own reasoning for the performance schedule, and lack of explanation for why it extended the timeline out so far from the issuance date, GAO determined that Kiewit had not adequately established a basis upon which to question the reasonableness of the Corps' evaluation and denied Kiewit's protest.

5. Overseas Lease Group, Inc., B-402111, January 19, 2010

Link: [GAO Opinion](#)

Agencies: Department of the Army

Disposition: Protest Denied.

Keywords: Contract modification

General Counsel, P.C. Highlight: Modification of an existing contract is not normally protestable at GAO except where the modification is beyond the scope of the original contract, since, absent a valid sole-source justification, the work covered by the modification would have been the subject of a new competitive procurement.

After the Department of the Army issued a modification to one of its contracts to ANHAM FZCO, LLC, Overseas Lease Group, Inc. (OLG) protested, claiming that the modification is beyond the scope of the contract and amounted to an improper sole-source award. The initial request for proposals (RFP) sought proposals for a single award task-order indefinite-delivery/indefinite-quantity (ID/IQ) contract to provide vehicle leases for certain types of armored and non-tactical vehicles in Afghanistan. The contract was then awarded to ANHAM in May of 2009. Two months later, the Army issued a no-cost modification to the contract, which added additional unarmored vehicles to the list of vehicles already included in the original contract. OLG protested this modification on the basis that the original contract was limited to armored vehicles and that by adding unarmored vehicles the Army had exceeded the scope of the contract and created an improper sole-source award.

The Army countered this claim by stating that the original solicitation included unarmored vehicles in its scope when it made reference to “non-tactical vehicles,” asserting that in military parlance the two terms were synonymous.

GAO typically does not adjudicate protests surrounding contract modifications, since they generally revolve around contract administration, however an exception to that rule can be found when a protestor alleges that a modification is beyond the scope of the original contract and should have been subject to the statutory requirements for competition.

In this protest, GAO determined that the purpose and nature of the original contract was not sufficiently changed by the modification to warrant sustaining the protest. Even though the

original RFP did not specifically mention unarmored vehicles, GAO found that the contract was sufficiently clear in including unarmored vehicles within its scope. Because the RFP specifically enumerated non-tactical vehicles and “up-armored” vehicles, GAO established that the RFP’s intent was to contrast the two types and that non-tactical was to include unarmored vehicles. In addition, the list of vehicles provided in the original contract, while not including any unarmored vehicles, was made clear by the Army that it was non all-inclusive and therefore left room for modifications in the future to include unarmored vehicles. As such, OLS’s protest was denied.