



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. JRS Management, B-402650.2, June 25, 2010

Link: [GAO Opinion](#)

Agency: Department of the Navy

Disposition: Protest denied.

Keywords: Terms of the Solicitation

General Counsel P.C. Highlight: GAO will review the record to determine whether the restrictions imposed by the solicitation are reasonably related to the agency's needs.

JRS Management (JRS) protests the terms of a request for quotations (RFQ), issued by the Department of the Navy (Navy), for a sail loft instructor at the Navy Consolidated Brig.

The RFQ contained one contract line item number (CLIN), for which vendors were required to provide a unit hour price for a total quantity of 1,992 hours (249 days, 8 hours per day) for the sail loft instructor. An amendment to the RFQ contained a schedule of supplies and services that the instructor may be required to work.

The RFQ stated that the primary duties of the instructor should include managing the sail loft, training and supervising approximately eight prisoners, and assisting security personnel in maintaining security. The instructor was also required to have at least two years correctional experience and have supervised at least eight prisoners. The Navy amended the RFQ to additionally require the instructor to have at least two years experience in the control and use of keys, tools, and toxic, caustic, and flammable materials in a correctional setting and have at least a year of experience in supervising, moving, and teaching at least eight prisoners in a correctional setting.

JRS asserts that there should be a second CLIN for the amendment containing possible additional hours. GAO states that the risk that additional hours may be required does not make the solicitation inappropriate or improper. It is within the agency's discretion to offer a proposed contract that imposes maximum risks upon the contractor.

JRS also asserts that the experience requirements are unduly restrictive. GAO states that the determination of a contracting agency's needs and the best method of accommodating them are matters primarily within an agency's discretion. GAO will review the record to determine

whether the restrictions imposed are reasonably related to the agency's needs. GAO's review of the record finds that the Navy has established a reasonable need for the experience requirements. The Brig houses violent offenders in contact with materials that could be used for harm and therefore, it is reasonable for the Navy to increase safety by requiring the contractor to provide personnel with experience with the challenges that can arise within the facility. The protest is denied.

2. C2C Solutions, Inc.; TrustSolutions, LLC, B-401106.6; B-401106.7, June 21, 2010

Link: [GAO Opinion](#)

Agency: Department of Health and Human Services

Disposition: Protests denied.

Keywords: Corrective Action; OCI

General Counsel P.C. Highlight: Where an agency conducts exchanges with an offeror regarding the offeror's plan to mitigate identified conflicts of interest, such exchanges do not constitute discussions.

C2C Solutions, Inc. (C2C) protests the corrective action being taken by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), in response to GAO recommendation for corrective action in sustaining a previous protest.

GAO originally sustained C2C's protest against an award of a contract, under a request for proposals (RFP), issued by CMS for contracts in support of its audit, oversight, and anti-fraud, waste, and abuse efforts in two geographic zones. GAO found that CMS failed to reasonably consider the plan submitted on behalf of the awardee, by its parent company, to mitigate the awardee's organizational conflicts of interest (OCI). GAO recommended that "the agency reconsider its determination that the awardee is eligible for award based on the amended OCI mitigation plan." CMS advised GAO that it planned to implement the recommendation by "re-engaging" the awardee regarding its proposed OCI mitigation strategy.

C2C and TrustSolutions argue that CMS's decision to reengage the awardee regarding the proposed mitigation plan is improper where it is inconsistent the GAO recommendation and is contrary to FAR § 9.504(e). GAO states that the details of implementing their recommendations for corrective action are within the discretion and judgment of the

contracting agency. The issue in this protest is whether the corrective action proposed by CMS is contrary to FAR § 9.504(e) or whether their “re-engagement” constitutes improper discussions.

Under FAR § 9.504(e), when an agency concludes that an apparently successful offeror is ineligible for award based on a conflict of interest, the agency is required to notify the firm and allow it “a reasonable opportunity to respond.” GAO states that CMS is not precluded from reengaging the awardee regarding its OCI mitigation plan. FAR § 9.504(e) merely establishes an agency’s minimum duty to provide an offeror with an opportunity to respond to an agency’s OCI concerns where, but for the OCI concerns, the offeror would receive an award. There is also nothing in FAR § 9.504(e) to suggest that the offeror’s status has any bearing on how the agency should engage the offeror regarding its OCI mitigation strategy. Where an agency conducts exchanges with an offeror regarding the offeror’s plan to mitigate identified conflicts of interest, such exchanges do not constitute discussions. The protests are denied.

3. Bilfinger Berger AG Sede Secondaria Italiana, B-402496, May 13, 2010

Link: [GAO Opinion](#)

Agency: U.S. Army Corps of Engineers

Disposition: Protest denied.

Keywords: Responsibility

General Counsel P.C. Highlight: GAO will not question a negative responsibility determination unless the protester can demonstrate bad faith on the part of the agency or a lack of any reasonable basis for the determination.

Bilfinger Berger AG Sede Secondaria Italiana (BBSSI) protests the award of a contract under a request for proposals (RFP), issued by the U.S. Army Corps of Engineers (Army), for construction, repair, and facilities maintenance services in Italy.

The RFP was for award on a “best value” basis. The offerors were required to submit a Societa Organismi D’Attestazione (SOA), which is a certification evidencing compliance with Italian law regarding the qualifications of companies competing for public works contracts. BBSSI’s proposal included an SOA in the name of a related company, Bilfinger Hochbau GmbH (BBH), a debarred contractor.

In considering BBSSI's responsibility, the contracting officer (CO) found that BBSSI and BBH had an extremely close business relationship. The Army also received an opinion from an Italian legal expert to determine the effect of BBSSI's use of BBH's SOA. Based on the information gathered by the CO, the CO determined that BBSSI would have "full disposal of BBH's assets and resources" and would likely avail itself of those assets. Based on the close relationship between BBSSI and BBH, the CO determined that BBH was indirectly offering on the solicitation through BBSSI and, therefore, BBSSI was not a responsible offeror.

BBSSI challenges the agency's negative responsibility determination. In making a negative responsibility determination, a CO is vested with a wide degree of discretion and must rely on his or her business judgment in exercising that discretion. The determination must be factually supported, but GAO will not question the negative determination unless the protester can demonstrate bad faith on the part of the agency or a lack of any reasonable basis for the determination. In this case, the GAO found that CO's determination was based on extensive information on which the CO relied fully supported the view that BBSSI and BBH were closely related, and the resultant appearance that BBH, a debarred contractor, would be involved in performing the contract. The FAR prohibits debarred firms from submitting offers for government contracts either directly or indirectly. GAO finds that the CO reasonably relied on the evidence in concluding that BBH essentially was proposing through BBSSI, and that BBSSI was nonresponsible. The protest is denied.

4. Alalamiah Technology Group, B-402707.2, June 29, 2010

Link: [GAO Opinion](#)

Agency: Defense Logistics Agency

Disposition: Protest denied.

Keywords: Late proposal

General Counsel P.C. Highlight: It is the offeror's responsibility to deliver its proposal to the proper place at the proper time.

The Defense Logistics Agency (DLA) issued a request for proposals (RFP), for excess property management and office support services to be performed in Kuwait. The RFP established a closing date and time of April 20 at "10 AM Sharp" local time. DLS issued two

amendments to the RFP; the first included a revised closing date of April 23 and second amendment included a revised closing date of April 28. However, the time remained unchanged at 10 AM.

Alalamiah Technology Group (ATG) submitted its proposal electronically to the contracting official on April 28 in three volumes. The first volume was sent at 9:52 a.m., the second volume at 9:57 a.m., and the third volume was sent at 10:00 a.m. However, the contracting official did not receive the volumes until 10:03, 10:08, and 10:11. ATG was notified that its proposal was received late and would not be considered for award.

GAO states that it is the offeror's responsibility to deliver its proposal to the proper place at the proper time. When a proposal is submitted electronically, it is the offeror's responsibility to ensure timely delivery by transmitting the proposal sufficiently in advance of the time set for receipt of proposals to allow for timely receipt. The RFP, in this case, established that offerors' proposals were to be received by April 28 at 10:00 a.m. The record shows that the primary cause of ATG's late delivery was that the offeror delayed attempting to transmit its proposal until shortly before the time set for receipt. ATG did not act reasonably in waiting to transmit its electronic proposal until minutes before the time set for receipt of proposals, especially when ATG was aware of potentially long email delivery times common to its location. The protest is denied.

5. **K & S Associates, Inc., B-402604, June 14, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Proposal Evaluation

General Counsel P.C. Highlight: In reviewing a protest objecting to an agency's evaluation, it will not evaluate the proposals anew or substitute its judgment for that of the agency; rather, it will examine the record to determine whether the agency's judgment was reasonable and in accord with the RFP.

K & S Associates, Inc. (K & S), protests the rejection of its proposal, under a request for proposals (RFP), issued by the Department of the Army (Army), for construction of a digital training facility.

The RFP provided for award to the offeror whose proposal represented the best value to the government based on technical factors and price. K & S was not awarded the contract and received an overall rating of acceptable although its price was lower than the awardee's. K & S argues that the agency's evaluation of its proposal was unreasonable and that the agency has not justified its selection of a higher-priced proposal.

GAO states that in reviewing a protest objecting to an agency's evaluation, it will not evaluate the proposals anew or substitute its judgment for that of the agency; rather, it will examine the record to determine whether the agency's judgment was reasonable and in accord with the RFP. GAO's examination of the record supports the agency's conclusion that the awardee's previous projects had a greater degree of relevance to the project called for under the RFP. K & S failed to demonstrate that it had experience on projects that were similar overall, it failed to demonstrate that all four of the proposed key individuals had previously worked together on a project as a team, and it failed to demonstrate a capability to plan and schedule the complete project to meet the proposed contract completion period. Therefore, the protest is denied.