



Bid Protest Weekly

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May 12, 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.generalcounsellaw.com.

1. Ocean Ships, Inc., B-401526.4, April 21, 2010

Link: [GAO Opinion](#)

Agency: Department of the Navy, Military Sealift Command

Disposition: Protest denied.

Keywords: Disclosure of Source Selection-Sensitive Information

General Counsel P.C. Highlight: The disclosure of source selection information, including an offeror's price, during the course of procurement is improper and the agency may take remedial steps, including canceling the procurement, if it reasonably determines that the disclosure harmed the integrity of the procurement process.

The Department of the Navy, Military Sealift Command, issued an RFP for the operation and maintenance of large, medium-speed roll-on/roll-off (LMSR) ships in the agency's surge project. The protester, OSI, challenged the evaluation of its proposal. During the evaluation stage and in preparation for opening discussions with offerors in the competitive range, the contracting officer sent an email to General Dynamics American Overseas Marine (AMSEA), the eventual awardee, that inadvertently contained pricing and discussion questions for all offerors, including the protester. AMSEA's receiving official stopped reading the document when he realized what it contained, deleted the attachment, and notified the contracting officer of the error. The contracting officer notified the offerors of the mistake and eventually determined that the disclosure did not give AMSEA a competitive advantage.

After submitting final proposal revisions, the Agency rated OSI's technical proposal as marginal, its past performance as very good, and its socioeconomic factor as satisfactory. The Agency judged AMSEA's technical proposal as exceptional, its past performance very good, and its socioeconomic factor as satisfactory. AMSEA submitted a lower price by 8.5%. OSI protested the Agency's decision to allow AMSEA to remain in the competition and the evaluation of OSI technical and socioeconomic factors.

The disclosure of source selection information, including an offeror's price, during the course of a procurement is improper and the agency may take remedial steps, including canceling the procurement, if it reasonably determines that the disclosure harmed the integrity of the

procurement process. If the agency considers the issue and decides to take no action, GAO will sustain a protest based on the improper disclosure only where the protester demonstrates that it was in some way actually, competitively prejudiced by the disclosure.

During the procurement, AMSEA alone was asked to explain in detail each of the changes that it made to its final proposal revision, to insure that AMSEA's changes did not result from any information that it learned in the disclosure. The Agency reviewed this information and was satisfied that AMSEA had not profited from disclosure of source selection information. GAO agreed and further determined that the protester had not been able to document any prejudice to its proposal by the release of information. AMSEA had the lowest price after the initial evaluation, lowered its price more in its final proposal revisions, and the protester could not explain how, knowing that OSI had a higher price, that AMSEA would continue to lower its price.

OSI objected to its satisfactory rating on the socioeconomic factor. It argued that it should have received an exceptional because it is a small business and will perform the majority of the work on the contract. The GAO disagreed that a small business automatically is entitled to an exceptional rating on socioeconomic factor just for doing the majority of the work. The GAO noted that OSI had not identified any specific small businesses or minority institutions on this project, the Agency was reasonable in evaluating them as acceptable.

OSI further objected to their technical evaluation as marginal. The GAO noted, however, that OSI could prevail on this protest ground completely and still not be in line for award. If the Agency concedes that OSI's technical proposal was exceptional, then the non-price factors between OSI and AMSEA would be equal. Where the non-price factors are equal under this solicitation, the Agency then looks to price to make final award. Since AMSEA was 8.5% lower in price, AMSEA would still be first in line for award. Because OSI could not show actual prejudice in its technical evaluation, the GAO then denied OSI's final protest ground.

2. Del-Jen Education & Training Group, B-401787.3, May 4, 2010.

Link: [GAO Opinion](#)

Agency: Department of Labor

Disposition: Protest denied.

Keywords: Corrective Action

General Counsel P.C. Highlight: Where there is a need for continued performance under a protested contract, an agency generally may permit the original awardee to continue performance (after the lifting of any applicable stay) pending the implementation of corrective action undertaken in response to the protest.

Del-Jen Education and Training Group protested the award of a contract to Res-Care, Inc. for establishment of a Job Corps Center in St. Petersburg, Florida. The procuring agency, the Department of Labor, considered Del-Jen's protest grounds and decided to take correction action to include discussions with offerors, requesting final proposal revisions, and making a new source selection decision. During the pendency of the corrective action, Res-Care continued to perform the contract under an agency override of the CICA automatic stay of performance. Del-Jen then protested Res-Care's continued performance and, as a result of the protest, the Department of Labor decided to terminate Res-Care's contract and give the work, during the balance of the corrective action, to a contractor who had not submitted a proposal.

Del-Jen then protested to the GAO that Res-Care should have been excluded from the award because it had obtained a significant competitive advantage and unequal access to information regarding the project that it was otherwise free to include in its final proposal revisions.

GAO noted that, where there is a need for continued performance under a protested contract, an agency generally may permit the original awardee to continue performance (after the lifting of any applicable stay) pending the implementation of corrective action undertaken in response to the protest. GAO determined that based on this, a competitive advantage accruing to the original awardee as a result of continued performance does not constitute an unfair advantage for which the agency is required to compensate. This is similar to the natural advantage that an incumbent has, which an agency is not required to compensate for. GAO denied the protest.

3. **Nippo Corporation, B-402363.2, May 5, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Navy

Disposition: Protest denied.

Keywords: Technical evaluation; cost-technical trade-off

General Counsel P.C. Highlight: In conducting a price-technical tradeoff, the source selection official has discretion to select a higher-priced, higher technically-rated proposal if doing so is in the government's best interest, is consistent with the stated evaluation criteria, and is properly documented in writing in the procurement file.

Nippon Corporation protested the award by the Navy of a contract to Toa Corporation for revitalization of several hundred townhouses in Sasebo, Japan. The construction work here would be awarded not based solely on low price, but offers would be evaluated on their technical proposal as well. The awardee would be selected on a best value basis, where technical factors when combined were considered to be equally important to the price factor. Nippon's proposal was significantly lower in price, by 11%. Toa's proposal was rated as overall Good and Nippon's proposal was overall lower at the satisfactory level. Nippon argued that, because its price was more than 10% lower than Toa's, Toa's technical proposal would have to be rated as "Excellent," or two adjectival ratings above Nippon's to warrant an award to Toa. GAO rejected this mechanistic application of the rules for a cost-technical trade-off.

In conducting a price-technical tradeoff, the source selection official has discretion to select a higher-priced, higher technically-rated proposal if doing so is in the government's best interest, is consistent with the stated evaluation criteria, and is properly documented in writing in the procurement file. An agency is not required to engage in a mechanical process of equating differences in adjectival ratings to some established dollar value or percentage difference in price. To the contrary, adjectival ratings are merely a guide to intelligent decisionmaking, and it generally is improper for an agency to rely on a purely mathematical or mechanical price-technical tradeoff methodology. GAO noted that the source selection official extensively documents the strengths and weaknesses that supported her award decision. GAO found the assessment to be reasonable and denied Nippon's protest.