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Bid Protest Digest
Volume II

This issue of bid protest highlights include decisions from the Government Accountability Office (GAO) and the U.S. Court of Federal Claims (COFC). These decisions emphasize important legal principles addressing (1) agency discretion in technical evaluations, (2) requirements to sufficiently document evaluation findings, (3) timeliness, (4) reimbursement of protest costs, and (5) protester standing.

Court of Federal Claims

Percipient.ai Inc. v. United States, No. 1:23-cv-00028, 2023 WL 2819637
(Fed. Cl. Mar. 9, 2023)

Holding: A party that does not submit a proposal in response to a solicitation nevertheless has standing to challenge an agency procurement process at COFC after the agency awards the contract, if the party plausibly alleges that, but for the agency’s procurement-process deficiencies, the party would have been a prospective offeror with a direct economic interest.

Summary: In January 2021, the National Geospatial-Intelligence Agency (NGA) awarded a task order to defendant-intervenor CACI International, Inc. (CACI) to develop an artificial intelligence system for analyzing, storing, and organizing geospatial-intelligence data the agency collects from satellites and other sources. Two years later, the plaintiff, Percipient.ai (Percipient), protested the NGA’s 2021 task order award despite never submitting a proposal in response to the solicitation.

Percipient claimed NGA violated 10 U.S.C. § 3453, which establishes a preference for already-developed commercial products and services and requires government agencies and their contractors to conduct market research and to acquire those products and services “to the maximum extent practicable.” Percipient acknowledged that it could not bid on the solicitation because its proprietary commercial computer software could fulfill some, but not all, of the task order requirements. Percipient alleged that it instead informed NGA of those requirements that Percipient’s computer software could meet, and that in response NGA assured Percipient that CACI would conduct post-award market research in support of several “make or buy” decisions for viable commercial products as required by the solicitation. Percipient filed this protest after learning that CACI was developing its own program to satisfy the task order requirements, thereby calling into question whether CACI would fairly consider Percipient’s commercial product as a solution to fulfill those requirements.

NGA and CACI sought dismissal, arguing, among other things, that Percipient lacked standing because (1) only actual or prospective bidders could file suit related to an agency’s procurement process, and Percipient never submitted a proposal, (2) Percipient did not have a direct economic interest in the project, and (3) Percipient’s protest was a challenge to NGA’s contract administration.

The court disagreed and held that Percipient did have standing because its complaint plausibly alleged that the agency’s violation of § 3453 deprived Percipient of a chance to offer its product and potentially profit off its use. The court concluded that had the agency complied with the statute, Percipient would have offered its commercial product as a prime contractor, subcontractor, or licensee. Percipient therefore did have a direct economic interest in the procurement because NGA’s alleged statutory violation deprived Percipient of the opportunity to offer its commercial product in response to the solicitation. Moreover, the court determined that prohibiting offerors of commercial products from challenging an agency’s post-award violation of § 3453 would effectively authorize such violations so long as the agency deferred “make or buy” commercial product decisions until after contract award. The court stated that result would conflict with the clear congressional intent behind the statute.

Digiflight, Inc. v. United States, No. 22-1521-C, 2023 WL 3001241
(Fed. Cl. Apr. 19, 2023)

Holding: First, an agency must conduct a price realism analysis in a rational manner that is in accordance with the stated evaluation methodology and that comports with the agency’s evaluation of non-price factors. Mere conclusory statements that the agency satisfied the requirements for a price realism analysis are insufficient. Second, in a best value procurement, an agency must sufficiently document its technical evaluations and associated rationales to award (or not award) strengths, weaknesses, or deficiencies in order to (i) comply with even the minimal documentation requirements of a Federal Acquisition Regulation (FAR) subpart 8.4 procurement, and to (ii) enable the Court to apply the Administrative Procedure Act (APA) standard of review required in a bid protest.

Summary: The U.S. Army issued an RFQ to provide Army Aviation and Missile Command (AMCOM) programmatic support services. The solicitation explicitly stated that it was a best value procurement under FAR subpart 8.4 and not a FAR Part 15 negotiated competition. The U.S. Army awarded the task order to defendant-intervenor The Tolliver Group, Inc. (Tolliver), selecting Tolliver over plaintiff DigiFlight, Inc. (DigiFlight) and a third offeror. DigiFlight protested the Army’s task order award arguing, among other things, that (1) the Army’s price realism analysis was irrational, and (2) the Army failed to conduct a technical expertise evaluation and thereby essentially converted a best value procurement into a lowest price technically acceptable (LPTA) procurement.

DigiFlight alleged the Army’s price realism analysis was irrational because the analysis consisted of conclusory and repetitive statements with little explanation or documentation describing the Army’s actual analysis. Specifically, DigiFlight challenged the Army’s conclusions that: (1) a comparison of the two lowest composite rates offered by Tolliver and the third offeror sufficiently indicated there was no evidence of an attempt to offer unrealistically low pricing; (2) all offered labor category prices were acceptable, and therefore realistic, when the Army used the GSA Contract Awarded Labor Categories (CALC) tool to substantiate a random sample; and (3) each offeror’s level of effort and labor mix reflected an understanding of the RFQ requirements, demonstrated an ability to perform the Performance Work Statement (PWS) tasks, and was realistic to support the offeror’s proposed approach at an acceptable level of risk.

The Court agreed with DigiFlight and found all three of the Army’s conclusions to be unreasonable. First, the Army irrationally concluded that rates were realistic simply because more than one offeror proposed rates well-below independent government cost estimate. It was “surely” conceivable that two companies – competing for award – would have similar motivations to lower the price of their quotations, even to the point of offering unrealistically low prices. Second, the Court found no evidence in the record that the Army used the CALC tool reasonably, such as descriptions of the sample sizes and price categories run through the CALC tool. Third, the Army’s analysis regarding level of effort and labor mix was unreasonable because it was not tethered to price. The Army only conducted step one of a two-step analysis; however, the Army must determine that the number of hours proposed to conduct a task are in line with agency estimates and that the costs of those hours realistically comport with the proposed price.

The Court further found that the Army’s conclusion that each offeror possessed an “adequate understanding” of the PWS requirements under the technical expertise factor conflicted with the Army’s price realism finding that each offeror had a “clear understanding of the requirements.” The Court held the Army was not permitted to “airdrop” in such conclusions “when needed to satisfy the requirements of the price realism analysis” without some additional rationale, particularly when the only documented finding regarding the offeror’s understanding of the requirements was that the offeror’s understanding was “adequate or acceptable, not clear.”

DigiFlight also claimed the Army failed to evaluate the offerors’ quotations for technical strengths,

which contravened the RFQ terms and essentially converted the best value procurement into a LPTA procurement. Despite technical expertise being the most important evaluation factor, the Army assessed zero strengths, weaknesses or deficiencies to any quotation, nor did the Army separately analyze differences among the quotations as to “critical” PWS tasks. The Court agreed, and found that the Army’s technical evaluations relied on repetitive and conclusory explanations that offered no insight into the evaluation methodology, the evaluations’ fairness or consistency with the RFQ, or the rationale for the tradeoff analysis. The Court concluded that the Army’s failure to substantiate its purported evaluations did not comport with even the streamlined documentation requirements of FAR subpart 8.4, and additionally precluded the Court from applying the required APA standard of review for bid protests.

Government Accountability Office

International Service Contractors, LLC, B-421333, Feb. 16, 2023, 2023 CPD ¶ 49

Holding: GAO denied a protest challenging the technical evaluation of proposals and resulting best-value tradeoff decision where the overall “Very Good” rating at the factor level did not preclude the agency from assigning an “Unsatisfactory” rating at the element level.

Summary: International Service Contractors, LLC (ISC) challenged the Defense Commissary Agency’s (DeCA) decision to award a contract to ISC’s higher-priced competitor, Logistical Customer Service, Inc. (LCS). Although LCS and ICS received the same “Very Good” ratings at the factor level, ISC received an “Unsatisfactory” rating under one of the subfactors’ elements. During the tradeoff analysis, DeCA concluded the basis for this “Unsatisfactory” rating (significantly lower labor hours than the Government estimate) presented “substantial risk,” and DeCA awarded the contract to LCS on this basis, notwithstanding its price premium. In its protest, ISC alleged that its “Very Good” rating at the factor level could not be reconciled with DeCA’s conclusion that, at the element level, ISC’s proposal presented substantial risk. DeCA countered that under the solicitation’s terms, a “Very Good” proposal was not necessarily one that was risk free, and a proposal that had both favorable and unfavorable aspects could still receive an overall positive rating.

GAO agreed with the agency, finding that the solicitation did not preclude DeCA from assigning a “Very Good” rating at the factor level while assessing risk to an underlying subfactor or element. GAO also denied ISC’s challenge to the merits of the “Unsatisfactory” rating and unfavorable risk assessment. ISC claimed that staffing efficiencies enabled it to propose a low-priced staffing solution that was well below the Government’s labor hours estimate. Unconvinced, GAO concluded the contemporaneous record did not support ISC’s claimed efficiencies and, therefore, protester’s bare assertions otherwise did not provide an adequate basis to sustain the protest.

General Dynamics Info. Tech., Inc., B-421290, B-421290.2, Mar. 1, 2023, 2023 CPD ¶ 60

Holding: An agency’s claimed “familiarity” with an awardee’s past performance relevancy was not a sufficient defense to the agency’s undocumented and unreasonable evaluation findings.

Summary: General Dynamics Information Technology, Inc. (GDIT) protested the issuance of a task order to GovCIO, LLC (GovCIO) under a request for task order response (RTOR) issued by the Department of Veterans Affairs (VA) for file conversion services to improve the VA’s claims and benefits processes. GDIT contended that the VA unreasonably evaluated the relevancy of GovCIO’s past performance references, which were smaller in value than the solicited requirements and did not demonstrate all necessary performance capabilities, and improperly assigned a “low risk” rating to GovCIO’s proposal. According to GDIT, GovCIO’s proposal should have received no more than a neutral rating under the past performance factor. The VA relied on its familiarity with GovCIO’s performance on those references to defend its past performance evaluation.

GAO sustained the protest and found that the VA had failed to adequately explain its evaluation conclusions regarding the relevancy of GovCIO's past performance references. In reaching this decision, GAO rejected the VA's defense that its own alleged familiarity with GovCIO's performance was sufficient to deem GovCIO's past performance relevant. GAO emphasized the VA's obligation to document the basis of its finding in the evaluation record. GAO also sustained GDIT's similar challenge to the VA's finding that GovCIO's proposal was technically acceptable under the capability and experience element, given that GovCIO had relied on the same contracts that were at issue under the past performance factor. GAO again concluded that the contemporaneous evaluation record lacked any explanation to support the VA's findings regarding the size, scope, and complexity of GovCIO's references.

ThunderCat Tech., LLC, B-421299, Mar. 6, 2023, 2023 CPD ¶ 63

Holding: GAO will not invoke the good cause exception to consider an untimely bid protest on the basis of a compelling legal challenge to the agency's evaluation. Rather, a protester must demonstrate that some reason beyond its control prevented it from timely filing its protest.

Summary: The Department of Veterans Affairs (VA) issued a request for quotations (RFQ) seeking project management and operations services. The VA held exchanges with offerors but limited the scope of quotation revisions. Following receipt of revised quotations, the agency eliminated ThunderCat Tech., LLC's (ThunderCat) quotation from consideration for award because ThunderCat did not comply with the limitations on revisions.

ThunderCat protested the VA's decision, alleging that the agency failed to engage in adequate discussions and improperly limited quotation revisions. GAO deemed ThunderCat's challenge untimely because ThunderCat did not file its protest prior to the deadline for submission of revised quotations. ThunderCat urged GAO should invoke either the "good cause" or "significant issue" exception to the bid protest timeliness rules (see 4 C.F.R. § 21.2(c)). First, ThunderCat asserted the VA's "brazen" violation of established rules regarding the conduct of discussions presented "good cause" justifying consideration of ThunderCat's belated protest. GAO explained, however, that the relevant test is not whether protester has advanced a compelling legal basis for its challenge, but instead whether some "good cause" prevented the protester from timely filing its protest. There was no such "good cause" evident in the filing circumstances here. Second, with respect to the "significant issue" exception, ThunderCat argued GAO should consider the untimely protest because it involved a question relating to discussions conducted under FAR Part 16 (rather than FAR Part 15). GAO noted that it invokes this exception "sparingly" and that ThunderCat had not presented any issue of "widespread significance" to the procurement community that GAO had not previously considered. Accordingly, GAO dismissed ThunderCat's protest as untimely.

Martek Global Servs., Inc.—Costs, B-420865.3, Mar. 9, 2023, 2022 CPD ¶ 245

Holding: GAO denied a request for reimbursement of bid protest costs where, even though the agency took corrective action following outcome prediction ADR, the protester's challenge to the agency's evaluation was not clearly meritorious and was instead "a close call," as evidenced by extensive record development, a hearing, and post-hearing briefing.

Summary: The VA issued an RFQ seeking a commercially available off-the-shelf project management information system, which was required to be Federal Risk and Authorization Management Program (FedRAMP) "approved" at a moderate impact level. Several offerors, including Martek Global Services, Inc. (Martek) and Blue Water Thinking, submitted quotations. The VA determined Martek's quotation was technically unacceptable because its proposed solution did not comply with the RFQ's FedRAMP approval requirement.

Martek protested the VA's award to Blue Water Thinking and challenged the agency's conclusion regarding the technical acceptability of Martek's proposed solution. Following supplemental briefings and a hearing on the issue, GAO conducted outcome prediction alternative dispute resolution (ADR) and notified the parties it would likely sustain the protest because the contemporaneous record failed to adequately document the VA's evaluation conclusions. The VA took corrective action as a result, and GAO dismissed the protest as academic.

Martek then sought, and GAO denied, a recommendation for reimbursement of its protest costs. GAO noted that although outcome prediction generally indicates GAO views a protest as clearly meritorious, that is not always the case, and a protester therefore will not always be entitled to reimbursement of costs when an agency takes corrective action following outcome prediction. GAO determined that the FedRAMP approval issue raised in Martek's protest was not "clearly meritorious" because the VA had a defensible legal position. The fact that assessing Martek's protest allegations required extensive record development, including a hearing, supported that the issue was "a close call." Martek therefore was not entitled to reimbursement of its protest costs.

Spectrum Healthcare Resources, B-421325, Mar. 31, 2023, 2023 CPD ¶ 74

Holding: GAO sustained a protest challenging the agency's evaluation of proposals and resulting best-value tradeoff decision where the agency conflated the evaluation criteria for two factors and therefore failed to evaluate proposals consistently with the terms of the solicitation.

Summary: The Department of Homeland Security, Federal Emergency Management Agency (FEMA) solicited proposals to provide medical and behavioral health services. Numerous vendors, including Spectrum Healthcare Resources, Inc. (Spectrum) and Dentrust Dental International, Inc., d/b/a Docs Health (Docs Health), submitted proposals. FEMA awarded the contract to Docs Health on the basis of its technically superior, lower-priced proposal.

Spectrum protested FEMA's decision, arguing that the agency's assessment of seven weaknesses in Spectrum's proposal under the most important factor – technical capability – was not in accordance with the solicitation criteria. Spectrum asserted that FEMA improperly conflated the scope of the technical capability factor, which was meant to evaluate offerors' technical capabilities based on prior corporate experience, with the scope of the staffing and management approach factor, which addressed offerors' proposed approach to meeting the statement of work (SOW) requirements. FEMA countered that while the solicitation directed offerors to describe their historical experience in order to demonstrate their technical capability to perform the solicitation requirements, offerors who lacked experience in certain technical aspects nonetheless had to demonstrate their capability to meet those requirements as part of their proposal response under this factor.

GAO sustained the protest and found that FEMA's evaluation of proposals was not consistent with the solicitation. GAO determined that the solicitation instructions and evaluation criteria for the technical capability factor, when read as a whole, required FEMA to evaluate offerors' technical capabilities based on their "verifiable past experience." It was under the separate staffing and management approach factor that the solicitation directed FEMA to evaluate "how" offerors would meet SOW requirements. FEMA therefore acted unreasonably when it assessed two weaknesses under the technical capability factor for Spectrum's alleged failure to describe its personnel deployment strategy for this acquisition. GAO likewise found that, for the five remaining weaknesses assessed under the technical capability factor, FEMA continued to conflate the evaluation criteria for the technical capability and staffing and management approach factors, and that this improper conflation factored into FEMA's assessment of some weaknesses in Spectrum's proposal.

GAO explained that because FEMA's flawed evaluation adversely affected at least two, and perhaps all seven, of the weaknesses assigned to Spectrum's proposal, GAO could not conclude with any certainty whether the source selection authority would have reached the same award decision had the agency correctly evaluated proposals. Accordingly, GAO sustained Spectrum's challenge to the

agency's technical evaluation under the technical capability factor on this basis. GAO also sustained Spectrum's challenge to the cost/technical tradeoff, finding the tradeoff decision unreasonable in light of the underlying flawed technical evaluation.

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