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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.generalcounsellaw.com.

1. Veterans Construction of South Carolina, LLC, B-401723.2, January 21, 2010

Link: [GAO Opinion](#)

Agency: Department of Agriculture

Disposition: Protest denied.

Keywords: Responsiveness

General Counsel, P.C. Highlight: Awardee may correct and update expired ORCA certifications and representations after bid opening.

The Department of Agriculture issued an invitation for bids (IFB) to award a fixed-price services contract for the removal of tornado debris in Tennessee. The IFB was issued as a service-disabled veteran-owned small business (SDVOSB) set-aside. The solicitation included standard Federal Acquisition Regulation clauses requiring bidders to be registered in the Central Contractor Registration (CCR) and requiring bidders to have reviewed and completed the requirements on the Online Representations and Certifications Application (ORCA) website. Agriculture received 14 bids, 2 of which were Blackmon Companies' (awardee) and Veterans Construction of South Carolina's, with Blackmon submitting the low bid.

Following the award, Veterans complained to the contracting officer that Blackmon was not an SDVOSB concern. Following up on the complaint, the contracting officer found that Blackmon's ORCA record had expired prior to bid opening. Blackmon's CCR entry did not identify it as a SDVOSB but the VetBiz website did. The contracting officer submitted the SDVO protest to the SBA for resolution. Blackmon renewed its ORCA certifications and representations after the discovery and self-certified its SDVO status. Veterans protested the proposed award to Blackmon, arguing that the expiration of Blackmon's ORCA record prior to the opening of the bid process rendered the firm's bid nonresponsive.

A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. This determination is made at the time of bid opening from the face of the bid documents. In this case, GAO found that the failure of Blackmon to include completed standard representations and certifications with its bid did not render the bid nonresponsive because it did not affect the bidder's material obligations. The applicable representations and certifications in Blackmon's ORCA record related only to responsibility matters, which may be addressed after bid opening and did not

reduce or modify Blackmon's obligation to perform in accordance with the IFB. Accordingly, Veteran's protest was denied.

2. LaBarge Products, Inc., B-402280, January 19, 2010

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest dismissed.

Keywords: Delivery order jurisdiction

General Counsel P.C. Highlight: Protester that holds the same ID/IQ contract as the awardee may not protest the award of a delivery order under the ID/IQ as being outside of the scope of that same ID/IQ contract because they were not locked out of the original competition.

LaBarge Products, Inc. protested the Department of the Army's issuance of a delivery order for fuel and water pump assemblies, valued at a little over \$2 million, to DRS Sustainment Systems, Inc., alleging that the pumps quoted by the winning vendor would not meet the delivery order specifications and that the Army impermissibly changed the scope of the underlying indefinite-delivery/indefinite-quantity (ID/IQ) contract. In its protest, LaBarge acknowledged that the delivery order was valued at less than \$10 million, but still asserted that GAO had jurisdiction because it claimed that the delivery order impermissibly expanded the scope of the underlying contract.

GAO does not have jurisdiction to consider award of a task order under an ID/IQ contract (not including GSA Schedule contracts), except where (1) it is valued in excess of \$10 million, or (2) where the protester argues that the task order is outside the scope of the underlying ID/IQ contract. Since the task order at issue was \$2 million, the first exception for task order jurisdiction is not available to the protester.

The protester argued that GAO had jurisdiction to consider its protest because it protested that the task order exceeded the scope of the underlying ID/IQ contract. Before addressing the merits of LaBarge's protest, GAO noted that LaBarge held exactly the same ID/IQ contract involved in this award. GAO noted that LaBarge had been involved in the task

order competition that resulting in the award to DRS. GAO held that “outside the scope” task order protests are not available to holders of the underlying ID/IQ contract who had an opportunity to compete for the award. GAO noted that the “outside the scope” jurisdiction is available only to those who had been closed out of the competition by not having the appropriate ID/IQ contract but would have competed for the award if the order had been subject to full and open competition.

3. John Blood, B-402133, January 15, 2010

Link: [GAO Opinion](#)

Agencies: Department of Agriculture

Disposition: Protest denied.

Keywords: Best value, cost-technical trade-off

General Counsel, P.C. Highlight: No matter how competent a contractor may be, the technical evaluation must be based on information included within the four corners of the proposal or quote.

Through a request for quotations (RFQ) the Department of Agriculture sought quotations from bidders for tree thinning services in Clearwater National Forest. The source selection was to be based on technical and price factors, and award was to be made to the technically acceptable quotation that presented the best value to the government considering both technical merit and price. The solicitation included three technical factors with specific instructions that quotations would not be considered without the requisite information for evaluation.

John Blood’s quotation was the lowest in price of the twelve quotes received by Agriculture, but was evaluated as marginal technically with high performance risk due to a material lack of information in the quote. The Agency determined that Lara Brothers’s quote, which it found to be of greater technical merit and lower performance risk, was worth paying a higher price and thus constituted the best value for the government. Thereafter, John Blood protested.

GAO, in reviewing a protest against the propriety of an evaluation, does not independently evaluate proposals and substitute their judgment for that of the agency. Rather, GAO

reviews to ensure that the evaluation was reasonable and consistent with the criteria in the solicitation and applicable statutes and regulations. The burden is on the bidder to demonstrate affirmatively the merits of its quotation, and all aspects of the technical evaluation must be based on information included in the quotation. Because the RFQ here expressly required detailed technical submissions from each vendor, and because there was a significant amount of information missing from the quotation submitted by John Blood, the GAO determined that the Agency's award determination was reasonable and thus the protest was denied.

4. Enterprise Engineering Services, LLC, Federal Aviation Administration Office of Dispute Resolution for Acquisition, 09-ODRA-00490

Link: [ODRA Opinion](#)

Disposition: Sustained in part, denied in part.

Keywords: Size determination, Evaluation criteria

General Counsel P.C. Highlight: The FAA is not subject to the Federal Acquisition Regulations (FAR) or the Small Business Administration (SBA) Regulations, but is governed by its own Acquisition Management System (AMS). Interpretation of AMS policy should be based on the explicit language of the AMS, but may also consider, as appropriate, the SBA regulations.

In 2008 the FAA's William J. Hughes Technical Center issued a solicitation to award a time and materials, indefinite-delivery/indefinite-quantity contract providing second-level maintenance engineering on systems related to the National Airspace System (NAS). The competition was conducted as a 100% competitive set-aside for "socially and economically disadvantaged businesses." The technical evaluation team (TET) received proposals from nine offerors and began the review process. Following an extensive review of the proposals based on a series of technical and price related factors, the TET awarded the contract to the Arctic Slope Regional Corp., Research and Development Solutions (ARTS). Upon receiving notice of the award, Enterprise Engineering Services, LLC (EES) filed a timely protest with the FAA's Office of Dispute Resolution (ODRA). Thereafter, ARTS intervened in the protest.

EES's protest was broken into two main categories, a size challenge against ARTS and a protest of the evaluation process on several grounds. ODRA examined EES's assertion that ARTS does not meet the FAA's Acquisition Management System (AMS) definitions of a small business or of a socially and economically disadvantaged business, although admittedly ARTS qualifies as a small business and small, disadvantaged business under the SBA's regulations. After a lengthy discussion of references and which authority shall govern, ODRA concluded that it was proper to determine small business status under the AMS using the Small Business Administration's criteria, which includes exceptions that apply to ARTS and therefore defeat EES's size challenge.

EES's protest also alleged a series of challenges to the manner in which the TET conducted its evaluation of the proposals. EES claimed that there was disparate treatment in the way the TET awarded strengths and weaknesses for understanding the statement of work (SOW) in the solicitation. ODRA concluded that EES exhibited a "clear understanding" of the SOW, but unlike the other offerors that had a "clear understanding" it did not receive a strength and thus EES was treated differently than the other offerors. EES also stated that the TET did not evaluate and treat EES's web-based tool in the same way as other offerors that received strengths for their web-based management tools. ODRA agreed with EES on this ground as well. The rest of EES's challenges to the evaluation process were denied by ODRA. In conclusion, ODRA recommended denial of all grounds of EES's protest, except for the two grounds discussed above. Because these two errors were prejudicial to EES ODRA sustained the protest and recommended that EES's technical proposal be reevaluated.

5. Apex Limited, Inc., B-402163, January 21, 2010

Link: [GAO Opinion](#)

Agencies: Department of Veterans Affairs

Disposition: Protest Denied.

Keywords: SDVO, Sole-source award

General Counsel, P.C. Highlight: The Veterans Administration may award a sole-source set aside contract under the terms of FAR Part 19.14, or, unique to the VA, under the terms of 38 U.S.C. § 8127, the Veterans First Contracting Program.

Apex Limited was the incumbent on a Veterans Administration (VA) grounds maintenance contract at Fort Sam Houston Cemetery. Shortly before the expiration of Apex's contract, the VA awarded the follow-on contract to American Veteran Contracting Services (AVCS), a service disabled veteran owned company (SDVO), on a sole-source basis. Apex then protested, arguing that the sole-source award was in violation of Federal Acquisition Regulation (FAR) Subpart 19.14 governing awards to SDVOs. GAO, however, found that FAR Subpart 19.14 did not apply to the type of acquisition in question. While FAR Subpart 19.14 applies to the Service-Disabled Veteran-Owned Small Business Procurement Program for most executive branch agencies, the award in this case was made pursuant to the Veterans First Contracting Program (VFCP), created by the Veterans Benefits, Health Care, and Information Technology Act of 2006, which applies only to the VA.

GAO concluded that the sole source award to AVCS complied with the terms of the VFCP and that Apex had no basis for objecting to the award.

6. Clark/Caddell Joint Venture, B-402055, January 7, 2010

Link: [GAO Opinion](#)

Agencies: Department of the Army, Corps of Engineers

Disposition: Protest Denied.

Keywords: Proposal errors, Discussions

General Counsel, P.C. Highlight: Discussions are adequate where the agency directs the offeror to the problem areas of the proposal. Errors remaining in the proposal after discussions may form the basis of a determination that the technical proposal is unacceptable.

The Army Corps of Engineers issued a request for task order proposals (RFP) for the design and construction of a barracks complex at Fort Bragg in North Carolina. After the task order was awarded to B.L. Harbert International, Inc., Clark/Caddell Joint Venture protested the award claiming that the Army's evaluation of its proposal under the performance capability factor as unacceptable was improper. A contract line item (CLIN) in the solicitation required offerors to state the duration of the contract in calendar days, with a maximum of 690 calendar days for both design and construction.

In Clark/Caddell's original proposal, there was a discrepancy between its CLIN estimate and the amount of days that it indicated in the summary schedule of its technical proposal. During discussions, Clark/Caddell was notified of this difference and responded, however, their response did not satisfy the Army's concerns. The Army opened a second round of discussions and Clark/Caddell was again notified of the discrepancy. It responded by stating that its total contract duration would be 560 days, but it never made the change in the summary schedule of its technical proposal. The Army decided that because the amount of days entered in the CLIN schedule (560 days) was binding and because this amount of time was very short, the risk of unsuccessful performance was very high. The proposal was thus deemed unacceptable under the performance capability factor.

GAO found nothing improper with the Army's evaluation of the proposals. Not only was the 560 days inconsistent with prior statements and with the duration listed in the summary schedule, but the length of time was reasonably determined to be too short for the project. In protests of this sort, GAO will not reevaluate the technical proposal, instead it will examine the agency's evaluation to ensure that it was reasonable and consistent with the stated criteria in the solicitation. Based on this analysis, the Army's evaluation was reasonable and Clark/Caddell's protest was denied.

7. **McKissack+Delcan JV II, B-401973.2, B-401973.4, January 13, 2010**

Link: [GAO Opinion](#)

Agencies: Department of Transportation, Federal Transit Administration

Disposition: Protest Sustained.

Keywords: DCAA Audit, Compliance, Cost Accounting System

General Counsel, P.C. Highlight: An agency's evaluation must be reasonable and consistent with the evaluation criteria. An agency's evaluation is unreasonable if the contemporaneous record lacks sufficient detail to support the agency's action or determination.

The Federal Transit Administration issued an RFP soliciting proposals for program management oversight, contemplating an award of multiple cost-reimbursement, indefinite-delivery/indefinite-quantity task order type contracts. McKissack+Declan JV II (MD-JV) protested FTA's rejection of its proposal.

After receiving proposals and rating MD-JV's as technically acceptable, FTA sent the cost proposal to the Defense Contract Audit Agency (DCAA) for a pre-award audit. During this analysis, DCAA raised several issues with MD-JV's accounting system – in particular the fact that its system was maintained in Canada and did not comply with U.S. Generally Accepted Accounting Principles (GAAP). Moreover, DCAA also raised issues with MD-JV's indirect rate structure, labor rates, and cost estimates for the period of contract performance. Based on DCAA's audit, FTA determined MD-JV's proposal to be unacceptable and listed the above reasons as support for its rejection. MD-JV filed a protest with GAO challenging FTA's reasons, and then filed a supplemental protest after receiving a copy of the DCAA report, arguing that FTA's reliance on the report was unreasonable due to factual errors and DCAA's nonconformity to Generally Accepted Government Auditing Standards (GAGAS).

In its response to the protest, FTA stated that none of MD-JV's arguments addressed the real issue of the case, which was MD-JV's failure to submit a single overhead rate in its cost proposal; their basic failure being the noncompliance with Cost Accounting Standard (CAS) 401.

After its review of the record, GAO stated that while a contracting officer has significant discretion for deciding a negative determination of responsibility (as was the case here), it will not be found to be reasonable where it is based primarily on unreasonable or unsupported conclusions. In addition, the agency's reliance upon the advice of DCAA did not insulate it from responsibility for error on the part of DCAA. Because neither FTA nor DCAA provided any analysis or legal authority as to why MD-JV's indirect rate structure violated CAS 401, and because FTA did not provide a reasonable explanation why MD-JV's accounting system was unacceptable, the protest was sustained. GAO recommended that FTA reevaluate MD-JV's accounting system, and if it was found to be adequate, it was recommended that FTA would then determine whether MD-JV's proposal was otherwise in line for award.

8. Evolver Inc., Federal Aviation Administration Office of Dispute Resolution for Acquisition, 09-ODRA-00495

Link: [ODRA Opinion](#)

Disposition: Protest sustained.

Keywords: Evaluation factors

General Counsel P.C. Highlight: Agencies are not allowed to deviate from the stated evaluation criteria in selecting an awardee.

In 2008 the FAA's William J. Hughes Technical Center (Center) issued a solicitation to award a Time and Materials indefinite-delivery/indefinite-quantity contract providing second-level maintenance and engineering services related to the National Airspace System (NAS). The technical evaluation team (TET) received proposals from eleven offerors and began the review process. Following an extensive review of the proposals based on a series of technical and price related factors, the contracting officer, on recommendation from the TET, determined that an award to Enroute Computer Solutions (ECS) constituted the "best value" to the Government. Upon receiving notice of the award, Evolver, Inc. (Evolver) filed a timely protest with the FAA's Office of Dispute Resolution (ODRA).

Evolver's protest centered around two main contentions: (1) the Center improperly evaluated Evolver's and ECS's proposals under the corporate experience/past performance factors by over-crediting ECS and lacking a rational basis for Evolver's rating and (2) the Center improperly evaluated Evolver's proposal for its program management plan by using an unstated evaluation criterion.

Evolver first challenged the TET's rating of ECS's corporate experience/past performance as unreasonably high and lacking a rational basis. While ODRA will not substitute its judgment for the contracting official, it will analyze the evaluation process to ensure that stated evaluation criteria are followed in arriving at the award decision. Here, ODRA found that the TET had properly evaluated ECS's past work as meeting the standards for scope of work, but that the size of the projects were smaller and thus outside the language of the criteria used in the solicitation. On this rationale, ODRA determined that TET's rating of ECS's corporate experience/past performance lacked rational basis.

Next, Evolver claimed that the Center improperly evaluated its price proposal by not performing a cost analysis, conducting an improper price reasonableness evaluation, and using undisclosed evaluation criteria when evaluating Evolver's proposed price. Principally, Evolver was concerned that the Center's price analysis was incorrectly based on the contracting official's determination that Evolver's low price constituted a risk to successful contract performance. ODRA determined that the contracting official's price reasonableness evaluation was improper because under the Acquisition Management System (AMS) price reasonableness signals the need for additional cost analysis where a significantly low price

raises concerns with regard to fairness and reasonableness. As such, when Evolver's proposed price was much lower than ECS's, the contracting official should have requested cost data from the parties in order to perform a cost analysis as to whether there were any risks associated with the low proposed price. Since this was not done during this procurement, the ODRA again agreed with Evolver's protest ground.

Finally, Evolver claimed that the Center used evaluation criteria not contained in the solicitation as it related to recruitment and retention of personnel. ODRA, in reviewing the record, determined that the solicitation clearly stated that salaries would not be a part of the evaluation. However, the contracting official evaluated salaries as they related to recruitment and retention of personnel under its price evaluation. Furthermore, ECS was credited in this analysis for its ability to retain qualified employees.

Thus, for the above discussed reasons, and because Evolver was prejudiced by the actions of the Center, ODRA recommended that Evolver's protest be sustained. In addition, ODRA recommended that the Center reevaluate ECS's and Evolver's proposals, request cost data as necessary, and determine whether Evolver's proposal under the new analysis is appropriate for the award.