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.generalcounsellaw.com.

1. Transportation Security Administration--Costs, B-400340.8, May 20, 2010

Link: GAO Opinion

Agency: Transportation Security Administration

Disposition: Request granted.

Keywords: Attorney Fee Cap

General Counsel P.C. Highlight: In reimbursing attorney's fees following a successful protest, an agency may pay more than the fee cap of $150 per hour where the increase is consistent with the Government's Consumer Price Index.

General Dynamics protested the award of a contract by the Transportation Security Administration (TSA) under a request for proposals (RFP) for computer support services. GAO sustained the protests, issued corrective action, and recommended that the agency reimburse costs.

General Dynamics filed a claim for protest costs with the agency, which included a request for reimbursement of attorneys' fees at a higher rate than the statutory max of $150/hour. TSA makes no objection to the higher rate. GAO states that the successful protester may receive a higher hourly rate in reimbursing attorney's fees where the protester is a small business concern or where the agency determines, on a case by case basis, that a special factor, such as cost of living or special expertise, justifies a higher fee. In this case, the protester is not a small business, but GAO states that the higher rate is justified to adjust for the cost of living increase where the rate is increased in accordance with the Department of Labor's (DOL) Consumer Price Index (CPI).

GAO finds that General Dynamics provided TSA a detailed explanation of the enhanced attorney fee rate using DOL's CPI—All Urban Consumers, which is consistent with GAO's prior decisions, and since TSA does not object, GAO recommends reimbursement at the higher rate.

2. Gonzales-McCaulley Investment Group, Inc., B-402544, May 28, 2010

Link: GAO Opinion

Agency: Department of Veteran Affairs

Disposition: Protest denied.

Keywords: Prejudice

General Counsel P.C. Highlight: GAO will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions

Gonzales-McCaulley Investment Group, Inc. (GMIG) protests the issuance of an order to NPI, Inc. (NPI) under a request for quotations (RFQ), issued by the Department of Veterans Affairs (VA), to provide contracting training for the VA Acquisition Academy (VAAA).

The RFQ provided that quotations would be evaluated for "best value" based on three factors: technical approach; past performance; and price. The RFQ stated that "previous performance conducted within the VAAA will be considered more heavily than other previous performance outside of VAAA." GMIG's technical approach resulted in a rating of unacceptable and was assigned one deficiency and one weakness under the past performance factor, resulting in a rating of acceptable. NPI was rated excellent for technical approach and acceptable for past performance.

GMIG asserts that it was unreasonable for the VA to assign its quotation a deficiency based on its having only one past performance reference for teaching at the VAAA. GAO states that evaluation of a protester's past performance is a matter within the discretion of the agency and as long as the performance rating is reasonable, GAO will not

substitute its views. Upon examination of the record, GAO finds no reason to object to the past performance rating since GMIG was on notice that less past performance with VAAA would result in a lower rating, and only one of GMIG's required references was for the VAAA.

GMIG also asserts that its quotation was misevaluated under the technical approach factor, objecting to each specific criticism. However, the GAO will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. Here, even if GMIG received the highest technical approach rating, it still would not receive the order, since NPI's price was still lower. The protest is denied.

3. IntegriGuard LLC, B-401626; B-401626.2, October 20, 2009

Link: GAO Opinion

Agency: Office of TRICARE Management Activity

Disposition: Protest denied.

Keywords: Discussions; technical evaluation

General Counsel P.C. Highlight: The FAR requires agencies conducting discussions to inform offerors of deficiencies and significant weaknesses, but the content of discussions is largely a matter of the contracting officer's judgment.

TRICARE Management Activity (TMA), a Department of Defense Field Activity, procures and administers contracts for TRICARE healthcare support services. TMA issued a request for proposals (RFP) for a contractor to provide independent audits of TMA healthcare support contractors' reimbursement determinations and healthcare claims processing services. The RFP also stated that award would be made to the offeror with the lowest-priced, technically acceptable proposal based on technical and price factors.

A set of subfactors were set forth under the technical factors. Specifically at issue in the protest, was the "staffing plan" subfactor. IntegriGuard LLC (IntegriGuard) submitted a proposal that was deemed inadequate because of its proposed staffing. IntegriGuard's price was also considered too low. Following two rounds of discussions, IntegriGuard submitted final proposal revisions (FPRs) in which it reduced the staffing for four of five option periods. The agency still deemed the proposal technically unacceptable and considered the price too low.

IntegriGuard claims that the agency unreasonably found its proposal technically unacceptable under the staffing plan subfactor on the basis of an unsupported productivity estimate. IntegriGuard's estimate for the number of claims processed per day was found to be unreasonable by the agency since it was "such an aggressive productivity level" and it "demonstrates a misunderstanding of the audit process." GAO states that the evaluation of technical proposals is a matter largely within the agency's discretion and it finds no basis to question the productivity estimate on which the agency based its conclusion.

The record demonstrates that all three of the evaluators have extensive knowledge of the TRICARE program and relevant experience in auditing TRICARE claims. The three evaluators had determined a reasonable daily workload

for claims analysis and IntegriGuard's proposed rate was inadequate to meet the RFP requirements. GAO cannot conclude that the estimate in the RFP was unreasonable.

IntegriGuard next claims that the agency ignored aspects of its proposed "team approach" to claims auditing. GAO states that offerors bear the burden of submitting a sufficiently detailed proposal and IntegriGuard failed to identify the staffing position responsible for conducting initial claims review audits and failed to specify any other labor category as sharing this responsibility. Therefore, the evaluators reasonably concluded that only certain staffers were devoted to initial claims review.

As to IntegriGuard's assertion that the agency failed to conduct meaningful discussions, GAO states that the Federal Acquisition Regulation (FAR) requires agencies conducting discussions to inform offerors of deficiencies and significant weaknesses, but the content of discussions is largely a matter of the contracting officer's judgment. GAO finds that the record clearly demonstrates that IntegriGuard was informed that its staffing was inadequate and therefore, the agency conducted meaningful discussions. The protest is denied.

4. Magnum Opus Technologies, Inc. and The Healing Staff, Inc. v. U.S. and Luke & Associates, Inc. and Terrahealth, Inc.

Link: Court of Federal Claims Opinion, Nos. 10-106C, 10-127C

Agency: U.S. Air Force

Disposition: Protest Granted.

Keywords: Exercise of Options; ID/IQ Contracts

General Counsel P.C. Highlight: In exercising the option on an ID/IQ contract, the Government must be able to consider the price element and if all contractual price commitments have been removed from the master ID/IQ contract, the Government may not exercise the option. It is not enough that the ID/IQ contract required consideration of price at the task order level, there must be limits in the ID/IQ contract itself prior to the exercise of an option.

In a request for proposals (RFP) issued in 2005 for a minimum of five indefinite delivery /indefinite quantity (ID/IQ) contracts for a four-year period, with two three-year options by the Air Force, offerors were required to submit pricing info including not-to-exceed (NTE) ceiling rates for sixty-eight health care service staffing positions.

The RFP also included an economic price adjustment to provide adjustments to contract price as a result of economic changes as the contracts aged. Contracts were eventually awarded to five companies, not including Magnum Opus Technologies, Inc. (Magnum) or The Healing Staff, Inc. (Healing). Magnum initiated two separate protests. One with the Small Business Administration (SBA), which found in favor of Magnum and the other with GAO, which recommended award to Magnum, after which an ID/IQ contract was awarded.

The Air Force found later that contractors were exceeding NTE rates even though the contracts stated that prices could not be more than the NTE price. The Air Force ultimately agreed to remove requirement to comply with NTE rates and issued

contract modifications. The Air Force chose to exercise four contractors' options and gave notice to Magnum and Healing that their options would not be exercised. Both filed protests with GAO, which were dismissed because the protests concerned matters outside scope of GAO bid protest function.

Magnum and Healing filed motions for reconsideration with GAO, which were not acted upon. The companies, therefore, filed a bid protest in the Court of Federal Claims asserting that because NTE pricing was eliminated from the contracts, the Air Force had exercised unpriced options violating Federal Acquisition Regulation (FAR) §17.207. Healing also alleged violation of §17.207 and further alleged that the Air Force wrongfully failed to disclose that it would use performance evaluations in determining whether to exercise options.

After establishing subject matter jurisdiction and standing, the Court of Federal Claims held that the Air Force failed to comply with FAR §17.207, specifically subsection (f), which states that for the Government to validly exercise an option, "the option must have been evaluated as part of the initial competition and be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract."

The Court of Federal Claims stated that following the modifications rendering the NTE rates non-binding, the price evaluation conducted at the time of the initial award was no longer useful. When the options were exercised, the NTE rates were only advisory, and contractors could increase their labor rates at will. Therefore, the relative costs to the Government of various contractors' options, was entirely unknown. The pricing of the options, as exercised, was not "evaluated as part of the initial competition."

The Air Force also failed to satisfy the second clause of FAR §17.207(f), that the option was "exercisable at an amount specified in or reasonably determinable from the terms of the basic contract." The Court of Federal Claims held that it is impermissible to evaluate relative cost based only upon non-binding proposals, because such a comparison is not meaningful. Once the Air Force removed the NTE rates, it removed its only basis of meaningfully comparing the cost to the Government of the contractors' options. The price of the options was not "reasonably determinable" from the ID/IQ contracts.

The Court of Federal Claims also stated that, "the statutory requirement that cost to the government be considered in the evaluation and selection of proposals for award is not satisfied by promise that cost or price will be considered later, during award of individual task orders." The Air Force cannot substitute competition at the task order level for compliance with the applicable laws and regulations.

Finally, the Court of Federal Claims held that the maximum contract value for the ID/IQ contract did not establish price either. The contracting officer looked at the total contract value and made a guess as to how to divide it between the base period and two option periods, which is not "evaluated" price within the meaning of CICA and FAR.

As for remedy, the Court of Federal Claims ordered injunctive relief since the plaintiffs succeeded on the merits of the case, proved that they will suffer irreparable harm in the absence of injunctive relief, identified a number of mechanisms other than the contract options that the Air Force could use during pendency of an injunction, and public interest weighed in favor of granting the injunction.