



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. **Metro Machine Corp, B-402567; B-402567.2, June 3, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Navy

Disposition: Protest denied.

Keywords: Cost Realism Analysis

General Counsel P.C. Highlight: When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated cost of contract performance is not considered controlling since, regardless of the costs proposed by the offeror, the government is bound to pay the contractor its actual and allowable costs. As a result, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract costs are likely to be under the offeror's technical approach, assuming reasonable economy and efficiency.

Metro Machine Corp. (Metro) protests the award of a contract, issued by the Department of the Navy (Navy), under a request for proposals (RFP) for maintenance, repair, modernization, and alternation of ships.

The RFP contemplated the award of a cost-plus-award-fee/incentive-fee, "multi-ship, multi-option" contract for execution planning and performance of ship availabilities. Offerors were instructed to base their cost proposals on a notional work package included with the solicitation and in addition to cost, the following technical evaluation factors would be considered: management approach; technical approach; resource capabilities; and past performance.

Metro asserts that the Navy failed to properly evaluate the cost realism of the awardee's proposal. GAO states that a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract costs are likely to be under the offeror's technical approach. The analysis does not have to achieve scientific certainty, but the methodology employed must be reasonably adequate and provide some measure of confidence that the agency's conclusions about the most probable costs under the offeror's proposal are reasonable and realistic. GAO will review an agency's judgment in that area only to see that the analysis was reasonably based.

GAO's review of the record finds that the cost realism analysis of the awardee's proposal was proper where the non-significant subcontractor/temporary labor amounts were properly adjusted downward based on historical information described in the technical proposal. GAO finds that the labor rates were realistic, even if the adjusted rate was lower than the proposed rate.

Additionally, where Metro asserts that the Navy's cost analysis of the awardee's proposal was improper where the Navy failed to adjust the projected costs to account for increased employee pension costs, GAO finds that the cost impact of the increased pension fund contribution was not certain enough prior to award to constitute a material change to the proposal, and therefore, the awardee was not required to advise the Navy of the matter. GAO also found no error in calculating the awardee's material costs where the Navy clearly showed how it determined the estimated material costs.

Metro asserts that the navy failed to properly consider a Defense Contract Audit Agency (DCAA) audit report regarding a deficiency in the awardee's estimating system. GAO's review of the record shows that the evaluation board was fully aware of the report and its findings when performing the cost analysis and utilized overhead and G&A rates for the awardee that were higher than those proposed by the offeror and those recommended by DCAA.

Finally, Metro challenges the Navy's evaluation of the awardee's technical proposal under the management approach and resource capabilities factors. GAO states that it will not reevaluate technical proposals, but it will examine the evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. A mere disagreement with the agency's evaluation is not sufficient to render the evaluation unreasonable. The record shows that the Navy's evaluation was unobjectionable where the strengths under the two factors cannot be disputed and where Metro cannot dispute that the awardee had resource sharing agreements with various subcontractors, which provided the awardee with the ability to share its facility and manpower resources to optimize facility utilization. GAO finds that Metro's argument amounts to mere disagreement with the Navy's evaluation, which does not make it unreasonable. The protest is denied.

2. Highland Engineering, Inc., B-402634, June 8, 2010

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protests denied.

Keywords: Cost-Technical Tradeoff

General Counsel P.C. Highlight: A source selection authority's final decision on a cost-technical tradeoff must be both fully informed and independently made.

Highland Engineering, Inc. (HEI) protests the award of a contract issued by the Department of the Army for lightweight water purifiers. The request for proposals (RFP) was issued based on full and open competition, and provided for award on a "best value" basis considering experience and price. The awardee was given the contract based on a lower price than HEI although HEI received a lower rating for risk for one experience subfactor.

HEI asserts that the Army failed to consider in its price evaluation the awardee's intent to use government-owned property in performing the contract. However, HEI cannot present any evidence supporting its assertion.

HEI asserts that the Army's evaluation of the awardee's experience failed to take into account past performance issues. GAO's review of the record shows that the Army was not going to evaluate past performance, but experience. Under the terms of the RFP, therefore, there was no basis for the Army to consider the awardee's past performance.

HEI asserts that the Army's best value determination improperly failed to take into account the fact that HEI's proposal received a lower risk rating than the awardee's under one experience subfactor. GAO states that in making best value decisions, the evaluation results were reviewed and the review board was fully aware of differences in the various contractors' experience. HEI may disagree with the conclusion, but disagreement does not demonstrate that the conclusions were unreasonable. The protest is denied.

3. SOS International, Ltd., B-402558.3; B-402558.9, June 3, 2010

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Past Performance Evaluation

General Counsel P.C. Highlight: GAO will not reevaluate proposals in deciding a bid protest, but it will examine both the proposal and the evaluation documents to determine whether the agency’s evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations.

The Department of the Army (Army) issued a request for proposals (RFP) for advisory, atmospheric, and analysis support services for U.S. forces in Iraq. The solicitation sought proposals for an indefinite-delivery/indefinite-quantity (ID/IQ) contract for a six-month base period, with three six-month option periods. Award was to be made on a “best value” basis and technical proposals were to be evaluated on a “go/no-go” basis. Those with a “go” rating would be evaluated for past performance and price.

SOS International, Ltd. (SOS) received a “go” under the technical evaluation factor and a past performance rating of very low risk. However, SOS’s price was higher than the awardee’s. SOS asserts that the agency miscalculated the awardee’s proposal.

GAO states that it will not reevaluate proposals, but it will examine the record to determine whether the agency’s evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations.

As for the Army’s consideration of the awardee’s past performance, the record shows that the Army received three past performance questionnaires (PPQs) in connection with the awardee’s proposal, but the Army only considered two. While the RFP permitted the Army to consider past performance information where such information was relevant, the RFP did not require it. Also, the Army did not unreasonably fail to account for the instances of no answer or “not applicable” on the awardee’s PPQs where the Army calculated the scores for all offerors in the same manner and SOS could not show how it was competitively prejudiced by the Army’s methodology. SOS’s assertion that the Army failed to consider negative information regarding the awardee’s past performance is also without merit where the RFP did not require the Army to consider the information that was not included in the PPQs. Therefore, the Army’s failure to discover or consider such information does not constitute an evaluation impropriety. The protest is denied.

4. **Florida State College at Jacksonville, B-402656, June 24, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Navy

Disposition: Protest denied.

Keywords: Task Orders; ID/IQ contracts

General Counsel P.C. Highlight: GAO is authorized to hear protests of task orders that are issued under multiple-award contracts where the protester asserts that the task order increases the scope of the contract under which the order is issued.

Florida State College at Jacksonville (FSC) protests the decision of the Department of the Navy (Navy), to obtain certain training services that have been provided in the past by FSC, through a task order issued under the SeaPort Enhanced (Seaport-E) multiple-award, indefinite-delivery/indefinite-quantity (ID-IQ) contracts.

FSC is currently providing the services to the Navy and does not hold a Seaport-E contract. The scope of the existing Seaport-E contract is to “provide services that potentially span the entire spectrum of mission areas supported by the activities and technical capabilities that comprise the various ordering offices” within 22 identified functional areas. Training support is one of the 22 identified functional areas, and includes (1) technical training support and (2) professional development and training support. The Navy determined that each of the courses provided under the FSC contract fit within the definition of technical training in the SeaPort-E contract and decided to include the FSC training under the Seaport-E contract as part of a larger follow-on task order.

FSC argues that the technical training that it provides is outside of the scope of the SeaPort-E contract since its technical training is only at the apprentice level and not the more complex technical training anticipated by the SeaPort-E contract. GAO states that its office is authorized to hear protests of task orders that are issued under multiple-award contracts where the protester asserts that the task order increases the scope of the contract under which the order is issued. GAO will then analyze the protest in essentially the same manner as those in which the protester argues that a contract modification is outside the scope of the underlying contract. The inquiry the GAO will make is whether the order is one which potential offerors would have reasonably anticipated.

Reviewing the record shows that some of the classes currently provided under the FSC contract are technical in nature and are for apprentice technical training. However, the Navy reasonably established that the training in FSC’s contract, including the apprentice technical training, is technical training as defined under the SeaPort-E contract where it provides more specific training, focused on specific platforms, systems and warfighting capabilities. GAO

also finds that FSC could have reasonably anticipated that the FSC technical training could be obtained through the task orders issued against the SeaPort-E ID/IQ contracts. The protest is denied.

5. **Calnet, Inc., B-402558.2; B-402558.5; B-402558.7, June 3, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Prejudice

General Counsel P.C. Highlight: Prejudice is an essential element of every viable protest and it will not sustain a protest unless the protester can demonstrate a reasonable possibility that it was prejudiced by the agency’s actions; in effect, a protester must show that, but for the agency’s actions, it would have had a substantial chance of receiving the award.

The Department of the Army (Army) issued a request for proposals (RFP) for advisory, atmospheric, and analysis support services for U.S. forces in Iraq. The solicitation sought proposals for an indefinite-delivery/indefinite-quantity (ID/IQ) contract for a six-month base period, with three six-month option periods. Award was to be made on a “best value” basis and technical proposals were to be evaluated on a “go/no-go” basis. Those with a “go” rating would be evaluated for past performance and price. Past performance was to be evaluated based on past performance questionnaire (PPQ) responses received by the agency.

Calnet, Inc. (Calnet) received a “go” under the technical evaluation factor and a past performance rating of low risk. Calnet’s price was higher than the awardee’s. Calnet asserts that the agency miscalculated the awardee’s proposal by not considering a third PPQ of the awardee’s.

GAO states that prejudice is an essential element of every viable protest and it will not sustain a protest unless the protester can demonstrate a reasonable possibility that it was prejudiced by the agency’s actions; in effect, a protester must show that, but for the agency’s actions, it would have had a substantial chance of receiving the award. GAO’s review of the record shows that the Army rated past performance using the same scores assigned under the various elements of the PPQs. Calnet’s rating would have been the same whether or not the

awardee's third PPQ had been considered. The awardee would have remained in line for award ahead of Calnet due to its lower price. The protest is denied.