



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 eighty 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. **Platinum Services Inc., B-402718.2; B-402923, August 27, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Contract Termination/ RFP Cancellation

General Counsel P.C. Highlight: A procuring agency has broad authority to cancel an RFP, and needs only a reasonable basis to do so. Such a reasonable basis exists where a solicitation does not present a reasonably accurate representation of the agency's anticipated actual needs.

Platinum Services Inc. (Platinum) protests the termination of contracts and the cancellation of a request for proposals (RFP), issued by the Department of the Army (Army), for inbound, outbound, and local shipment of household and other goods for service members in the D.C. area.

The Army originally issued multiple solicitations, including RFPs, contemplating the award of fixed-price requirements contracts for a 10-month base period with four one-year options. Award was to be made to the lowest-priced, technically-acceptable offeror. The solicitations included an ordering limitations clause, which contained three columns: the estimated maximum daily requirements; the minimum acceptable daily capabilities; and the offeror's guaranteed daily capability. The Army also issued a series of amendments in an attempt to clarify the solicitation and to respond to questions from potential offerors.

The agency awarded six contracts, including two to Platinum, but prior to commencement of performance, one of the awardees advised the agency that it had misunderstood the maximum daily requirements. The agency received new input and again, revised its estimates for a third time. Given the new estimates, the agency determined that it would be best to terminate the contracts and cancel the underlying solicitations. Platinum asserts that the cancellations were unreasonable because there is there is no basis for concluding that the solicitations as amended (and the resulting contracts) did not accurately reflect the agency's needs, or otherwise confused offerors.

GAO states that a procuring agency has broad authority to cancel an RFP, and needs only a reasonable basis to do so. Such a reasonable basis exists where a solicitation does not present a

reasonably accurate representation of the agency’s anticipated actual needs. Further, where a valid basis for cancellation exists, an agency properly may cancel a solicitation no matter when the information precipitating the cancellation first surfaces or should have been known. Upon examining the record, GAO found that the significantly overstated estimates in amendment 5 provided a reasonable basis for cancellation. Since the risks associated with a variance between actual and estimated purchase quantities are borne by the contractor, the government is obligated to use its best information in preparing quantity estimates so that offerors can appropriately assess and apportion risk and other contract performance costs into their prices. Where award is made on the basis of estimates that vary significantly from the agency’s actual requirements, the contractor is in the untenable position of performing contract work of a magnitude significantly different from the solicited work, posing a risk to both the contractor and the government that the contractor will be unable to perform as required. The protest is denied.

2. Alaska Structures, Inc., B-402648.3, August 10, 2010

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Corrective Action; FSS Contract

General Counsel P.C. Highlight: In negotiated procurements, agencies have broad discretion to take corrective action where they determine that such action is necessary to ensure fair and impartial competition. GAO will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action.

Alaska Structures, Inc. (ASI) protests the corrective action taken by the Department of the Army (Army), under a request for quotations (RFQ), with respect to an order for shelters and related items.

The RFQ, issued under FAR part 8.4, sought shelters and related equipment on a brand name or equal basis for soldiers in Afghanistan. Vendors were informed that an order would be issued to the firm submitting the lowest-priced, technically-acceptable quotation. ASI protested the award of the contract, arguing that not all of the awardee’s quoted items were on the firm’s FSS contract, and that two of its proposed items did not satisfy the RFQ’s salient requirements. The agency issued a stop work order to the awardee. After ASI filed a supplemental protest, the agency decided to take corrective action. Specifically, the agency

stated that it would terminate the order issued to the awardee and recompile the items that had not yet been delivered.

ASI asserts that, because the awardee's quotation was technically unacceptable, the agency should have issued an order to ASI for the items that had not yet been delivered. GAO states that in negotiated procurements, agencies have broad discretion to take corrective action where they determine that such action is necessary to ensure fair and impartial competition. GAO will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. GAO has found unobjectionable an agency's cancellation of a negotiated procurement after receiving proposals where the agency determined that the solicitation overstated the agency's requirements and the agency would seek enhanced competition by relaxing its requirements.

GAO finds the agency's decision to relax its requirements to seek enhanced competition for the remaining items as reasonable. Although ASI concludes that the agency has not proven that its needs will be met by the relaxed efforts, the fact that the agency has evaluated its needs, found that the awardee's products would meet its needs, and further determined that the awardee's products were not compliant with the solicitation's salient characteristics, is sufficient to demonstrate the reasonableness of the agency's actions here. Moreover, where, as here, an agency determines that a relaxed specification will both meet its needs and afford enhanced competition for the goods or services being acquired, we will not object to the relaxation. The protest is denied.

3. **Torres Advanced Enterprise Solutions, LLC, B- 403036, August 18, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Technical Evaluation

General Counsel P.C. Highlight: The evaluation of a vendor's proposal or quotation is a matter within the agency's discretion. In reviewing a protest against an agency's evaluation, GAO will not reevaluate quotations but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations

Torres Advanced Enterprise Solutions, LLC (Torres), protests the issuance of a task, under a task order request (TOR) for the performance of security services at Contingency Operation Station (COS) Kalsu, Iskandariyah, Iraq, issued by the Department of the Army (Army).

The TOR was issued to firms who hold contracts under the Army's Theater Wide Internal Security Services II indefinite-delivery/indefinite-quantity contract for security guard services for U.S. military installations in Iraq. The TOR sought quotations for security services at COS Kalsu, and anticipated issuance of a fixed-price task order with a base period of 1 year with two 6-month options. Torres is the incumbent contractor providing security services at COS Kalsu. The TOR stated that the task order would be issued to the contractor that submitted the lowest priced technically acceptable quotation. To be technically acceptable, a quotation must include: (1) a mobilization plan that met the timeline set forth in the performance work statement (PWS), and (2) a manning chart that met the staffing requirements of the PWS.

Torres asserts that the awardee's quotation was technically unacceptable based on deficiencies in its mobilization plan. GAO states that the evaluation of a vendor's proposal or quotation is a matter within the agency's discretion. In reviewing a protest against an agency's evaluation, GAO will not reevaluate quotations but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing quotations does not establish that the evaluation was unreasonable.

Torres argues that the awardee's mobilization plan did not address the TOR requirement to provide a "plan for integrating with and shadowing the incumbent contract/military unit." The agency found that the awardee's mobilization plan met all of the requirements of the TOR. Torres argues that the awardee's plan was unacceptable because it did not "address how the awardee will develop site-specific orders, plans and procedures, all of which are essential to the effective transition and performance of the task order," and that the awardee's plan did not address "security protocols and strategies and the allocation for personnel resources [that] must be developed and vetted before transitioning fully to contract performance." The TOR, however, does not include any of these requirements; instead, the TOR required a "plan for integrating with and shadowing the incumbent contract/military unit." GAO finds that the agency reasonably concluded that the awardee's quotation addressed the requirements of the TOR.

GAO argues that Torres' arguments amount to mere disagreement with the agency's judgment, and therefore do not provide a basis to sustain the protest.

Next, Torres asserts that the agency failed to consider information concerning the awardee's performance of a contract awarded by the Department of State (DOS) for security services at the U.S. Embassy in Baghdad, as detailed in a report issued by the DOS's inspector general (DOSIG). However, the TOR did not provide for the evaluation of past performance and

GAO states that the argument here is, essentially, a complaint that the agency should have considered the awardee's past performance. The protest is denied.

4. MCR Federal, LLC, B-401954.2, August 17, 2010

Link: [GAO Opinion](#)

Agency: Central Intelligence Agency

Disposition: Protest denied.

Keywords: Corrective Action; Organizational Conflict of Interest (OCI)

General Counsel P.C. Highlight: Where a procurement decision--such as whether an OCI should be waived--is committed by statute or regulation to the discretion of agency officials, the GAO will not make an independent determination of the matter but will review whether the agency's decision was reasonable.

MCR Federal, LLC (MCR) protests the award of a contract to Scitor Corporation (Scitor), under request for proposals (RFP), issued by the Central Intelligence Agency (CIA) for cost analysis and research support services for the Office of the Director of National Intelligence (ODNI) Cost Analysis Improvement Group (CAIG).

The statement of work (SOW) encompassed three tasks--cost analysis production support, cost research support, and independent technical assessment support. The level-of-effort was estimated at 12 to 14 full-time equivalent (FTE) personnel plus a reach-back capability for subject matter experts of 1 FTE in each contract year. All personnel were expected to have appropriate security clearances. The RFP contemplated the award--on a "best value" basis--of a cost-plus-fixed-fee, level-of-effort contract for a base period, with four options.

With regard to OCIs, the RFP advised offerors that the successful contractor would be ineligible to participate as either a prime or subcontractor on any major system acquisition by ODNI, over the life of the contract. Written proposals and oral presentations were to be evaluated under five factors (with subfactors)--technical approach; management; past; security; and cost. Proposals were evaluated under the OCI plan subfactor and security factor on a pass/fail basis; proposals were rated under the remaining non-cost factors and subfactors on an adjetival basis.

Based on his review of the evaluation record, the source selection authority (SSA) concluded that Scitor's technical superiority outweighed its higher cost and made award to Scitor. MCR challenged the award. In response to the protest, CIA proposed corrective action, including

appointment of a new SSA and contracting officer to re-evaluate the proposals; consideration of whether an impaired objectivity OCI existed for work performed by both offerors; and a new award determination.

In implementing the corrective action, the agency issued requests to both offerors for additional information concerning their performance under current and recent IC contracts and followed up with clarification requests. After reviewing the responses, the contracting officer conducted interviews with government personnel responsible for administering the prior contracts in order to arrive at an assessment of OCI risk. Based on his review, the contracting officer concluded that MCR had a medium risk OCI under 2 of 7 contracts and that Scitor had a medium risk OCI in 2 of 16. Thereafter, the SSA prepared a seven-page waiver request. The request included a description of the OCI concern and potential effect if not avoided, neutralized, or mitigated, and the government's interest in using the offerors notwithstanding the OCI concerns. The designated official approved the waiver.

SSA explained that Scitor's and MCR's roles under existing and past contracts presented conflicting interests that theoretically might bias their judgment in performing the RFP work. Given the limited number of cleared estimators and the lack of competition that would result from eliminating Scitor from the procurement, the SSA reasoned that, even if MCR were deemed not to have an OCI similar to Scitor's, it was in the government's interest to acquire the services competitively in order to obtain the best value, and that waiver of the OCIs therefore was justified.

MCR asserts that it was unreasonable for CIA to waive Scitor's OCI for several reasons. For example, it asserts that the agency unreasonable considered the offerors' OCIs as equivalent because MCR's OCI allegedly could be easily mitigated. GAO states that under FAR subpart 9.5, when the facts of a procurement raise a concern that a potential awardee might have an OCI, the agency must determine whether an actual or apparent OCI will arise, and whether the firm should be excluded from the competition. The specific responsibility to avoid, neutralize or mitigate a potential significant conflict of interest lies with the cognizant contracting officer. As an alternative, the agency head or a designee may waive any general rule or procedure of determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee.

In this case, the SSA made a written request for a waiver from CIA's Chief of Acquisition Services, describing the OCI concern with both offerors; the potential effect if not avoided, neutralized, or mitigated; and, the government's interest in allowing the offerors to compete for the award notwithstanding the OCI concerns. After reviewing the request, the designated official approved the waiver. GAO states that CIA has met the requirements of FAR § 9.504 and MCR's assertions to the contrary provide no basis to object to that waiver.

MCR also asserts that the evaluation of its technical proposal under each factor was unreasonable. In considering a protest of an agency's proposal evaluation, GAO's review is confined to determining whether the evaluation was reasonable and consistent with the terms

of the solicitation and applicable statutes and regulations. GAO's review of the record shows that the agency reasonably determined that, under the technical approach subfactor, the proposal lacked detail as to how the protester would accomplish three of the required subtasks, and demonstrated only a limited depth of experience in cost analysis in several required areas. Also, under the transition plan subfactor, MCR's proposal lacked the strategy to mitigate risk to ongoing operations if grants of security access were delayed.

MCR asserts that the agency improperly evaluated the Scitor's proposal under the past performance factor. GAO states that the evaluation of Scitor's past performance was reasonable where the RFP specifically provided for consideration of subcontractor past performance, and did not prohibit an offeror from proposing subcontractor personnel for key positions. Thus, the agency properly considered Scitor's proposed subcontractor's relevant past performance. In its evaluation, the agency found that the subcontractor's work on two cost estimating and analysis support contracts involved work similar in nature and scope to the RFP. The agency also reviewed Scitor's three past performance references and found each to be similar in nature and scope to the RFP.

Finally, MCR asserts that the cost-technical tradeoff decision was neither reasonable nor adequately thorough. GAO states that where the RFP allows for a cost-technical tradeoff, the agency has discretion to select a higher-cost, technically higher-rated proposal if doing so is in the government's best interest and is consistent with the solicitation's stated evaluation and source selection scheme. The agency's judgments are governed only by the tests of rationality and consistency with the stated evaluation criteria.

GAO finds that the tradeoff and source selection were reasonable. The RFP made non-cost factors approximately equal to cost. Here, the evaluation record makes clear the superiority of Scitor's proposal. In making her source selection, the SSA prepared a detailed decision document comparing the proposals and specifically identified the advantages she found in Scitor's proposal. Her selection decision expressly addressed the potential OCIs for both offerors and, while it did not discuss the risks in detail, it specifically referred to the SSA's own waiver request discussing the offerors' relative OCIs in detail. MCR's belief that the cost premium is too great constitutes no more than disagreement with the agency's judgment, and is not sufficient to establish that the tradeoff was unreasonable. The protest is denied.