



# 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](http://www.generalcounselaw.com).

1. **Vetcorp, Inc., B-402519, May 24, 2010**

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**Link:** [GAO Opinion](#)

**Agency:** Army Corps of Engineers

**Disposition:** Protest denied.

**Keywords:** Commercial Product Acquisition; HUBZone Price Preference

**General Counsel P.C. Highlight:** HUBZone price preferences cannot be used against other small businesses.

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The U.S. Army Corps of Engineers (Army Corps) issued a solicitation for purchase of an aquatic herbicide under FAR Part 12, Acquisition of Commercial Items. The Army Corps received four offers – each containing the same unit price. The Army Corps used FAR Part 14’s guidance on Equal Low Bids to determine the award priority. One of the unsuccessful bidders was Vetcorp, Inc., a HUBZone small business. Vetcorp protested the decision by asserting that, where price was the only factor for award and where all four offerors submitted the same price, Army Corps should not have relied on FAR Part 14 Sealed Bidding, to break the tie in a commercial item acquisition. Vetcorp also asserted that the Army Corps should have provided the company with an evaluation preference as a HUBZone small business under FAR Part 19.

Army Corps’ solicitation, issued pursuant to FAR Subpart 12.6, sought unit prices for purchase of an aquatic herbicide. The solicitation did not specifically identify the basis upon which award would be made but it only requested unit pricing from each vendor. Vetcorp also identified itself as a HUBZone small business concern. The contracting officer (CO) looked to the guidance set forth at FAR § 14.408-6, Equal Low Bids to determine which offeror should receive the award. Army Corps ended up drawing lots and another offeror was awarded the contract.

In its review of the protest, GAO examined the record to determine whether the CO could rely on the FAR Part 14 Equal Low Bids guidance to resolve the tie and concluded that it could. GAO stated that FAR Part 12 gives the COs discretion to choose acquisition procedures under either FAR Part 13, Simplified Acquisition Procedures; FAR Part 14, Sealed Bidding; or FAR Part 15 Negotiated Procurement for making an award. Since

Vetcorp did not identify any procurement law, regulation, or any solicitation provision that was violated, GAO stated that Army Corps acted appropriately.

As to the issue of whether Army Corps was required to apply the HUBZone price preference, GAO held that the FAR and the Small Business Act prohibit use of the HUBZone price preference against another small business concern. GAO denied the protest.

## 2. Crewzers Fire Crew Transport, Inc., B-402530; B-402530.2, May 17, 2010

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**Link:** [GAO Opinion](#)

**Agency:** Department of Agriculture

**Disposition:** Protest denied.

**Keywords:** Protesting the Terms of a Solicitation; Best Value

**General Counsel P.C. Highlight:** An agency has the discretion to determine its needs and the best way to meet them, including broad discretion in selecting evaluation criteria.

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In a request for quotations (RFQ) by the Department of Agriculture, U.S. Forest Service, for award of multiple blanket purchase agreements (BPAs), issued as a total set-aside for Historically Underutilized Business Zone (HUBZone) small business concerns for crew carrier bus services, Crewzers Fire Crew Transport, Inc. protested the terms of the RFQ prior to submitting its proposal. Crewzers filed the protest claiming that the selection of vendors should have been decided on a best value basis, rather than on a low-priced, technically acceptable basis.

By the terms of the RFQ, the Forest Service intended to award multiple BPAs to vendors whose quotations included a “reasonable price and resources that are technically acceptable.” Once the BPAs are established, the RFQ provided that orders would first be placed with HUBZone small business concerns, then with the remaining small businesses.

GAO stated that an agency has the discretion to determine its needs and the best way to meet them, including broad discretion in selecting evaluation criteria. GAO reviewed the record and found that the agency reasonably considered the alternative methods for establishing and ranking BPAs and its determination to use a low-priced, technically acceptable approach was reasonable. GAO denied the protest.

3. **Metalcraft, Inc.--Costs, B-402181.3, May 17, 2010**

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**Link:** [GAO Opinion](#)

**Agency:** Department of the Army

**Disposition:** Request denied.

**Keywords:** Corrective Action; Bid Protest Costs

**General Counsel P.C. Highlight:** GAO's policy is to recommend reimbursement of protest costs if it sustains a protest or where the agency has unduly delayed in taking corrective action in the face of a clearly meritorious protest.

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The Department of the Army issued a request for proposals (RFP) for portable fire extinguishers. The RFP provided for award of a fixed-price, indefinite-delivery/indefinite-quantity (ID/IQ) contract for a base year with three option years with a minimum order of 3,348 extinguishers and maximum of 67,875. Other than a first article test (FAT) requirement, price was the only factor identified. The Army received three proposals, with TAMOR's being the lowest priced. After performing the pre-award survey to determine TAMOR's responsibility, the Army made award to TAMOR.

In its initial protest, Metalcraft alleged that the Army was required to consider past performance and quality assurance systems, rather than base the contract award solely on price. Metalcraft also alleged that the Army impermissibly held discussions only with TAMOR. The Army filed its agency report responding to the protest allegations and Metalcraft filed its comments in response plus a supplemental protest that repeated the original allegations, but with more specificity. The GAO requested an additional agency report on the supplemental protest. The Army then advised GAO that, after reviewing the supplemental protest allegations, it had decided to take corrective action. GAO dismissed the initial and supplemental protests as being moot following the corrective action decision. Metalcraft then filed a request for reimbursement of costs for filing and pursuing its protest.

GAO's policy is to recommend reimbursement of protest costs if it sustains a protest or if the GAO determines that the agency has unduly delayed taking corrective action in the face of a clearly meritorious protest. In this instance, as the record showed, the initial protest was not clearly meritorious, so GAO will not recommend reimbursement. Also, GAO concluded that

since the Army took corrective action before the due date for its supplemental agency report, GAO considered the action prompt and does not recommend reimbursement of costs. The request is denied.

4. **DGR Associates, Inc., B-402494, May 14, 2010**

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**Link:** [GAO Opinion](#)

**Agency:** Department of the Air Force

**Disposition:** Protest sustained.

**Keywords:** HUBZone Priority

**General Counsel P.C. Highlight:** Despite the Department of Justice's recommendation to the contrary, GAO finds that the HUBZone Small Business Program has priority over all other SBA programs such as the 8(a) program or the SDVO program. A procurement may not be set aside for 8(a) participants unless and until the agency has determined if there are two or more qualified HUBZone small business concerns and if the award can be made to one of these HUBZone participants at a fair market price)

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Following a request for proposals (RFP) for military family housing maintenance, issued by the Department of the Air Force (Air Force), DGR Associates, Inc. (DGR), a Historically Underutilized Business Zone (HUBZone) small business concern, protested that the Air Force should have issued the solicitation as a HUBZone set-aside rather than setting it aside under the 8(a) program.

The Air Force issued the RFP as a set-aside for 8(a) small business concerns. The RFP contemplates the award of a fixed-price requirements contract for maintenance, inspection, and repair services for military family housing. DGR filed an agency-level protest, which was denied, then a GAO protest challenging the Air Force's decision not to set aside the procurement for HUBZone small businesses.

GAO stated that the plain language of the statute authorizing the HUBZone program is mandatory and requires that an agency set aside a procurement for HUBZone participants when certain criteria are met (specifically, where the agency has a reasonable expectation of receiving offers from at least two qualified HUBZone small business concerns and where the award can be made at a fair market price). GAO concluded that the Air Force was required first to consider whether the conditions for setting aside the procurement for HUBZone

businesses were met. Because the Air Force did not perform this mandatory step in the set aside process, GAO found that it was improper to proceed with the procurement as an 8(a) set-aside.

The Air Force claimed that it was following a Department of Justice Memorandum binding on all Executive Branch agencies that said that the HUBZone program does not have priority over the 8(a) program and that federal contracting officers have substantial discretion to consider and designate contracts for either the HUBZone, 8(a), or the Service Disabled, Veteran-Owned (SDVO) Program without having to prioritize one program above the others. Citing GAO precedent and a recent case from the Court of Federal Claims agreeing with GAO's interpretation, GAO upholds its previous decision that the HUBZone statute clearly gives the HUBZone program priority over all other small business programs. GAO further states that future GAO protests raising this issue will be decided in the same way in an expedited and summary manner. GAO sustained the protest and recommended that the Air Force reimburse the protester its costs of filing and pursuing the protest.