



# 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. **General Dynamics One Source, LLC; Unisys Corporation, B-400340.5, B-400340.6, January 20, 2010**

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

**Agency:** Transportation Security Administration

**Disposition:** Protests sustained.

**Keywords:** Price realism; Incentive fee

**General Counsel P.C. Highlight:** Where a solicitation clearly specifies a particular incentive fee amount, a different, lower, incentive fee may not be accepted for award.

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In 2008, the Transportation Security Administration (TSA) issued a request for proposals (RFP) for a fixed-price task order to perform a wide variety of computer support services for TSA at a number of the agency's installations nationally and internationally. The RFP was solicited in two phases; during phase I, offerors provided information related to their transition strategy, technical capabilities, and past performance. After phase I, three of the six offerors were eliminated from the competition. Two of these three filed protests with the Federal Aviation Administration's Office of Dispute Resolution for Acquisition (ODRA) and the GAO because it was not clear which office had jurisdiction to consider the protests. After learning that ODRA would consider their protests, both withdrew their protests from the GAO. While the ODRA protests were pending, TSA issued phase II of the solicitation to the three successful offerors. Before reaching a conclusion on phase II, TSA settled the two outstanding ODRA protests by allowing the protestors, as well as the third offeror eliminated in phase I, back into the solicitation. The phase II solicitation was then reissued to all offerors, which stated that the award would be made on a "best value" determination considering price and four non-price factors: technical approach, management, performance, and small business contracting plan. TSA received proposals from General Dynamics (GD), Unisys and Computer Sciences Corporation (CSC), after which it prepared a technical evaluation report and a price evaluation report. Based on these reports, TSA issued the task order to CSC, finding that its proposal offered the best value to the government. After being advised of the source selection decision and receiving debriefings, GD and Unisys filed protests.

Each protester alleged that (1) TSA's price realism evaluation of the CSC proposal was improper and (2) TSA impermissibly accepted CSC's proposal with an incentive fee that varied from the fee specified in the RFP.

Beginning with the price realism analysis, both protestors challenged TSA's findings that CSC's pricing was realistic for two reasons: (1) CSC's proposed staffing was inadequate to meet the requirements of the RFP and inconsistent with staffing information included elsewhere in the proposal, and (2) inadequate consideration was given to CSC's comparatively low proposed labor rates, given the fact that CSC proposed to hire incumbent personnel to perform the duties required by the solicitation. The primary fact supporting this portion of the protest was that CSC's price proposal contained staffing estimates that decreased steadily through the option years, to a level that was significantly below what CSC had outlined in its technical/management proposal. TSA attempted to counteract this allegation by submitting affidavits from several of its evaluators, however these were found to be insufficient in showing that the evaluators were aware of the disparity between the technical/management and price proposal staffing figures. Because GAO was not able to find an indication in the record that TSA had considered the staffing decrease in the option years, or the staffing inconsistency between the price and technical/management proposals, it concluded that TSA's price realism analysis of the CSC proposal was not supported by the record.

Both protestors also alleged that the price realism analysis also failed to address sufficiently the low labor rates contained in CSC's proposal. TSA countered this allegation by stating that the labor rates were not a meaningful basis for evaluation because they are fully burdened hourly rates, rather than wage rates; thus, a comparison of the labor rates does not necessarily show the actual wages that CSC anticipates paying. TSA also asserts that while CSC had the lowest proposed labor rates for many of the categories, it also had the highest wages for several key employee categories, which meant that they would be better able to recruit and retain key personnel. GAO's analysis of the record related to this issue was unable to get past the fact that CSC was proposing such low rates for the majority of its proposed staff, and the fact that it was proposing to hire a high number of incumbent personnel. Based on these two factors, GAO sustained the price realism portion of the protests.

The second component of the protest related to CSC's inclusion of a lower incentive fee in its proposal than the fee that was specified in the RFP. The RFP appeared to require that vendors add a 5% incentive fee on certain contract line items (CLINs). GD had submitted a question attempting to clarify whether the 5% was required or not. TSA did not answer the question directly, but issued an amendment inserting a 5% incentive fee in its table of calculations. Both GD and Unisys included a 5% incentive fee in their final proposal

revisions, but CSC included an incentive fee of only 3%. GD and Unisys first assert that TSA had led them to believe that they were required to apply a 5% incentive fee in calculating their prices, and that TSA should have rejected CSC's proposal or advised all offerors that some other percentage was acceptable. TSA argued that offerors were free to propose their own fee percentage and that the wording of the solicitation put all firms on notice that offers of amounts different from 5% would be entertained. Based on this fact, and TSA's unwillingness to clarify this point through the evaluation period, GAO concluded that the offerors were led to believe that the 5% was the required fee in their price proposals. Where a solicitation clearly specifies a particular incentive fee amount, a different, lower, incentive fee may not be accepted for award. For this reason, GAO sustained this element of the protest. In sustaining both elements of the protests, GAO recommended that TSA amend the RFP to advise offerors of its intent regarding the incentive fee, provide adequate discussions, and solicit revised proposals. If a firm other than CSC is in line for the award, it is recommended that TSA cancel CSC's task order and issue a new task order to the successful offeror.

**2. Laducer & Associates, Inc., B-401735.3, February 23, 2010**

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

**Agency:** Department of the Air Force

**Disposition:** Protest denied.

**Keywords:** Solicitation amendment; Corrective action; Disclosure of price

**General Counsel P.C. Highlight:** When taking corrective action in response to a protest, reopening the competition and requesting revised proposals is not improper merely because the awardee's price has been released in the initial award notice.

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The Internal Revenue Service issued a solicitation for the conversion of sensitive but unclassified information from paper-based documents to digital format. After receiving proposals from Laducer & Associates, Inc. and Mandaree Enterprise Corporation, the IRS awarded the contract to Laducer. Mandaree protested that source selection decision, at which point the IRS informed GAO that it would cancel the contract, reevaluate proposals, and make a new decision. Mandaree's protest was dismissed. At that point, the IRS determined

that it would amend several of the solicitation requirements by revising, updating and clarifying an assortment of the quantity estimates, schedules for release of certain forms and an addition to the technical capability evaluation factor. Laducer then protested the IRS's decision to amend.

In principal, Laducer alleged that since its price had been disclosed in connection with the initial award announcement, any reopening of the procurement process would be inappropriate. In addition, Laducer also argued that the amendment to the technical capability evaluation factor effectively revealed the technical approach that Laducer had provided in its proposal.

When contracting agencies determine that corrective action is necessary to ensure fair and impartial competition, they are given broad discretion; in particular, unless otherwise objectionable, a request for revised proposals is not improper just because the awardee's price has been exposed. Here, the IRS was concerned that the terms of the original solicitation were unclear to the offerors and thus took steps to update the estimates and information provided. Further, the IRS stated that the solicitation amendment did not disclose any of Laducer's proprietary information. For the above reasons, the GAO denied Laducer's protest.

### 3. Ricoh America's Corporation, B-402239, February 22, 2010

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

**Agency:** Department of the Army

**Disposition:** Protest denied.

**Keywords:** Proposal evaluation

**General Counsel P.C. Highlight:** GAO's protest jurisdiction is limited to a review of the written record for reasonableness and GAO will not, in post-award protest, re-evaluate existing proposals.

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The Department of the Army issued a request for quotations (RFQ) for copier machines for Fort Leonard Wood in Missouri. The solicitation contemplated the award of a fixed-price contract, using the commercial item acquisition procedures of Federal Acquisition

Regulation (FAR) Part 12, along with the two-step sealed bid procedures of FAR Part 14. Step one assessed the technical proposals for acceptability, and step two involved the submission of sealed priced bids by those offerors that had been deemed technically acceptable in step one. Additionally, each vendor had to hold a particular type of Blanket Purchase Agreement (BPA) and a current General Service Administration (GSA) schedule contract, and the copiers identified by each vendor had to be currently manufactured and actively marketed on their GSA schedule contract.

Following a technical review of the proposals, and a low-price determination, the Army selected Konica Minolta Business Solutions USA, Inc. for the award. Ricoh America's Corporation protested this decision on three grounds.

First, Ricoh contended that Konica's copiers were not on Konica's GSA schedule contract or BPA at the time proposals were submitted. In reviewing the written record, GAO, however, found that Konica's proposed products were in fact listed on Konica's GSA schedule contract and BPA at the time of proposal submission. Next, Ricoh alleged that Konica's copiers were technically unacceptable because they did not possess the ability to scan at a 256-bit encryption level. Again, GAO held that the written record indicated differently and that the 256-bit encryption was not a requirement of the solicitation. Rather, the solicitation required two-factor authentication, which Konica's machines provided. Finally, Ricoh argued that the Army did not comply with the solicitation in determining technical acceptability. Once again, GAO reviewed the written record and arrived at a different conclusion, finding that the Army had evaluated technical proposals in accordance with the process it set forth in the RFQ and that it had reasonably determined that Konica met the requirements of the RFQ. Accordingly, because the written record reasonably supported the Army's evaluation and award decision, GAO denied Ricoh's protest.

#### 4. JXM, Inc., B-401641.2, February 23, 2009

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

**Agency:** Department of the Air Force

**Disposition:** Protest denied.

**Keywords:** Past performance; Evaluation criteria

**General Counsel P.C. Highlight:** Where an RFP contains general evaluation criteria, the Agency has a wide degree of discretion in interpreting them.

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The Air Force awarded a contract to General Trades & Services, Inc. (GTS) to provide base housing management and services at Warren Air Force base . The award of this contract was the result of a solicitation issued by the Air Force that contained only two evaluation factors: past performance and price. These two factors were given equal weight and the award was to be based on a Performance Price Trade-Off (PPT).

Following the award of the contract, JXM, Inc., the only other bidder, protested to the GAO. JXM challenged the Air Force's evaluation of GTS's past performance. When GAO is faced with a protest that challenges an agency's evaluation, the GAO will not re-evaluate the proposals, but rather will examine the record to determine whether the agency's judgment was reasonable, and in accord with the solicitation criteria and applicable statutes and regulations. Here, JXM challenged the Air Force's evaluation of GTS's past performance because, in JXM's opinion, the past performance was not to the level of complexity or magnitude as the work contemplated in the present solicitation. However, GAO's review of the RFP revealed a much lower standard that was couched general and not specific language. Where an RFP contains general evaluation criteria, the Agency has a wide degree of discretion in interpreting them. As such, GAO concluded that the Air Force's interpretation of its evaluation criteria fit within the general terms of the RFP and the Air Force was, therefore, reasonable in its assessment of GTS's past performance. GAO denied the protest.

## 5. **Latvian Connection Trading and Construction, LLC, B-402410, February 25, 2010**

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

**Agency:** Department of the Army

**Disposition:** Protest denied.

**Keywords:** Timely filing; Electronic filing

**General Counsel P.C. Highlight:** It is the offeror's obligation to deliver its proposal to the Agency in accordance with the terms of the RFP. Evidence of timely electronic transmission

of a proposal is not sufficient to show timely delivery of the offeror's proposal to meet the offeror's burden to deliver its proposal to the proper place at the proper time.

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A request for proposals (RFP) was issued by the Department of the Army for the provision of generators to the Fenty Forward Operating Base in Afghanistan. The Army intended to award to the lowest priced, technically acceptable offeror. The RFP said that proposals could be delivered electronically or in hard copy, but the RFP specifically stated that offerors were "responsible for submitting offers, and any modifications, revisions, or withdrawals, so as to reach the Government office designated in the solicitation by the time specified in the solicitation." In response to the RFP, the Army received 74 timely proposals and 10 late proposals, and no proposal from Latvian Connection Trading and Construction, LLC . Latvian Connection protested the award of the contract, claiming that its bid was the lowest-priced, technically acceptable offer.

In response, the Army stated that it never received a proposal from Latvian Connection. In support of its position, Latvian Connection asserted that its "sent" e-mail folder confirmed transmission of its proposal at 1:19 a.m. on November 12, 2009. As additional evidence, Latvian Connection's CEO stated that he transmitted the proposal as an attachment and that his records did not reflect that the e-mail was rejected or undeliverable.

According to FAR §15.208, it is the offeror's responsibility to deliver its proposal to the proper place at the proper time. Here, GAO found that there was no evidence that the proposal was actually received by the agency. The Army said it performed searches of its emails on five separate occasions and found no evidence of Latvian Connection's proposal. GAO held that evidence of timely electronic transmission of a proposal is not sufficient to show timely delivery of the offeror's proposal to meet the offeror's burden to deliver its proposal to the proper place at the proper time. Because Latvian Connection failed to satisfy its burden of showing that it timely delivered its bid to the Army, its protest was denied.