



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. ITT Corporation-Electronic Systems, B-402808, August 6, 2010

Link: [GAO Opinion](#)

Agency: Department of the Navy

Disposition: Protest denied.

Keywords: OCI; conflict of Interest

General Counsel P.C. Highlight: The FAR requires contracting officials to avoid, neutralize or mitigate potential significant OCIs so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity.

ITT Corporation (ITT) protests the award of a contract under a request for proposals (RFP) issued by the Department of the Navy, Space and Naval Warfare Systems Center Pacific, for joint tactical radio system (JTRS) software.

The RFP contemplated the award of a cost-plus-fixed-fee/cost-plus-incentive-fee contract for a two-year base period, with three option years. Award was to be made to the offeror submitting the proposal deemed to offer the "best value" to the government considering both cost and several non-cost factors. After receiving three proposals, the agency determined that discussions were necessary. Following the award of the contract to another offeror, ITT filed this protest asserting that the awardee had an impermissible "unequal access to information"-type organizational conflict of interest (OCI).

The FAR requires contracting officials to avoid, neutralize or mitigate potential significant OCIs so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. An unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition.

ITT complained that it was required under another contract to share certain information with Boeing that eventually improved its proposal and made it first in line for award. GAO held that Where, as here, the protester has the information in question and the awardee also has the same information, the awardee cannot be said to have "unequal access to information." ITT cannot be prejudiced since both ITT and the awardee had access to the same

information. Additionally, ITT was contractually required to provide the information to the other offerors by virtue of a government purpose rights license. GAO concludes that there was no “unequal access” OCI.

ITT also asserts that the agency misevaluated its technical proposal and takes issue with almost every weakness identified by the agency. GAO states that it will not address ITT’s assertions relating to the evaluation in detail since, even if ITT was correct with respect to its assertions, the errors would not have affected its standing in the competition. The protest is denied.

2. PDL Toll, B-402970, August 11, 2010

Link: [GAO Opinion](#)

Agency: Department of the Navy

Disposition: Protest denied.

Keywords: Protesting Terms of a Solicitation

General Counsel P.C. Highlight: An agency has the discretion to determine its needs and the best way to meet them. An agency also has broad discretion in the selection of the evaluation criteria that will be used in an acquisition.

PDL Toll (PDL) protests the terms of a request for proposals (RFP) issued by the Department of the Navy (Navy), for ship husbanding services for Navy vessels. The RFP contemplated the award of a fixed-price indefinite-delivery/indefinite-quantity contract for a base year, with a six-month option period, to “the responsible offeror who submits the lowest price, technically acceptable offer with acceptable or neutral past performance.”

PDL argues that the use of the lowest-price, technically-acceptable source selection process is not appropriate for this acquisition and asks that the Navy use a tradeoff process. PDL also argues that the agency should conduct a comparative assessment of the offerors’ past performance and that the agency has improperly omitted several husbanding services that are provided under an existing contract for husbanding services.

GAO states that an agency has the discretion to determine its needs and the best way to meet them. An agency also has broad discretion in the selection of the evaluation criteria that will be used in an acquisition, and GAO will not object to the absence or presence of a particular

evaluation criterion so long as the criteria used reasonably relate to the agency's needs in choosing a contractor or contractors that will best serve the government's interest.

The record reflects that the agency reasonably determined that the lowest-price, technically-acceptable approach to evaluate offers was best where the decision was based on the fact that the requirement was relatively noncomplex, and there was little performance risk. There was also a substantial amount of information provided to the offerors in solicitation. Additionally, the agency explains that the requirements included in the solicitation were intentionally limited to those the agency would actually require during the contract's short performance period and for which estimated quantities could be provided. The agency states that if additional requirements for supplies and services arise under the contract to be awarded, it will then determine the acquisition method for obtaining those requirements. GAO cannot find this determination to be unreasonable. The protest is denied.

3. Infrastructure Defense Technologies, B-401860.2; B-401860.3, July 27, 2010

Link: [GAO Opinion](#)

Agency: Defense Logistics Agency

Disposition: Protest denied.

Keywords: Corrective Action

General Counsel P.C. Highlight: In negotiated procurements the agency has broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition.

The Defense Logistics Agency (DLA) issued a request for proposals (RFP) for expeditionary earth-filled protective barriers. The RFP anticipated award of an indefinite delivery/indefinite quantity, fixed-price with economic price adjustment delivery order contract, with a two-year base period and two one-year options. The RFP required offerors to submit product demonstration models (PDMs), which were to be evaluated based on a combination of testing and contractor performance certifications. Six offerors, including the protester, Infrastructure Defense Technologies (IDT), and the awardee, Hesco Bastion, Ltd. (Hesco), submitted proposals.

The offerors' PDMs were tested and each offeror's lab certifications were reviewed for acceptability. Following discussions, DLA made award to Hesco, concluding that its slightly lower rated technical proposal, but lower-priced proposal, provided the best value to the government. IDT filed a protest challenging several aspects of the evaluation process, including the way the agency evaluated its surge and sustainment plan and the agency agreed to take corrective action by amending the solicitation, conducting discussions with IDT and Hesco, soliciting and evaluating revised proposals, and making a new award decision.

DLA amended its RFP and advised offerors that their surge and sustainment plans should not assume or incorporate any material inventories that utilize funding under the DLA Warstopper program. The source selection authority (SSA) found that IDT's and Hesco's technical proposals were "largely equivalent, with IDT providing only a slight technical advantage." However, the SSA concluded that the slight benefits provided did not warrant a payment of a higher price premium for the PDMs. The contract was awarded to Hesco. IDT challenges the reasonableness of DLA's evaluation of the technical proposals and past performance.

GAO states that the evaluation of an offeror's technical proposal, and its past performance, is a matter within the agency's discretion. GAO will not reevaluate proposals 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.

IDT argues that DLA's corrective action was improper because it was designed with the specific intent to allow Hesco to correct a noncompliant offer. GAO states that in negotiated procurements the agency has broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. An agency can amend a solicitation, and request and evaluate revised proposals where the record shows that the agency made the decision to take this action in good faith, without specific intent of changing a particular offeror's technical ranking, or avoiding award to a particular offeror. GAO will not object to an agency's proposed corrective action where the agency concluded that the award, because of perceived flaws in the procurement process was not made on a basis most advantageous to the government. DLA explains that the agency reviewed the contract file based on the allegations raised in IDT's first protest, which led the agency to address the areas of concern involving surge, subcontracting plan, and field service life. DLA also states that certain elements of the surge plan requirements in the RFP were ambiguous and needed to be clarified, it may have improperly neglected an element of responsibility or may have failed to conduct meaningful discussions. GAO finds that the agency's decision to address these concerns through corrective action was reasonable.

As to the assertion that Hesco did not propose a warranty that complied with the solicitation requirements, GAO finds that the agency reasonably concluded that Hesco's warranty met the requirements of the RFP. While the awardees' warranty included a number of qualifying conditions, it expressly stated that it was warranted for the purposes described in the RFP.

IDT also argues that DLA did not reasonably evaluate Hesco's surge and sustainment plan, but GAO's review of the record shows that DLA's amended RFP prohibited offerors from using Warstopper funds and Hesco stated that it would meet the surge and sustainment requirements without use of any materials funded through the Warstopper program. GAO states that IDT's arguments consist of mere speculation that the awardee misrepresented its surge and sustainment plan and such speculation is not a valid basis of protest.

IDT argues that DLA treated the offerors unequally in evaluating the technical proposals and past performance. GAO finds that IDT's arguments have no merit. Finally, where IDT asserts that DLA's award of a single contract under the solicitation did not comply with the statutory and regulatory requirements concerning multiple awards of ID/IQ contracts valued in excess of \$100 million, GAO finds the protest untimely since IDT knew, at the time of award, that the agency had made a single award of an ID/IQ contract valued at more than \$100 million and did not bring it up in its initial protest. GAO denies the protest.

4. A P Logistics, LLC, B-401600, August 11, 2010

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Discussions

General Counsel P.C. Highlight: An agency is not required to repeat discussions where the offeror is informed of a problem and fails to correct the problem in a final proposal revision.

A.P. Logistics, LLC (APL) protests the award of a contract under a request for proposals (RFP), issued by the Department of the Army (Army), for storage services for privately-owned vehicles.

The RFP provided for award of an indefinite-delivery/indefinite-quantity contract on a “best value” basis and identified the following evaluation factors: mission capability, past performance, small business participation, and price. Offerors were informed that the agency would not conduct discussions before making and award and offerors should put their best terms from a price and technical standpoint in their initial proposal. Large business offerors, like APL, were instructed to submit small business subcontracting plans with their initial proposals.

APL’s proposal was assigned several weaknesses, including under the small business participation factor. Specifically, the Army identified concerns with APL’s submitted small business subcontracting plan and informed APL that its subcontracting plan did not indicate the total amount of the contract that would be subcontracted, did not address the types of services/supplies to be subcontracted or include a breakdown of which supplies/services would be planned for subcontracting in the different small business categories, and did not describe the methods used to develop goals and to identify potential sources. APL submitted a revised proposal, but it was found ineligible for award since its small business subcontracting plan was unacceptable.

APL asserts that the requirement that “the apparently successful offeror” submit an acceptable subcontracting plan indicates that the agency would negotiate a subcontracting plan only after the agency identified the apparently successful offeror. GAO states that it was within the contracting officer’s discretion to negotiate the details of APL’s subcontracting plan. However, the Army had already asked APL during both written and oral discussions to provide answers to specific questions concerning the subcontracting plan and APL failed to adequately respond. Therefore, the Army was not required, in these circumstances, to revisit its nonresponsibility determination by providing APL another opportunity to address the same questions that it had failed to answer during discussions. The protest is denied.

5. Information Ventures, Inc., B-401448.5; B-401448.6, August 11, 2010

Link: [GAO Opinion](#)

Agency: Department of Health and Human Services

Disposition: Protest denied.

Keywords: Corrective Action

General Counsel P.C. Highlight: The selection of individuals to serve as proposal evaluators is a matter of discretion of the agency and GAO will not review allegations concerning the composition of evaluation panels absent a showing of fraud, conflict of interest, or actual bias on the part of evaluation officials.

Information Ventures, Inc. (IVI) protests the award of a contract under a request for proposals (RFP), issued by the Department of Health and Human Services, for technical report preparation services.

The RFP was issued as a small business set-aside, contemplated the award of a cost-plus-fixed-fee contract for a five-year base period with five one-year options for technical report preparation services. Award was to be made on a best-value basis considering the following evaluation factors: technical, cost, and past performance. Eight proposals were received and a special emphasis panel evaluated each proposal. The panel then conducted discussions with the offerors. Various concerns were raised during discussions regarding IVI's proposal, including the concern that IVI's proposed team had not worked together before, the team would be new hires, IVI's offices and staff were located in different areas, and its cost proposal was high compared to the government estimate. Another panel raised the same concerns with IVI's proposal. Following award of the contract to another offeror, IVI filed a protest.

The agency decided to take corrective action, including convening a "new technical evaluation panel," and reevaluating the "competitive range proposals, as revised." However, the reviewers unanimously rated the proposal as unacceptable. IVI's proposal was downgraded and received a lower point score.

IVI argues that the use of members from the prior evaluation panels was inconsistent with its promised corrective action. GAO states that the selection of individuals to serve as proposal evaluators is a matter of discretion of the agency and GAO will not review allegations concerning the composition of evaluation panels absent a showing of fraud, conflict of interest, or actual bias on the part of evaluation officials.

As for IVI's assertion that its proposal was improperly evaluated, GAO reviewed the record and found the agency's judgment to be reasonable and in accord with the stated evaluation criteria. For example, IVI complains about the agency's conclusion that certain of its staff had limited experience. However, GAO finds that the panel was reasonable in concluding that this was a major defect. The protest is denied.