



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. **John P. Santry-Designated Employee Agent, B-402827, August 2, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Air Force

Disposition: Protest denied.

Keywords: A-76 Protest

General Counsel P.C. Highlight: No function of the Department of Defense performed by Department of Defense civilian employees may be converted, in whole or in part, to performance by a contractor unless the conversion is based on the results of a public-private competition.

John P. Santry—Designated Employee Agent and representative of federal workers who could be displaced by the award of a proposed contracting action, protests the Department of the Air Force’s (Air Force) issuance of request for quotations (RFQ), which sought submission of quotations from private-sector food service contractors to provide various food service activities at specified Air Force bases.

The RFQ required vendors to submit quotations for “core” requirements, defined as “operation of the mission essential [appropriated fund] dining facilit[ies] at each installation” along with providing non-appropriated fund “catering operations.” Santry asserts that, by seeking proposals from private-sector contractors, the agency has failed to comply with the statutory requirements in 10 USC §2461 and OMB Circular A-76 regarding “civilian employees.” Specifically, Santry asserts that the agency is not conducting a public-private competition for performance of the food service functions to determine whether the function should be performed by federal government employees or should be contracted out to private contractors. A “civilian employee” is defined as “An individual who works for a federal agency on an appointment without time limitation who is paid from appropriated funds, which includes working capital funds. A foreign national employee, temporary employee, term employee, non-appropriated fund employee, or uniformed personnel is not included in this definition.”

GAO states that non-appropriated fund employees are expressly excluded from the definition of “civilian employee.” GAO states that Santry’s argument that the agency’s alleged conversion of government functions to contractor performance is unfounded where the record establishes that the jobs of the employees performing services are not at risk and there is no conversion of work to the private sector since the federal employees’ jobs are not at

stake. GAO concluded that the provisions of 10 USC §2461 do not apply to functions performed by non-appropriated fund employees and where the agency amended the solicitation to provide that no appropriated fund employee will be “displaced, reassigned, subjected to reduction in force, or otherwise adversely affected,” the ongoing procurement actions do not constitute conversion of functions performed by those employees to private sector performance. The protest is denied.

2. Greystones Consulting Group, Inc., B-402835, June 28, 2010

Link: [GAO Opinion](#)

Agency: Department of Homeland Security

Disposition: Protest denied.

Keywords: Size Protest; corrective action

General Counsel P.C. Highlight: It is inconsistent with the integrity of the procurement system and the intent of the SBA for an agency to allow a firm to continue performing a contract where the firm was determined by the SBA after the award to be other than small, unless there are countervailing reasons for allowing the award to remain in place.

Greystones Consulting Group, LLC (Greystones) protests the award of a contract under a request for proposals (RFP), issued by the Department of Homeland Security (DHS) for roleplayer services.

The RFP was issued as a competitive set-aside for small businesses under the Small Business Administration’s (SBA) section 8(a) program. The agency received four proposals that were eligible for evaluation. Among the four were Greystones and the awardee, CWU. Following a size protest, the SBA determined that CWU is other than small with respect to the procurement and was not eligible for the award of the contract. But the agency decided not to terminate the contract award to CWU immediately. Instead, the agency decided to keep the contract in place but not exercise any option for performance beyond the base year period and to “resolicit with due diligence” to make a new contract award.

GAO states that it is inconsistent with the integrity of the procurement system and the intent of the SBA for an agency to allow a firm to continue performing a contract where the firm was determined by the SBA after the award to be other than small, unless there are countervailing reasons for allowing the award to remain in place. The key consideration is

whether there is another offeror in line for award who can step in and perform the contract if it is terminated.

Greystones proposal was found unacceptable, as were the remaining two offerors. Therefore, there is no offeror to which award could be made based on existing proposals if CWU's contract was terminated. GAO sees no basis to challenge the reasonableness of the agency's decision to honor CWU's contract, given the need for continuing roleplayer services and its plan to award a new contract after holding a reasonably prompt recompetition. The protest is denied.

3. Eisenhower Real Estate Holdings, LLC, B-402807, July 27, 2010

Link: [GAO Opinion](#)

Agency: General Services Administration

Disposition: Protest denied.

Keywords: Challenge to the terms of a solicitation

General Counsel P.C. Highlight: In preparing a solicitation, a contracting agency is required to specify its needs in a manner designed to achieve full and open competition and may include restrictive requirements only to the extent they are necessary to satisfy the agency's legitimate needs.

General Services Administration (GSA) issued a solicitation for offers (SFO) for the lease of office space to house portions of the Department of Homeland Security (DHS). The SFO requires that the housing be located in Washington, DC, or if in Virginia or Maryland, within a certain proximity of the main DHS campus under development.

Eisenhower protests the geographic restriction. GAO states that the contracting agency has the discretion to determine its needs and the best method to accommodate them. In preparing a solicitation, a contracting agency is required to specify its needs in a manner designed to achieve full and open competition and may include restrictive requirements only to the extent they are necessary to satisfy the agency's legitimate needs. An agency may include geographic restrictions if they are reasonably necessary for the agency to meet its needs.

The record shows that, early in the procurement planning process, DHS documented its rationale for the chosen geographic area. DHS concluded that the location is critical to DHS

headquarters operations. The location will facilitate the extensive daily interactions between DHS components, enabling DHS to share services among components, improve organizational efficiency, and enhance component working relationships. GAO states that this is sufficient to explain the nexus between the agency’s mission needs and proximity of DHS components. GAO states that the agency has reasonably explained the geographic restriction. The protest is denied.

4. **TrailBlazer Health Enterprises, LLC, B-402751; B-402751.2, July 20, 2010**

Link: [GAO Opinion](#)

Agency: Centers for Medicare and Medicaid Services

Disposition: Protest denied.

Keywords: Final Evaluation

General Counsel P.C. Highlight: Where a protest challenges an agency’s evaluation, it will review the evaluation record to determine whether the agency’s judgments were reasonably and consistent with the stated evaluation criteria and applicable procurement statutes and regulations.

TrailBlazer Health Enterprises, LLC (TrailBlazer) protests the award of a contract under a request for proposals (RFP) issued by the Department of Health and Human Service (HHS), Centers for Medicare and Medicaid Services (CMS), for administration services under Section 1011 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, which requires CMS to pay hospitals and other healthcare providers for costs associated with furnishing emergency healthcare services to undocumented or other specified aliens.

The RFP was for the award of a cost-plus-fixed-fee contract, with a one-year base period, and four one-year options, for services as the administrative contractor for the Section 1011 program. The contractor was required to enroll healthcare provider applicants and process subsequent claim submissions. Award was to be made to the offeror whose proposal represented the best value based on experience, past performance, technical approach, and cost. The RFP also provided “estimated workload assumptions” and specified that offerors “shall use the workload assumptions provided” in preparing their proposals.

CMS received four proposals, held discussions, obtained revised proposals, conducted final evaluations, and made an award decision. During discussions, CMS questioned the awardee's low staffing for claims processing, to which the awardee responded that the number was sufficient to perform the workload at the assumed 25% suspense rate set forth in the RFP. After reviewing the awardee's responses, CMS concluded that the staffing levels were sufficient to support the agency's requirements. The awardee's proposal was significantly lower in cost than TrailBlazer's and although TrailBlazer maintained a slight advantage with respect to the non-cost factors, CMS found that this advantage did not justify selection of TrailBlazer. TrailBlazer asserts that the evaluation of the awardee's proposal was inconsistent with the terms of the RFP and therefore improper.

GAO states that where a protest challenges an agency's evaluation, it will review the evaluation record to determine whether the agency's judgments were reasonably and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. Also, when an agency evaluates a proposal for the award of a cost-reimbursement contract, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. An agency's evaluation in this area is reviewed only to see that the agency's cost realism evaluation was reasonably based and not arbitrary.

The RFP provided that CMS would evaluate the extent to which offerors proposed "innovations" and "efficiencies" with respect to the various requirements to include claims processing. Additionally, FAR §15.404-1(d)(1), a cost realism analysis, which CMS was required to perform, provides for independently reviewing whether specific cost elements proposed by an offeror are realistic for the work to be performed considering the unique methods of performance described in the offeror's proposal. Having identified the awardee's explanation as to why it would reduce staffing as an innovative and viable technical approach, it was appropriate for CMS to consider the impact of this approach on the awardee's staffing levels and thereby its overall cost to the government. Also, since the Section 1011 program is essentially a replicate of the Medicare Part A and B processing system, CMS reasonably had little doubt that similar staffing reductions could be achieved. GAO concludes that the agency's consideration of the awardee's staffing was reasonable and proper. The protest is denied.

5. JLT Group, Inc., B-402603.2, June 30, 2010

Link: [GAO Opinion](#)

Agency: General Services Administration

Disposition: Protest denied.

Keywords: Protest of terms of the solicitation

General Counsel P.C. Highlight: In preparing a solicitation, a contracting agency is required to specify its needs in a manner designed to achieve full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy its legitimate needs.

JLT Group, Inc. (JLT) protests the terms of solicitation for offers (SFO), issued by the General Services Administration (GSA), for leased office space in Minnesota. JLT asserts that the SFO improperly restricts competition.

GSA originally published an advertisement on FedBizOpps regarding the need for 233,000 square feet of office space and a request for expressions of interest. After receiving 16 expressions of interest, GSA issued the SFO to three potential offerors, not including JLT, whose buildings were identified as being within the delineated area and as meeting or having the capability of meeting the minimum requirements of the SFO. After filing its protest, JLT received a copy of the SFO from the GSA and the protest was dismissed. JLT then filed this protest, challenging certain SFO requirements as unduly restrictive of competition, specifically, the requirements for indoor parking and a nine foot minimum ceiling height.

GAO states that a contracting agency has the discretion to determine its needs and the best method to accommodate them. In preparing a solicitation, a contracting agency is required to specify its needs in a manner designed to achieve full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy its legitimate needs. GAO will review a challenge to restrictive requirements to determine whether the restrictions are reasonably necessary to meet the agency's needs.

In its review of the record, GAO finds no basis for objecting to either requirement. While indoor parking may not be available in all federal buildings, it is a common feature and given the climate in Minnesota, indoor parking is manifest. As for the minimum ceiling height, GAO finds that the agency justified the height, based on the fact that it is a standard requirement contained in the Facilities Standards for the Public Buildings Service, which are intended to establish “design standards and criteria for new buildings, major and minor alterations, and work in historic structures.” The protest is denied.