



*February 24, 2010*

### **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. T-C Transcription, Inc., B-401470.2, February 16, 2009

---

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

**Agency:** Department of Veterans Affairs

**Disposition:** Protest denied.

**Keywords:** Proposal evaluation

**General Counsel P.C. Highlight:** An offeror's technical merit is judged on its proposal as drafted and not on an Agency's knowledge of the offeror's satisfactory past performance.

---

A contract for medical transcription services was originally awarded by the Department of Veterans Affairs (VA) to eTrans Plus for the provision of services to multiple VA medical facilities. T-C Transcription, Inc., the incumbent contractor and one of the unsuccessful bidders, protested this award, which GAO sustained. In conjunction with sustaining the protest, GAO recommended that the VA prepare a new source selection decision for the two locations where its misvaluation had prejudiced T-C's chances for an award. The VA reevaluated and again made an award to eTrans, which prompted another protest by T-C. This time T-C challenged the VA's reevaluation as being inconsistent with GAO's recommendation and that the source selection decision was unreasonable.

In its reevaluation, the VA prepared detailed evaluation notes related to the technical evaluation that identified strengths, weaknesses, and areas of uncertainty in T-C's proposal. Based on these notes, the contracting officer (CO) prepared a new source selection decision, which compared eTrans and T-C. While T-C's reevaluated rating for the technical factor was good and eTrans' was satisfactory, the CO noted that T-C's prices were higher for both locations. Based on a cost-technical tradeoff, the CO determined that T-C's technical advantages were not worth the price premium at either location.

T-C protested that the VA's evaluation was unreasonable because none of the ratings changed, that the overall rating of good for T-C was unreasonable, and that the VA made an unreasonable tradeoff decision. In response, the VA stated that unlike the initial evaluation record, the reevaluation clearly shows an acknowledgement by the CO that T-C was rated higher, but that the tradeoff analysis yielded a choice of eTrans over T-C based on the differences in price. GAO disagreed with T-C's choice to argue that the VA's knowledge of

T-C's performance as the incumbent should have been considered as a substitute for a well-written proposal. Instead, T-C should have attempted to demonstrate that its proposal provided the information that the VA found lacking.

T-C also challenged the notion that the VA treated the two reevaluated locations as a unit in making its new decision. However, the VA, in its agency report, pointed out that the record showed that the CO had considered T-C for each location, and had specified the price differences for each.

Finally, GAO acknowledged the settled view that it is reasonable for an agency to select a lower-rated, lower-priced proposal, even where price is a less important factor than technical merit, where it reasonably concludes that the price premium involved is not justified. These tradeoffs are judged on rationality and consistency with the evaluation criteria and are based on the record before the source selection official. GAO determined that the VA acted reasonably, therefore it denied T-C's protest.

## 2. **KAES Enterprises, LLC—Protest and Costs, B-402050.4, February 12, 2010**

---

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

**Agency:** Federal Emergency Management Agency

**Disposition:** Protest denied; request for reimbursement denied in part and sustained in part.

**Keywords:** Cancellation of RFP; Award of Protest Costs

**General Counsel P.C. Highlight:** Cancellation of a procurement is justified where the Agency determines that its needs have changed and the RFP as written no longer meets those needs; Corrective action taken during a protest but well after the Agency Report and Protester's Comments are filed will justify recommendation of payment of protest costs and fees on a clearly meritorious protest.

---

The Federal Emergency Management Agency (FEMA) issued a request for proposals (RFP) to provide generator maintenance, and subsequently awarded the contract to a vendor following its evaluation of proposals. After this award, KAES Enterprises, LLC, one of the unsuccessful bidders, protested the award to GAO on the primary basis that its proposal had been improperly excluded from the competitive range without consideration of its price.

GAO conducted an “outcome prediction” alternative dispute resolution (ADR) conference, during which the parties were notified that KAES would likely be successful in its protest and that GAO would likely recommend that FEMA reassess KAES’s proposal to see if it should properly fall in the competitive range. In response, FEMA canceled the contract award, canceled the solicitation, and stated its intent to draft a new solicitation and to resolicit the requirement, stating that its technical needs changed to the point where the contract award under the original solicitation would be inadequate to support its needs.

KAES protested this cancellation, claiming a number of different protest grounds. First, KAES asserts that the cancellation lacked credibility and was a pretext to avoid having to award the contract to KAES. This basis was found to be lacking. GAO presumes that procurement authorities act in good faith unless the record shows an intent by the agency to injure the protestor. Here, KAES general assertion of bad faith by FEMA did not evidence the necessary intent.

Next KAES claimed that it would be prejudiced by the cancellation because its prices were presumably exposed. GAO again points to the fact that this assertion lacks evidence. There was no evidence that KAES’s prices have been exposed, and further, there was no showing that KAES would be otherwise prejudiced by the cancellation to an extent greater than the other offerors.

Finally, KAES argued that the cancellation is inconsistent with the corrective action recommended by GAO during the ADR conference. However, during the conference, the GAO attorney did not recommend corrective action, rather he advised the parties of the likely recommendation in the event that the protest was sustained. For these reasons, GAO denied KAES’s protest of FEMA’s cancellation.

KAES also requested two reimbursements, one for the costs of pursuing its original protest (challenging its exclusion from the competitive range), and the other for the costs of preparing its proposal on a procurement that was subsequently cancelled. GAO denied KAES’s request for reimbursement for the costs of the preparing its proposal because the expenses represented typical costs of doing business and competing for government contracts where the reasons for cancelling the solicitation were found to be unobjectionable. However, GAO recommended that KAES be reimbursed its costs for protesting FEMA’s decision to exclude it from the competitive range without considering its price.

In considering whether to grant a reimbursement of protest costs, GAO considers whether the procuring agency took corrective action in response to a protest, if so, did the agency unduly delay in taking corrective action in the face of a clearly meritorious protest. Here, because

the result of the ADR conference was that the protest would likely be sustained, GAO deemed the protest clearly meritorious. Additionally, GAO found that FEMA did not take the corrective action promptly in the face of a clearly meritorious protest. GAO has traditionally held that corrective action will be considered prompt if it is taken before the due date for the agency report responding to the protest, will not be considered prompt if it is taken after that date. In summary, GAO denied the cancellation protest, denied the request for payment of bid and proposal costs, but granted the request for payment of protest costs relating to the meritorious protest ground.

### 3. DGR Associates, Inc., B-401791.5, February 16, 2010

---

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

**Agency:** Department of the Air Force

**Disposition:** Request for reimbursement denied.

**Keywords:** Reimbursement of protest costs

**General Counsel P.C. Highlight:** GAO will not recommend reimbursement of protest costs and fees where the basis of the corrective action is unrelated to the actual protest grounds filed by the protester.

---

The Department of the Air Force awarded a contract to Inuit Services, Inc. for military family housing maintenance services at Eielson Air Force Base, Alaska. DGR Associates, Inc. protested Inuit's size to the SBA and protested an alleged improper evaluation of Inuit's past performance to the GAO.

After DGR filed its protest, counsel for Inuit notified all parties (including GAO) that it had recalculated its average annual revenue for the last three years and determined that it could not, and would not, accept the award because it did not meet the size standards. Eight days later, the Small Business Administration (SBA) issued a size status determination that found Inuit ineligible for the award, after which the Air Force notified GAO that it was terminating the contract. However, after it notified GAO, the Air Force learned that Inuit was appealing the SBA determination, and decided that it would not terminate the contract until the appeal was decided.

Meanwhile, GAO continued its processes related to the DGR protest regarding Inuit's past performance. As a part of this process, the Air Force provided an Agency Report that responded to DGR's allegations. DGR then filed comments in response to the Air Force's Agency Report, which included an additional argument related to Inuit's past performance.

SBA denied Inuit's size status appeal, and the Air Force subsequently decided to terminate Inuit's contract and, because its requirements had changed, decided to re-solicit the requirement. On this information, GAO dismissed DGR's protest as academic, at which point DGR requested reimbursement for its costs in preparing its comments to the agency report. As the basis for this request, DGR claimed that it would have been unnecessary to file comments if the Air Force had terminated the Inuit contract at the time it was first informed that SBA had determined Inuit to be other than small, and thus ineligible for the award.

GAO has the authority to recommend the reimbursement of costs when it finds that an agency's action violated a procurement statute or regulation. Typically, this is done when a protestor can show that the agency's action that rendered a protest academic was taken in response to the protest, and that the agency unduly delayed taking the action in the face of a clearly meritorious protest. It will not recommend payment of protest costs where the corrective action was not based on the protestor's protest grounds. Here, because the Air Force took corrective action in response to the SBA determination, rather than in response to the arguments raised by DGR in its comments to GAO, DGR's request for reimbursement was denied.

#### 4. Chicago Dryer Inc., B-402340, February 16, 2010

---

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

**Agency:** Department of the Army

**Disposition:** Protest denied.

**Keywords:** Clarifications and Discussions

**General Counsel P.C. Highlight:** Where an Agency has determined an offer to be unacceptable, communications that would render the offer acceptable would constitute discussions and not mere clarifications.

---

The Department of the Army issued a request for quotations (RFQ) for laundry equipment at Fort Richardson, Alaska. The RFQ was a total small business set-aside, with specific requirements and specifications to allow for the new equipment to be installed into a preexisting space. In particular, the solicitation called for bidders to include an installation and a modification plan in their quotes. Three quotations were submitted, but only the quote by Automated Laundry Systems & Supply (ALSS) was deemed technically acceptable, thus earning ALSS the issuance of the order. Chicago Dryer Inc. (CDI) protested this award by challenging nearly every deficiency that the agency identified in CDI's quote.

In considering a protest of a government agency's quotation evaluation, GAO solely looks at whether the evaluation was reasonable and consistent with the terms of the solicitation, as well as any applicable statutes and regulations. Here, GAO denied the protest, but highlighted three of CDI's protest grounds for discussion.

The first ground that GAO highlighted related to CDI challenging the Army's determination that the quote lacked necessary detail. CDI claimed that the Army was not specific in what processes it was interested in receiving detail on, and thus, since its quote addressed each factor it should not have been rejected. GAO found this to be flawed. In fact, the solicitation had provided sufficient guidance for preparing the quote, including specific requirements for what should be included in the installation and modification plans. Because CDI's quote did not provide sufficient detail in these areas, this protest ground failed.

Next CDI points to the fact that its quote stated that "all systems offered would easily fit in the space made available and would provide the necessary clearances as specified" and that its drawings "clearly indicated" how its equipment would fit in the space as described in the RFQ. GAO again found the Army's evaluation reasonable, the protester's broad statements inadequate, and the protester's accompanying drawings to be conflicting and confusing. Due to the inability to adequately show how its plan would meet the Army's requirements this protest ground also failed.

Finally, CDI claimed that the Army should have sought clarifications on any unclear portions of its quotation. However, agencies generally do not have to conduct discussions when their solicitations state that decisions will be made on initial quotations and without discussions. Where an Agency has determined an offer to be unacceptable, communications that would

render the offer acceptable would constitute discussions and not mere clarifications. Because discussions were not required prior to award, the Agency was under no obligation to open discussions here. GAO determined the Army's evaluation to be reasonable and denied CDI's protest.