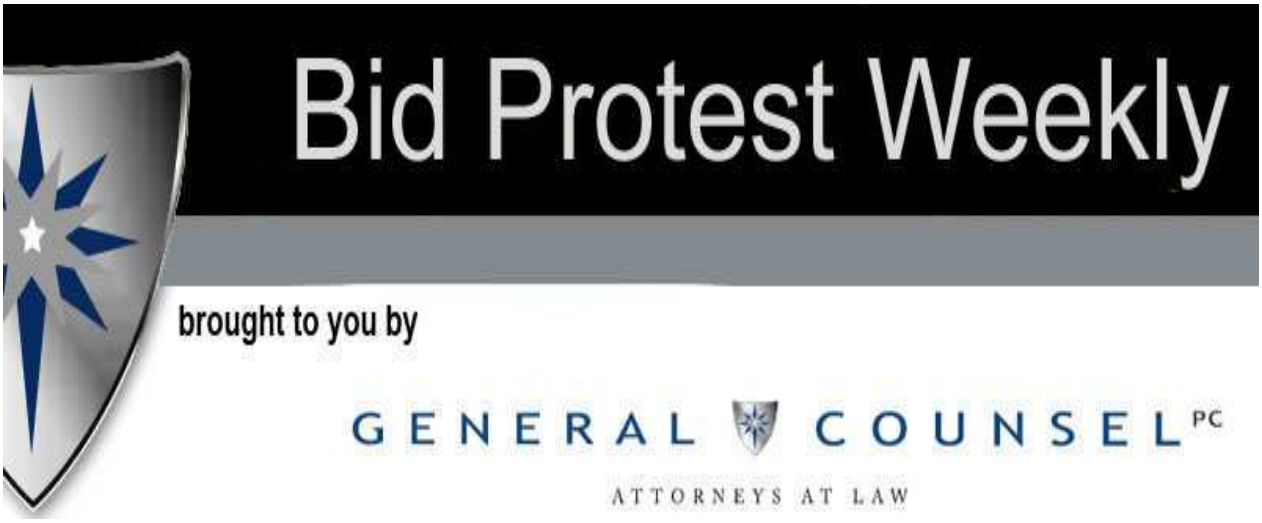

December 29, 2009

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.generalcounsellaw.com.

1. **M. Matt Durand, LLC, B-401793, November 23, 2009**

Link: GAO Opinion

Agencies: U.S. Army Corps of Engineers

Disposition: Protest denied.

Keywords: Individual Environmental Report

General Counsel, P.C. Highlight: Information obtained by the Agency after discussions have closed need not be the subject of further discussions unless explicitly required by the RFP.

M. Matt Durand, LLC protested the rejection of its proposal under a request for proposals (RFP) issued by the U.S. Army Corps of Engineers. In this low priced-technically acceptable procurement for services and supplies related to delivery of earthen clay material (fill dirt) for improving the Greater New Orleans Area Hurricane and Storm Damage Risk Reduction System.

Each offeror had to explain where they expected to obtain the fill dirt (called the "borrow site") and whether the removal would cause any environmental or cultural impact. The acceptability of an offeror's borrow site and whether it would have an environmental or cultural impact was a technical evaluation subfactor under the RFP.

Initially, Durand's explanation was found to be technically acceptable and thus was not the subject of discussions, which the Corps held will all offerors, including Durand. Subsequently, the Corps solicited comments from other interested parties, including Indian tribes and Mississippi State officials. These parties advised the Corps that they had several concerns regarding Durand's proposed site, especially its cultural impact. The Corps then advised Durand that its borrow site was not acceptable because of these concerns and, consequently, Durand's revised proposal "is considered unacceptable." Durand contended in this protest that the Corps conducted unequal discussions and unreasonably eliminated its proposal from the competitive range.

Durand asserted that the Corps should have contacted Indian tribes and other interested entities prior to opening discussions, so that these concerns could have been included in discussions. But, the GAO noted that the RFP clearly contemplated that offerors' proposed borrow sites would be reviewed twice: first in the evaluation of proposals, and subsequently with regard to environmental and cultural impact. The agency's actions were found to be

consistent with the RFP in this regard and thus the discussions were considered equal and fair.

2. **Fujifilm Medical Systems USA, Inc., B-400733.9; B-400733.10; B-400733.12, December 1, 2009**

Link: GAO Opinion

Agency: Department of Veterans Affairs

Disposition: Protest denied.

Keywords: Evaluation criteria

General Counsel, P.C. Highlight: It is always reasonable for an agency to consider whether an offeror has specific experience directly related to the work to be performed under the solicitation, even if such experience is not explicitly called for in the solicitation.

Fujifilm Medical Systems USA, Inc. protested the award of a contract to AGFA HealthCare Corporation by the Department of Veterans Affairs (VA) under a request for proposals (RFP) for picture archiving and communication system (PACS) services for Veterans Integrated Service Network 20 (VISN 20). Among other allegations, Fujifilm alleged that the agency employed an unstated evaluation criterion when it downgraded its proposal under the experience factor, which required vendors to have operated a program similar in scope and complexity to that proposed for a minimum of 1 year. It alleged that its proposal was improperly downgraded because it lacked VA-specific experience, which had not been identified as an evaluation criterion in the RFP. But the record showed that the agency determined that Fujifilm's proposal met the RFP requirement under the experience factor, and thus evaluated it as acceptable under that factor.

The GAO concluded that an agency properly may take into account specific matters that are logically encompassed by, or related to, the stated evaluation criteria, even when they are not expressly identified as evaluation criteria. In addition, it is always reasonable for an agency to consider whether an offeror has specific experience directly related to the work to be performed under the solicitation, even if such experience is not explicitly called for in the solicitation, which is what the VA did here. Because the VA's evaluation criteria was

consistent with the terms and requirements of the RFP and they found that Fujifilm's proposal met (but did not exceed) the minimum requirements of the RFP in this area, the GAO did not object to the agency's evaluation.

3. Bannum, Inc. v. United States and Dismas Charities, Inc., Court of Federal Claims, December 15, 2009

Agency: Federal Bureau of Prisons

Keywords: Past performance; Default termination

General Counsel P.C. Highlight: Agencies are given significant deference in their past performance evaluations. In evaluating past performance, an agency cannot ignore otherwise relevant past performance simply because the circumstances surrounding a previously terminated contract might not re-occur in the new contract.

Bannum, Inc. challenged a contract award by the Federal Bureau of Prisons (BOP) to Dismas Charities, Inc. for Residential Reentry Center services in Charleston, WV. In the initial evaluation and reevaluation following a sustained protest by the GAO, the BOP selected Dismas as the best value offeror. Following a second protest by Bannum, which was denied by the GAO, Bannum filed an action with the Court of Federal Claims seeking declaratory and injunctive relief. The Court has jurisdiction to review pre- and post-award bid protests pursuant to the Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996. Due to the high level of deference paid to procurement officials by the Court, a disappointed bidder must demonstrate that there was no rational basis for an agency's decision.

The BOP based its award decision on Dismas' better ratings in the evaluation factors of Past Performance and Technical/Management, the evaluation of which Bannum challenged. Bannum's Past Performance rating was in part due to the BOP's default termination of another Bannum contract for RRC services in Austin, TX, which Bannum claims was a unique situation and not determinative for this evaluation. Bannum also alleges that the BOP did not properly evaluate three of the five factors comprising Technical/Management Rating.

First, with regard to the Austin default termination, the Court determined that it is reasonable for an agency to consider an offeror's default termination for relevant services in the

agency's past performance evaluation of a new proposal from the same offeror. This conclusion was supported by repeated reference to the Court's continued deference to the contracting agency's decision, and reinforced by the fact that Bannum failed to demonstrate why the BOP's judgment was so unreasonable or contrary to law, merely that Bannum disagreed with the reasoning. Not only was the BOP's consideration of the Austin default termination reasonable, it was legally required. The Federal Acquisition Regulation (FAR) requires an agency to consider information obtained from all sources, even information not supplied by the offerors, in evaluating past performance. Thus, FAR 15.305(a)(2)(ii) obligated the BOP to consider Bannum's Austin performance along with the five other contracts that Bannum identified.

Bannum also asserted that its incumbent Charleston contract should have received a higher rating than it was awarded. Again, the Court pointed to the fact that Bannum did not demonstrate that the BOP was unreasonable in its rating, but merely that it disagreed. Bannum was informed from the start that only five of the six possible past performance evaluation criteria in the contractor evaluation forms would be used, and thus is without grounds to challenge the past performance evaluation process in a post-award protest. Moreover, Bannum did not prove that there was a substantial chance that it would have received the contract award if not for the BOP's alleged errors in the past performance evaluation.

Finally, Bannum claimed that the BOP conducted an improper "best value" determination because, according to Bannum, its proposal was technically equal to Dismas', and because Bannum offered its services at a lower price, its proposal should have been found to be the best value to the Government. The Court again found Bannum's argument flawed because the proposals were not found to be equal. In arriving at this conclusion, the Court points to the FAR which describes the "best value determination" as a trade-off process – "appropriate when it may be in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror" (FAR 15.101-1(a). Deferring to the BOP's determination, the Court again chose not to disturb the award to Dismas.

As such, the Court concluded that the BOP conducted a reasonable evaluation in awarding Dismas, and that Bannum's motion for judgment on the Administrative Record was denied.

4. Excel Building & Development Corporation, B-401955, December 23, 2009

Link: GAO Opinion

Agencies: U.S. Forest Service, Department of Agriculture

Disposition: Protest denied.

Keywords: Bid bond

General Counsel, P.C. Highlight: Where an IFB requires an original bid bond, a bid that includes a copy of the bond issued by the surety with an original principal signature is not sufficient and the proposal may be rejected as non-responsive.

Excel Building & Development Corporation protested the rejection of its bid by the U.S. Forest Service, Department of Agriculture, based on its failure to submit an original bid bond as required by the Invitation for Bids ("IFB"). Issues arose as to whether the documentation provided by Excel related to the bid bond included originals and whether the method of delivery (e.g., electronic mail) was in conformance with the invitation for bids. The GAO stated that the determinative question in judging the sufficiency of a bid guarantee is whether it could be enforced if the bidder subsequently fails to execute required contract documents and provide performance and payment bonds. Further, copies of bid guarantee documents, whether transmitted electronically or hand-delivered, generally do not satisfy the requirement for a bid guarantee since the contracting agency cannot verify whether alterations have been made or not. Thus, the GAO determined that the GAO properly rejected Excel's bid and denied the protest.

5. DeVal Corporation, B-402182, December 17, 2009

Link: GAO Opinion

Agency: Department of the Navy

Disposition: Protest denied.

Keywords: Technical Acceptance

General Counsel, P.C. Highlight: Where an RFQ requires offerors to submit sufficient information for the Agency to "evaluate compliance with the requirements," the offeror's quote must address each RFQ requirement to be considered technically acceptable.

DeVal Corporation protested the issuance of a purchase order to Rogers Associates Machine Tool Corporation under a request for quotations by the Department of the Navy, Naval Air Warfare Center Weapons Division, for skid platforms. DeVal challenged the agency's technical evaluation as unreasonable because the RFQ--with the exception of welding requirements--did not specifically require vendors to submit information addressing certain compliance and related requirements in the RFQ. DeVal stated that it should have received the purchase order since its quoted price was lower than Rogers's. The GAO determined that DeVal's protest was based on a flawed premise, in that the RFQ did not require quotations to include any specific information apart from welding experience. Further, while DeVal asserted that it is compliant the RFQ's requirements, the failure of its quotation to address certain specific requirement in any way made it impossible for the agency to determine that DeVal met it and thus the agency was found to have reasonably evaluated DeVal's quotation as technically unacceptable.

6. **DePonte Investments, Inc., B-401802, November 23, 2009**

Link: GAO Opinion

Agency: General Services Administration

Disposition: Protest denied.

Keywords: Experience and Past Performance

General Counsel, P.C. Highlight: Agency may consider, but is not required to consider, experience older than the 5 year cut off stated in the RFP, even if the experience is similar to the work required under the new contract.

DePonte Investments, Inc. protested the exclusion of its proposal from the competitive range under a solicitation for offers (SFO) issued by the General Services Administration (GSA) for construction of a detention facility for use by the Department of Homeland Security,

Immigration and Customs Enforcement. DePonte challenged the evaluation of its technical proposal. DePonte asserts that the source selection evaluation board's determination that its experience in constructing a detention facility was not recent, and therefore constituted a weakness, was unreasonable. DePonte conceded that its developer's detention facility experience, which was 9 years old, was "a bit older" than the specified 5 years, but asserted that, instead of a weakness, GSA should have considered this experience a significant strength because it "was so highly relevant to the current project" in that it was "the very same type of facility in the same geographic region." However, the GAO found that since these considerations were set forth as prerequisites for primary consideration, that it was reasonable for GSA to conclude that this single project did not warrant DePonte's conclusion. In fact, even though under the SFO, GSA could give consideration to the older, smaller project in the evaluation the GAO thought that GSA could also reasonably conclude that DePonte's listed experience did not warrant a higher rating.