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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.generalcounsellaw.com.

1. Ceradyne, Inc., B-402281, February 17, 2010

Link: GAO Opinion

Agency: U.S. Army Material Command

Disposition: Protests denied.

Keywords: Rule of two

General Counsel P.C. Highlight: "The Rule of Two": any procurement valued at over $100,000 where there is a reasonable expectation that two or more responsible small businesses will submit proposals and where there is a reasonable expectation that award will be made at a fair market price, must be set aside exclusively for small business competition.

In 2008, the Army issued a solicitation for the award of multiple indefinite-quantity/indefinite-delivery contracts to provide body armor components in support of the government's foreign military sales program. Pursuant to this solicitation, the Army made four awards to four different companies: Armacel Armor Corp., ArmorWorks Enterprises, LLC, Ceradyne, Inc., and Composix Co. In June of 2009, the Army received five purchase requests for four different countries. It decided to set aside the Lebanon, Tunisia, and Senegal requests for the two small business contract holders – Armacel and ArmorWorks – and solicited quotes from these firms. The Army also issued a delivery order request for the Afghanistan requirement, a delivery order that was then issued to Ceradyne.

The Army had intended the Afghanistan requirement to be issued on an unrestricted basis, but mistakenly solicited quotes from only the two largest firms (Ceradyne and Composix). ArmorWorks filed a protest and the Army took corrective action by reopening the competition for all contract holders and modifying the selection criteria. Prior to the closing date of the new competition, ArmorWorks filed another protest challenging the Army's decision to not set aside the Afghanistan order for small business concerns. The Army asked each of the two small business contract holders whether each one could meet the higher production capacity and delivery schedule of the Afghanistan task order. Each small business said it could. Therefore, the Army decided that the requirement would be set aside for the small business contract holders exclusively. Ceradyne then filed a protest.

Ceradyne argued that the Army's decision to set aside the order for the small business contract holders was unreasonable because the Army failed to scrutinize the capability of the small business concerns in making its set-aside decision.

Pursuant to FAR § 19.502-2, any procurement valued at over $100,000 where there is a reasonable expectation that two or more responsible small businesses will submit proposals and where there is a reasonable expectation that award will be made at a fair market price, must be set aside exclusively for small business competition. This is considered the "rule of two." Agencies need only undertake reasonable efforts to locate responsible small business competitors that could be expected to submit proposals at a fair market price.

The GAO held that, with the award of the underlying ID/IQ contract to two small businesses, the Army already knew that it had two responsible small businesses who could perform the work at issue. Once a firm has been determined to be responsible and is awarded the contract there is no requirement that the agency make an additional responsibility determination during contract performance (i.e., when placing delivery orders). Agencies need only make an informed business judgment that there is a reasonable expectation of receiving acceptably priced offers from small business concerns that are capable of performing the contract. Therefore, when the Army inquired of each small business if they could meet the capacity and delivery requirements, the Army had a reasonable basis to conclude that the "rule of two" has been met. As such, the Army was not required to subject Armacel and ArmorWorks to a higher level of scrutiny. Ceradyne's protest was denied.

2. ZAFER Construction Company, B-401871.4, February 1, 2010

Link: GAO Opinion

Agency: Department of the Army, Corps of Engineers

Disposition: Protest denied.

Keywords: Corrective Action

General Counsel P.C. Highlight: In taking corrective action in response to a protest, the agency has considerable discretion to determine the scope of that corrective action, including requesting new final proposal revisions from all offerors in the competitive range.

The Army issued a request for proposals (RFP) to design and construct an ammunition supply point at Bagram Airfield, Afghanistan. The RFP provided for a best value evaluation on the basis of experience, past performance, project management plan, and price. Following an evaluation of 15 submitted proposals, the Army awarded the contract to ZAFER Construction Company. This award was protested by Contrack International, Inc. on the basis that the Army's evaluation under the project management component was unreasonable and inconsistent with the RFP criteria. Contrack then filed a supplemental protest, challenging the fact that the Army had improperly allowed ZAFER to submit a 20-page project management plan, even though the solicitation limited the plans to 6-pages. The supplemental protest also alleged that the agency engaged in unequal treatment by criticizing Contrak's compliant 6-page plan for lack of detail, while giving credit to ZAFER's non-compliant 20 page plan for having greater detail.

As a result, the Army announced that it would take corrective action by terminating the contract, amending the solicitation, and allowing all offerors in the competitive range to submit revised proposals. ZAFER then protested the terms of this corrective action, principally basing its challenge on the fact that the Army's action would permit new and complete proposals, including price revisions, to be submitted. ZAFER alleged that this was overbroad and contradicted the explicit representations from the Army's counsel that the corrective action would be limited to the project management plan page limitation issue. By allowing a broad range of resubmitted proposals, after having exposed the prices, ZAFER argued that its original low price was unfairly prejudiced.

In addressing the protest of the corrective action, GAO stated that agencies have broad discretion to take corrective action where they determine that such action is necessary to ensure fair and impartial competition. GAO will not intervene in a corrective action, unless the corrective action is deemed to be incapable of remedying the agency's concern. Similarly, a request for revised price proposals is not improper merely because the awardee's price was revealed in an earlier award decision, if the request was otherwise unobjectionable.

The Army's reasoning that due to the time lapse between proposal submissions and the corrective action, the prices may not accurately reflect offerors' cost for the project, was deemed to be valid and not an abuse of its discretion. GAO denied ZAFER's protest.

3. Perot Systems Government Services, Inc., B-402138, January 21, 2010

Link: GAO Opinion

Agency: General Services Administration

Disposition: Protest denied.

Keywords: FSS contract, Pricing a task order quote under a GSA Schedule contract

General Counsel P.C. Highlight: Pricing of a task order quote must be based on existing GSA Schedule contract pricing and not on prices expected to be approved in a new GSA Schedule contract award that has not yet been awarded.

Under a request for quotations issued by the General Services Administration on behalf of the Department of Veterans Affairs, a Federal Supply Schedule (FSS) task order was issued to Electronic Data Systems, LLC to provide information technology support services for the VA's Computerized Patient Record System. Based on the solicitation, the successful offeror would be determined based on its initial quotation and a best value evaluation.

Perot Systems Government Services, Inc. submitted a quote that it said was based on its existing Schedule contract. It noted further that the pricing included in that quote was based on the pricing included in its new Schedule contract, which was under review by GSA and had not yet been approved. Because the proposed prices did not match the pricing in its existing GSA Schedule contract, the Perot Systems quote was excluded as being in violation of the GSA Schedule contract requirements.

The GSA requires that all quotes and accepted task orders under the GSA Schedule program must be based on existing schedule prices that are published as part of a prior GSA Schedule contract award. The existing schedule contract award affirms that the GSA has determined the listed prices to be fair and reasonable. FAR §§ 8.402(b) and 8.404(d). The only exception to this rule is that vendors may offer discounts to their existing price list. FAR § 8.404(d).

Perot's protest specifically challenged its exclusion because the solicitation explicitly allowed vendors to propose pricing "derived from" their current FSS contract. Because its proposed pricing was "derived from" both its existing and proposed pricing, it should have been acceptable. Moreover, since most, but not all, of Perot's pricing was lower than its

existing pricing and since its proposed overall price was lower than the awardee's price, it should not have been excluded.

GAO held that because Perot quoted prices that were not on its current FSS contract, some admittedly higher than its existing and approved pricing, its quotation was inconsistent with the solicitation's requirements and therefore was properly excluded. Perot's protest was denied.

4. CMI Management, Inc., B-402172, B-402172.2, January 26, 2010

Link: GAO Opinion

Agency: Department of Homeland Security

Disposition: Protest denied.

Keywords: Price realism; Past Performance Evaluation

General Counsel P.C. Highlight: Agencies are not required to conduct an in-depth analysis or verify each and every item in conducting a price realism analysis. In a protest, GAO will determine only whether the realism review is reasonable and consistent with the solicitation.

The Department of Homeland Security awarded a contract to Perot Systems Government Services following a request for proposals (RFP) for administrative support services. The RFP provided for the award of a contract on a "best value" basis, while considering several evaluation factors. Following the submission of proposals, a discussion period and an evaluation of final proposal revisions, DHS determined that Perot's lower price represented the best value to the government, and made the award. CMI Management, Inc. protested, alleging that DHS's evaluation of its and Perot's proposals was improper on several grounds.

CMI first challenged DHS's price realism evaluation of Perot's proposed price. In relevant part, CMI alleged that Perot proposed fewer hours than the agency had estimated in the RFP, and that the agency did not properly analyze the distribution of lower hours among different labor categories. GAO limited its review of the evaluation to determining whether DHS was reasonable and consistent with the solicitation. During the course of this review, the record revealed that DHS's business evaluation team (BET) was alerted to the lower proposed hours in Perot's proposal and raised the issue during the course of discussions. Perot's response,

including its reference to its incumbent subcontract under which it was currently providing services to approximately 50% of the sites, was deemed by the evaluation team to be sufficient. Therefore, GAO concluded that the realism evaluation was reasonable.

Next, CMI challenged DHS's evaluation of Perot's past performance. Here, CMI asserted that DHS should have examined each one of Perot's prior contracts to determine whether each contract met each one of the relevance criteria (similarity in size, scope and technical difficulty) as stated in the RFP. GAO disagreed, saying that the Agency was allowed to determine the extent to which all of Perot's contracts, their different aspects, in the aggregate, demonstrated relevant performance for purposes of assessing the likelihood of successful performance of the current requirement. GAO notes that to the extent that DHS applied a relaxed standard in evaluating Perot's past performance, it applied a similar standard to CMI, and thus CMI's proposal was not prejudiced.

CMI also protested DHS's rating of Perot under the experience evaluation factor. While CMI challenged Perot's work on its incumbent subcontract as not involving management, GAO found otherwise. In addition, GAO went on to state that even if CMI's allegations were correct, that it had not established a meaningful distinction in comparing Perot's work at other sites. GAO also found that the written record reflected DHS evaluation of Perot's other contracts in the public and private sector and that CMI had not challenged these.

Finally, CMI protested the evaluation of its own proposal as merely good under one technical subfactor. The GAO found that CMI's objection was a mere disagreement with the technical evaluation, which by itself does not show that the DHS evaluation was unreasonable.

As such, GAO found all grounds for protest alleged by CMI to be without merit and denied its protest.