



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. Cahaba Safeguard Administrators, LLC, B-401842.2, January 25, 2010

Link: [GAO Opinion](#)

Agency: Centers for Medicare and Medicaid Services

Disposition: Protest sustained.

Keywords: Organizational conflict of interest; Mitigation strategy

General Counsel, P.C. Highlight: Organizational conflicts of interest issues are, like responsibility issues, matters that can be resolved after evaluation and an award selection. They can be matters for rational negotiation, but will not trigger the requirement to open discussions with all offerors. The agency's acceptance of an organizational conflict mitigation plan must be reasoned and documented in the agency's files.

In 2008, the Department of Health and Human Services' Centers for Medicare and Medicaid Services (CMS) issued a request for proposals (RFP) for the award of two separate indefinite-delivery/indefinite-quantity (ID/IQ) contracts in support of CMS's audit, oversight, and anti-fraud, waste and abuse efforts. The RFP required offerors to include in their proposals a certificate identifying potential organizational conflicts of interest (OCI) and proposing a strategy to mitigate them. CMS received four proposals, including those of Cahaba Safeguard Administrators, LLC and AdvanceMed, the eventual awardee.

In its proposal, AdvanceMed acknowledged a potential conflict of interest relating to CMS contracts held by Computer Sciences Corporation (CSC), the ultimate parent company of AdvanceMed. The contracting officer determined that this relationship created an impaired objectivity OCI for Medicare Part D oversight since AdvanceMed could find itself evaluating work that is being performed by its parent company, CSC.

Despite discussions with CMS and the materials included in AdvanceMed's proposal, AdvanceMed was not able to sufficiently demonstrate that it had overcome the identified organizational conflicts of interest. Despite this determination, AdvanceMed was not eliminated and continued in the competition. Following the agency's technical and price evaluation factors, CMS determined that AdvanceMed represented the best value to the government, and was therefore first in line for award. But, rather than make award to AdvanceMed, the contracting officer informed them that CMS was unable to accept their proposal because the contracting officer found the mitigation strategies for the admitted

conflicts of interest were unacceptable. CMS then provided AdvanceMed with an opportunity to respond to these concerns prior to making contract award to the next in line.

In response, AdvanceMed produced a letter from CSC in which it claimed that it would divest its ownership of AdvanceMed in the event that it was issued any task orders under the ID/IQ contract that created the admitted conflicts of interest and that it would subcontract out those functions that created a conflict of interest to other companies. CMS deemed this letter amending the proposed mitigation plan acceptable and subsequently awarded AdvanceMed the contract. Cahaba protested, alleging that CMS acted unreasonably in concluding that the amended mitigation strategy was acceptable.

In instances where the basis of a protest relates to a determination of conflicts of interest, GAO will not sustain a protest unless it can be shown that the determination was unreasonable or unsupported by the record. Here, GAO contrasted CMS's review of the initial mitigation strategies to its review of the amended mitigation strategy (by virtue of the one-sentence letter from CSC), and determined that the latter was hasty and reflected a plan that lacked the necessary level of detail to reasonably assess whether AdvanceMed could actually mitigate the conflicts of interest. In addition, GAO found the attempt to mitigate the OCI with subcontractor participation to be unacceptable. First, the audit functions of the contract could require a retrospective review of work already performed, which could not be mitigated by future subcontracting. Also, the GAO noted that, under the terms of its prime contract, CSC would remain contractually obligated to perform the work that was creating the OCI and that subcontracting the work would not relieve CSC of that original obligation. Based on CMS's failure to reasonably consider or evaluate the organizational conflict of interest mitigation strategy presented by AdvanceMed, GAO sustained Cahaba's protest and recommended that CMS reconsider its determination in light of the GAO's statements.

2. A&T Systems, Inc., B-401701, B-401701.2, November 12, 2009

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Task orders

General Counsel P.C. Highlight: It is the offeror's burden to submit a proposal that is adequately written and establishes the merits of its proposal, and if the offeror does not do so it runs the risk that elements and concepts of its technical approach not specifically identified and described in its proposal will not be considered.

Over the course of two years (2007 - 2008), nine companies were awarded indefinite-delivery/indefinite-quantity contracts (ID/IQs) to provide information management communications services for military installations across the country. At the time of the awards, each of the individual contracts "accepted" and incorporated some of the "elements and concepts" from each awardee's technical proposal that were based on particular strengths found in each proposal. In conjunction with these ID/IQs, the Army issued a task order proposal request (TOPR) for information management communications services for Fort Monmouth, New Jersey, a task order that was eventually issued to Cordev, Inc. A&T Systems, Inc. protested this issuance.

The award was to be made based on a best-value determination considering technical merit and price, where technical merit was significantly more important than price. A&T was the lowest-priced bid, but received a technical rating of "acceptable," while Cordev received a higher rating of "good" but was higher priced. The source selection official determined that the strengths in Cordev's proposal were enough to warrant paying the cost premium over A&T's proposal. A&T protested this decision, alleging that the Army's evaluation did not recognize the strengths incorporated in its ID/IQ contract, which it asserts obligated the Army to attribute the same strengths in its evaluation of A&T's proposal for the TOPR.

While GAO acknowledged that A&T was obligated under the ID/IQ contract to provide the elements and concepts that were accepted and incorporated into its contract, there was nothing in the ID/IQ that obligated the Army to consider those elements and concepts to be specific strengths in evaluating proposals submitted in response to TOPRs. The burden was thus on A&T to submit a proposal that was adequately written and establishes its merits. Based on its determination that A&T did not successfully accomplish this, GAO concluded that the Army's evaluation of A&T's proposal was reasonable and in accord with the TOPR, and denied the protest.

3. **Alsalam Aircraft Company, B-401298.4, January 8, 2010**

Link: [GAO Opinion](#)

Agency: Department of the Army

Disposition: Protest denied.

Keywords: Technical evaluation

General Counsel P.C. Highlight: A protester must show not only that the Agency made material errors in the evaluation of an awardee's proposal, but that these specific errors also prejudiced the protest cutting off its chance for award. If agency errors do not rise to that level, the GAO will not sustain the protest.

The Department of the Army issued a solicitation under the Foreign Military Sales program (FMS), to provide support services for the Saudi government, Royal Saudi Land Forces Aviation Command. Two offerors bid on this solicitation: Alsalam Aircraft Company, the incumbent, and DynCorp International LLC. The Army found the DynCorp proposal to be technically superior to Alsalam and lower in price and thus awarded the contract to DynCorp. Alsalam's protest followed.

The RFP warned offerors that they would need to provide a 60 day transition plan and that it could take up to 6 to 8 months for a new contractor that was not already registered in Saudi Arabia to obtain the required permits for performance of this work. Despite this warning, DynCorp proposed to register in Saudi Arabia, obtain the necessary permits, and complete the transition within 60 days. Alsalam protested that the DynCorp proposal was inconsistent with the stated warning in the RFP and that the Army had not conducted a proper cost analysis of the DynCorp proposal. During the protest, the GAO attorney assigned to the case conducted "outcome prediction" alternative dispute resolution (ADR) and determined that it was likely Alsalam's protest would be sustained. The Army decided to take corrective action by reevaluating the two proposals with regard to the two premises for Alsalam's protest.

The Army reevaluated the proposals and subsequently reaffirmed its award to DynCorp; Alsalam then protested to GAO again, alleging the same grounds.

In its re-evaluation of DynCorp's transition plan, the Army consulted with several U.S. government subject-matter experts related to the question of obtaining work permits in Saudi Arabia. Based on these consultations, it determined that the RFP warning had been in error and that DynCorp's proposed transition could be achieved within the required time. GAO held that the Army had reasonably relied on the information provided by the experts and concluded that the reevaluation of DynCorp's proposed transition was reasonable. In addition, the GAO found that the erroneous warning did not prejudice Alsalam because Alsalam as the incumbent did not propose a transition plan or any costs associated with the transition.

Alsalam's second argument claimed that the Army failed to reasonably evaluate DynCorp's cost proposal. While the GAO agreed with Alsalam, stating that the record did not sufficiently establish that the Army had reasonably evaluated the costs, it declined to sustain the protest on this basis because, here as well, there was no prejudice to Alsalam. Had the Army adjusted upwards the Dyncorp cost proposal, it would have remained lower than Alsalam's proposed costs. Because Dyncorp remained technically superior, and low cost, the cost evaluation errors did not prejudice the protester. For the above reasons, GAO denied Alsalam's protest.