

## **PROTEST BY GOVERNMENTAL AGENCIES**

By Phil Hunter, SBCCOM

The U.S. AMC Treaty Laboratory (AMCTL), an element of the U.S. Army Soldier and Biological Chemical Command (SBCCOM), Aberdeen Proving Ground, Maryland, recently filed an agency level protest against a solicitation issued by the National Institute of Standards and Technology (NIST), an element of the Department of Commerce. The protest was filed because NIST refused to: a) extend the proposal submission period; b) remove blatant ambiguities from its solicitation's statement of work (SOW); c) include meaningful discriminators in Section M and; d) include required Federal Acquisition Regulation clauses and provisions in the Request for Proposal (RFP). AMCTL prevailed in the protest.

AMCTL utilized NIST'S Alternate Dispute Resolution (ADR) process to proactively advance its position. Discussions with NIST's Attorney and Contracting Officer (prompted by AMCTL) were ongoing during the pendency of the protest. This protest was unique only from the perspective that both the protester and recipient of the protest are federal agencies. This novelty begs the question of whether one federal entity can be considered an "interested party" (within a protest context) if it files a protest against another federal entity. My conclusion is yes, absent statutory or regulatory restriction(s) to the contrary.

The below background, statutory, regulatory and conclusionary information is provided in support of the ADR approach that was utilized in allowing AMCTL to continue to compete and possibly obtain an award in another federal agency's acquisition.

During this era of downsizing and tight budgets, we can ill afford to accept untenable answers from agencies that knowingly or unknowingly place stumbling blocks that impede potential utilization of our capabilities. Our solution was to be proactive via the protest route. Protests are recommended only as a last resort and only when blatant statutory and regulatory violations exist. Protect your client's interest; utilize processes, procedures, remedies, etc., available to contractors, unless prohibited by law.

### **BACKGROUND INFORMATION**

The protested solicitation is NIST's RFP # 52SBNB8C1087. It is for analytical services for retention Indices and Gas Chromatography-mass spectrometry of chemical weapons compounds in complex matrices. The work to be performed consists primarily of identifying, analyzing and reporting the results of some very lethal chemicals. Only six (6) laboratories in the world are approved to perform work pursuant to the RFP SOW. AMCTL is the only approved lab in the United States.

NIST initially synopsised its requirement in the Commerce Business Daily (CBD) as a sole-source acquisition to VERIFIN Laboratory, of Finland. NIST incorrectly stated that VERIFIN was the only lab capable of satisfying RFP requirements. AMCTL vigorously challenged the sole source determination and prevailed. NIST thereafter changed the acquisition from "sole source" to "full and open competition". All potential Offerors were thereby allowed to compete for an award. In the process of changing its acquisition approach, NIST failed to redraft its RFP to remove inherent SOW ambiguities and vagueness that often appear in sole-source acquisitions.

## THE PROTEST

The protest was filed because the Department of Commerce refused to:

Remove ambiguous language from the SOW;

Include required Federal Acquisition Regulation (FAR) Clauses and Provisions in the request for proposal (RFP);

Extend the proposal submission period by approximately ten (10) days due to clarifications provided to the SOW;

Include objective discriminators as evaluation criteria in Section M of the RFP.

Based upon this refusal, and the strict time constraints imposed on filing a protest (i.e., defects in the RFP must be filed prior to RFP closing date and time) and the unavailability of an immediate and effective forum and remedy to correct the identified defects, a protest was reluctantly filed.

## FAVORABLE ACTION AFTER THE PROTEST

Approximately ten (10) days after the protest was filed, the Protest Decision Authority (PDA) for NIST, requested AMCTL to address the issue of whether our agency possessed statutory authority, as an "Interested Party" (IP), to file a protest against NIST, due to its federal agency status. This very vexing issue became moot when both agencies' counsels, and the contracting officer, telephonically discussed (using ADR techniques) ways to resolve issues in order for the acquisition to proceed. Good faith discussions occurred and the results were that SBCCOM withdrew its protest, with prejudice; the KO agreed to amend the RFP and remove ambiguities from the SOW, and; extend the proposal submission period by 30 days. Without discussions, the protest would have continued indefinitely (with a possible appeal to the General Accounting Office).

Irrespective of the favorable outcome (from our Command's perspective), the troubling issue of whether one governmental agency can file a protest --as an "**interested party**"-- against another governmental agency remains. I am of the opinion that protest can be filed absent some prohibiting federal statute. Authorities supporting said position follow.

## APPLICABLE LAWS AND REGULATIONS

To my knowledge, no federal statute, law, or regulation exists that prohibits a federal agency from being considered an "interested party" within the context of filing a protest. The only criteria an offeror must meet in obtaining "interested party" status are: 1) you must be an actual or prospective bidder; and 2) your direct economic interest must be affected by the award or failure to award the contract. No other criteria are specified in law. The law is silent in segregating federal vs. non-federal protesters. No distinctions are specified. Absent express statutory or regulatory prohibition, agencies are not barred from filing protests as "interested parties".

1. 31 USC § 3551 defines an "Interested Party" as:

“[W]ith respect to a contract or a solicitation or other request for offers...means an **actual or prospective bidder** or offeror whose **direct economic interest** would be **affected by the award** of the contract **or by failure to award the contract**”

FAR 33.101 incorporates this definition verbatim.

2. FAR 1.102-4(e), supports the principle that unless prohibited by law, the government has standing to file a protest. It reads:

[I]f a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive Order or other regulation, Government members of the Team should not assume it is prohibited. Rather, **absence of direction should be interpreted as permitting the Team to [be] innovative and use sound business judgment** that is otherwise consistent with law and within the limits of their authority. (emphasis supplied)

3. FAR 33.102 states that “Contracting Officers shall consider all protests...if, in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award *does not comply with the requirements of law or regulation*, the head of the agency may...take any action that could have been recommended by the Comptroller General had the protest been filed with the General Accounting Office....

4. FAR 33.103 permits the filing of an *agency level protest* and reveals that *Executive Order 12979*, establishes policy on agency procurement protests and states that an “agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency’s personnel are acceptable protest resolution methods”.

5. Executive Order 12979 read in part

“in order to ensure effective and efficient expenditure of public funds and fair and expeditious resolution of protests to the award of Federal procurement contracts, it is hereby ordered that procedures prescribed pursuant to this order shall...emphasize that whenever conduct of a procurement is *contested*, *all parties should use their best efforts to resolve the matter with agency contracting officers*...allow actual or prospective bidders or Offerors *whose direct economic interests* would be affected by the award or failure to award the contract to **request a review**, at a level above the contracting officer, of any decision by a contracting officer that is alleged to have violated a statute or regulation and, thereby, caused prejudice to the protester”.

6. 10 U.S.C. § 2304 (a)(1), states that “[e]xcept as provided in ... the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a *procurement for property or services* ... shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the Federal Acquisition Regulation; and ... shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.”

7. Federal agencies are equally protected from violation of federal statutes and regulations by other federal agencies to the same degree as the private sector. No discrimination in the application of procurement laws is permitted under the U.S. Constitution.

The above cited authorities fail to expressly, or by implication, disqualify a federal entity from an "interested party" status. In fact, they encourage potential bidders and bidders to resolve conflicts as quickly and economically as possible. Federal agencies must be accorded the same laws, fairness, rights to compete, privileges and immunities, etc., as the private sector. Full and open competition is the byword in this acquisition environment.

#### DIRECT ECONOMIC INTEREST

The Army's AMCTL was established as a laboratory which is partially Army treaty mission funded and partially customer funded (by other DOD services and other Government Agencies). Customer work is continually sought which is related to treaty efforts. This acquisition involves treaty work. The work in this solicitation would clearly provide both critical funding and new, state of the art treaty experience and scientific information. This experience will enhance the UNITED STATES' capability to perform treaty mission work in support of CWC. The work is significant to the readiness and capability of the UNITED STATES and the US ARMY.

If a federal agency has a direct economic interest and will be affected by an award decision, it cannot be excluded from the competition. AMCTL has a direct economic interest in subject acquisition and is an interested party, as defined by 31 U.S.C. § 3551.

#### CONCLUSION AND LESSON LEARNED

Governmental agencies must aggressively review Commerce Business Daily announcements to determine if they can satisfy other agencies' acquisition requirements. If you can satisfy an announced requirement, but are prevented from submitting a proposal because of various advertised restrictions, e.g., sole sourceness (only one responsible source), challenge the restrictions and if necessary protest the solicitation prior to the date specified for proposal submission. NOTE: Don't protest unless you are categorically sure that your agency can satisfy all solicitation requirements. Otherwise, we are no better than protesters who submit frivolous, ridiculous and time-consuming protests. Your agency must clearly and unequivocally show a direct economic interest and impact in not receiving the award or not being permitted to submit a proposal.

The timeliness rules relative to filing protests inhibit us sometimes from waiting on agencies to do the right thing. If we fail to protest within 10 days of...or prior to the deadline for submission of proposals, we lose by default due to our failure to act.

The broad mission of the AMCTL is to provide sampling and analysis services and expertise for the protection of U.S. interests under bilateral and multilateral chemical treaties.

SBCCOM became a new command on 1 Oct 98, as a result of the merger of Chemical and Biological Defense Command, Aberdeen Proving Ground, Md., and Soldier System Command, Natick, Ma.

There may be policy statements from a particular agency prohibiting protests between agencies.

41 U.S.C. § 403. The term "full and open competition", when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or

competitive proposals on the procurement. The term "responsible source" means a prospective contractor who has adequate financial resources to perform the contract or the ability to obtain such resources; is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments; has a satisfactory performance record; has a satisfactory record of integrity and business ethics; has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills; has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and is otherwise qualified and eligible to receive an award under applicable laws and regulations.

Id. At (5). The term "competitive procedures" means procedures under which an agency enters into a contract pursuant to full and open competition.