

GAO BID PROTEST DECISIONS

The implementation of recent procurement reform legislation presents many challenges to those who participate in the government's acquisition of goods and services. This year's bid protest decisions again highlight common pitfalls.'

Documentation of evaluation and source selection record

- Adequate documentation of evaluation and source selection decisions continues to be critical.

Biosoherics Inc., B-278508.4 et al., Oct. 6, 1998, 98-2 CPD 11 96 (agency failed to document its evaluation of final revised proposals and, as a result, GAO was unable to assess the reasonableness of the selection decision).

GAO may give little weight to post-protest evidence unless it represents the memorialization of pre-protest analyses or judgments.

Intellectual Properties Inc., B-280803, Nov. 19, 1998, 98-2 CPD 1 115 (since GAO accords greater weight to contemporaneous materials rather than judgments made in response to protest contentions, agency's post-protest reevaluation was not accepted because it asserted a new basis for rejecting the protester's proposal and was not consistent with the agency's initial evaluation of proposals).

Evaluations and tradeoffs

- Agencies must evaluate proposals in accordance with the terms of the solicitation.

Beckman Coulter, B-281030, B-281030.2, Dec. 21, 1998, 99-1 CPD ~ 9 (offeror took exception to material solicitation requirements and, therefore, award was improper).

ENMAX Corp., B-281965, May 12, 1999, 99-1 CPD it 102 (under a pass/fail evaluation scheme, agency unreasonably assigned a "pass" rating to the awardee's proposal where the firm failed to demonstrate required experience in

'Bid protest decisions can be accessed at GAO's web site: <http://www.gao.gov>.

each specified computing environment in accordance with the solicitation terms).

- Agency reliance on a purely mechanical/mathematical tradeoff methodology is problematic.

Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD 11 61 (tradeoff was unreasonable where agency mechanically compared total proposal point scores, but made no qualitative assessment of the technical differences in the proposals to determine whether it was worth paying a price premium for a technically superior proposal).

Past performance evaluations

- Downgrading an offeror's past performance rating simply because the offeror has filed claims or protests is impermissible.

AmClvde Engineered Prods. Co.. Inc., B-282271, B-282271.2, June 21, 1999, 99-2 CPD ~ 5.

- "Same or similar" past performance requirements and neutral past performance ratings continue to be troublesome.

ACS Gov't Solutions Group. Inc., B-282098 et al., June 2, 1999, 99-1 CPD 1 106 (agency unreasonably determined that the awardee's more limited experience, for example, in collecting delinquent auto loans or leases, was "the same as or substantially similar to" the comprehensive servicing of single family mortgages required by the solicitation)

National Aerospace Group. Inc., B-281958, B-281959, May 10, 1999, 99-1 CPD 1 82 (agency failed to make a meaningful tradeoff where it selected a significantly higher-priced vendor simply because the low-priced vendor lacked a prior, relevant performance history).

- An agency cannot ignore relevant information that is close at hand.

GTS Duratek. Inc., B-280511.2, B-280611.3, Oct. 19, 1998, 98-2 CPD 1 130 (where one of the technical evaluators was personally aware of the protester's performance under a prior, highly relevant contract, agency unreasonably failed to consider this information which was in its possession).

Cost realism evaluations

- Cost realism analyses continue to cause difficulties.

E. L. Hamm & Assocs. Inc., B-280766.3, Apr. 12, 1999, 99-1 CPD 11 85 (agency unreasonably accepted the awardee's low proposed overhead rate as realistic where the firm's cost proposal did not explain or justify why the proposed rate was significantly less than its rate as approved by the Defense Contract Audit Agency).

L-3 Communications Corp., Ocean Svs. Div., B-281784.3, B-281784.4, Apr. 26, 1999, 99-1 CPD ~ 81 (in determining the realism of an offeror's proposed indirect rates, agency unreasonably relied solely on an unaudited summary of indirect rate data).

Competitive range

Even under the FAR Part 15 rewrite, a competitive range of one is permissible.

Clean Serv. Co.. Inc., B-281141.3, Feb. 16, 1999, 99-1 CPD 1 36.

Discussions

Particularly in the context of enhanced oral and written communication **between** agencies and offerors, the legal requirements regarding discussions have become increasingly important.

Cotton & Co.. LLP, B-282808, Aug. 30, 1999, 99-2 CAD 11 (discussions not meaningful where agency failed to clearly identify deficiencies in the protester's proposal in either written or oral discussions and failed to respond when, in oral discussions, it became clear that protester had misunderstood agency's concerns).

Metro Machine Corp., B-281872 et al., Apr. 22, 1999, 99-1 CAD 1f 101 (agency engaged in misleading discussions by failing to make clear that a particular approach in the protester's proposal could not be modified or enhanced, but rather, rendered the proposal technically unacceptable).

MCR Fed.. Inc., B-280969, Dec. 14, 1998, 99-1 CPD 11 8 (no requirement that agency discuss every aspect of an otherwise acceptable proposal that received less than the maximum score).

Du & Assocs.. Inc., ~280283.3, Dec. 22, 1998, 98-2 CPD ~ 166 (no requirement that agency "spoon-feed" an offeror during discussions).

Task and Delivery Orders

- Task and delivery orders must be within the scope of the contract.

Makro Janitorial Servs.. Inc., B-282690, Aug. 18, 1999, 99-2 CPD 1 (task order for housekeeping services for medical facilities was out of scope where the original contract limited requirements to repair and maintenance of medical facilities).

GAO's jurisdiction over task and delivery orders under indefinite-delivery, indefinite-quantity contracts has been in dispute.

Teledvne-Commodore. LLC—Recon., B-278408.4, Nov. 23, 1998, 98-2 CPD 1 121 (while a protest is not authorized in connection with the issuance of a task or delivery order, except a protest alleging that the order increases the scope, period, or maximum value of the contract under which the order is issued, see 10 U.S.C. § 2304c(d) and 41 U.S.C. § 263j(d), where the nature of the procurement

- demonstrated that agency was essentially conducting only one competitive source selection, this competition was not subject to the statutory restriction).²

Commercial item acquisitions

- Commercial contracting presents challenging new issues.

Smelkinson Svscs Food Servs., B-281631, Mar. 15, 1999, 99-1 CPD 1 57 (agency failed to conduct adequate market research regarding whether a disclosure requirement in the solicitation was consistent with customary commercial practice).

American Artisan Productions. Inc., B-281409, Dec. 21, 1998, 98-2 CPD 1 155 (exhibition booth modified to meet the agency's specific requirements was reasonably determined a commercial item since the modifications did not change the essential physical characteristics of the item).

2GAO decided this protest on a fully developed record after reversing on reconsideration a prior dismissal.

Simplified acquisitions/schedules

- Even in a simplified acquisition or schedule buy, agencies must treat vendors fairly and act reasonably.

Universal Bldg. Maintenance. Inc., B-282456, July 15, 1999, 99-2 CPD 1 (simplified acquisition selection decision was flawed where the record showed that the agency failed to qualitatively compare the technical differences between proposals to determine whether the technical superiority of the awardee's proposal justified the payment of a price premium)

Amdahl Corp., B-281255, Dec. 28, 1998, 98-2 CPD 11 161; Information Sys. Tech. Corn, B-280013.2, Aug. 6, 1998, 98-2 CPD 1 36; COMARK Fed. Sys., B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD q 34 (where an agency requests proposals or conducts a competition before determining which Federal Supply Schedule (FSS) vendor will be issued the order, GAO will hear a protest concerning the agency's actions to ensure that the evaluation was reasonable and consistent with the solicitation terms).

Other ordering issues

- If an agency buys using the FSS, it must do so in accordance with schedule limitations.

Pvxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD 1 18 (agencies may no longer rely on the "incidentals" test to justify the purchase of non-FSS items; where an agency buys non-FSS items, it must follow applicable acquisition regulations).³

- Consideration is essential to awarding an enforceable contract.

Satellite Servs. Inc., B-280945 et al., Dec. 4, 1998, 98-2 CPD 1 125 (disclaimer of the government's ordering obligation renders illusory the consideration necessary to enforce the contract).

3GAO invoked the significant issue exception to its timeliness rules in this case.

Bundling

Bundling continues to raise competition concerns.

S&K Elecs., B-282167, June 10, 1999, 99-1 CPD ~ 111 (agency did not improperly bundle desktop computing requirements where such consolidation reflected a qualitatively different approach from earlier acquisitions and agency reasonably anticipated achieving substantial technical benefits from the use of a single contractor to acquire a broad range of computing requirements under one contract).

Accord The Urban Group. Inc.: McSwain and Assocs.. Inc., B-281352, B-281353, Jan. 28, 1999, 99-1 CPD 1 25.

A-76 competitions

GAO has issued a number of significant protest decisions involving procurements conducted pursuant to OMB Circular A-76.

BMAR & Assocs.. Inc., B-281664, Mar. 18, 1999, 99-1 CPD 1 62 (lump sum pricing scheme in an A-76 competition that provided no limitation on the amount of work that could be ordered under various tasks was improper because it placed an unreasonable risk on the contractor, thus unduly restricting the competition).

DZS/Baker LLC: Morrison Knudsen Corp., B-281224 et al., Jan. 12, 1999, 99-1 CPD 11 19 (where 14 of 16 evaluators held jobs which, under the A-76 cost comparison study, were proposed to be contracted out, unmitigatable conflict of interest existed and potentially impaired the objectivity of the evaluation conclusion that all private contractors' proposals were unacceptable)

Omni Corp., B-281082, Dec. 22, 1998, 98-2 CPD 11 159 (private sector offerors whose proposals are not selected for comparison with the in-house offer are entitled to a debriefing on the results of the private sector competition; a protest may be filed in accordance with GAO's bid protest regulations after the debriefing).

Prejudice

- A protester must demonstrate a reasonable possibility that it was prejudiced by the agency's actions.

National Toxicology Labs.. Inc., B-281074.2, Jan. 11, 1999, 99-1 CPD ~ 5 (protester failed to show that it was prejudiced by the agency's evaluation).