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Welcome to Jenner & Block's Government Contracts Legal Round-Up, a biweekly update on important government contracts developments. This update offers brief summaries of key developments for government contracts legal, compliance, contracting, and business executives. Please contact any of the professionals at the bottom of the update for further information on any of these topics.

Protest Cases

1. *Starlight Corp.*, B-420276.3, B-420267.4 (March 15, 2022) (Published March 24, 2022)

- GAO sustained a protest, in part, based on the agency's insufficient documentation regarding the relevance of past performance.
- The solicitation provided that among technically acceptable offers, a tradeoff would be made between past performance and price, with past performance significantly more important.
- Here, the protester alleged there was no evidence in the record that the agency considered the scope, complexity, dollar value, and extent of subcontracting/teaming to determine the relevancy of the awardee's past performance, as required by the solicitation.
- GAO identified that while the evaluation report included the notation "relevant" for each contract, the evaluators made no mention of the relevance of contracts in relation to the solicitation requirements and provided no rationale for the relevancy ratings assigned. GAO accordingly found the agency's documentation insufficient to allow it to assess the reasonableness of the past performance evaluation and sustained the protest.

Agencies are required to sufficiently document past performance evaluations to demonstrate their conclusions were reasonable. Failure to do so is a viable path for a sustained protest.

2. *Eccalon LLC*, B-420297, B-420297.2 (January 24, 2022) (Published March 22, 2022)

- GAO sustained a protest challenging the Department of Defense's (DOD) issuance of a task order for services to support the DOD's Office of Small Business Programs in increasing small business participation in DOD acquisitions.

- Under the solicitation's technical approach factor, the agency was to assess the extent to which a vendor's proposed approach demonstrated (1) the vendor's understanding of the requirements, (2) practical and feasible methods to accomplish the required tasks, and (3) reliable methods for ensuring quality deliverables.

- In declining to select Eccalon for award, the selection authority determined that the protester's technical approach was only "somewhat superior" to the awardee's because it relied on "experience and not necessarily innovation." GAO agreed with the protester that this assessment reflected the consideration of unstated evaluation criteria.

- More specifically, GAO concluded that if a vendor could demonstrate the attributes listed in the solicitation, a decision to downgrade an evaluation due to the vendor's *experience*, as opposed to any *innovation* in its approach, raised a consideration not reasonably encompassed within the attributes of demonstrating understanding, practicality, feasibility, and reliability.

- GAO also sustained the protest because the selection authority lacked a reasonable basis for disregarding an underlying evaluation finding regarding the awardee's limited understanding of the requirement for cyber readiness and assessments, as well as because the record did not support the agency's decision to increase the risk rating for the protester's quotation under the management and staffing approach factor.

Although an agency properly may apply evaluation considerations that are not expressly outlined in the solicitation where those considerations are reasonably and logically encompassed within the stated evaluation criteria, there must be a clear nexus between the stated criteria and the unstated consideration. GAO will sustain a protest where an agency relies on unstated evaluation criteria.

3. *Mitchco Int'l, Inc. v. United States*, Fed. Cir. No. 2021-1556 (Published March 3, 2022)

- The protester claimed, among other things, that the awardee violated the Procurement Integrity Act (PIA) by obtaining and using "contractor bid or proposal information" about the protester's performance as a subcontractor under the incumbent effort. Critically, the awardee was also the prime contractor in the incumbent contract.

- The Federal Circuit recognized a division in lower court precedent as to whether the PIA's prohibition against obtaining and using contractor proposal information applies to private entities or is limited to present and former government officials. The Federal Circuit did not resolve this issue of statutory interpretation.

- Instead, the Federal Circuit held that the PIA could not apply in this case because it was undisputed that the awardee properly obtained Mitchco's performance information as part of the awardee's performance of the incumbent contract, falling within a PIA safe harbor provision.

This case is another waypoint in the cluster of protest decisions relevant when a protester claims that the awardee had access to the protester's proprietary proposal information. As discussed in the last Government Contracts Legal Round-Up, GAO consistently rejects such allegations when framed as an unequal access to information Organizational Conflict of Interest. In *Mitchco,* the Federal Circuit left open the possibility that there could be some recourse under the PIA where a competitor improperly obtains access to a protester's proposal information, but not when the awardee properly obtained access to that information through the performance of a government contract.

Claims Cases

1. *Appeal of AECOM Technical Services, Inc.*, ASBCA No. 62800 (February 8, 2022)

- AECOM held an IDIQ contract for the performance of energy savings projects at government facilities. This IDIQ contract provided for issuance of competitive task order awards for specific energy savings performance contracts.

- AECOM responded to an RFP for an ESPC project at Buckley Air Force Base in Colorado and was issued a document informing AECOM that it had "been selected as the Energy Savings Performance Contractor" for the project and that it was authorized to "proceed with Preliminary Assessment development and submission." AECOM did so, developing and designing energy conservation measures for the project. Several months later, the government informed AECOM that it had decided not to pursue the ESPC project and had no plans to exercise its "option to obtain ownership of any submitted documentation pertinent to the project."

- Almost four years later, AECOM submitted a claim alleging that the Base's own news article indicated that it used AECOM's designs to pursue several of the ECMs. AECOM sought its costs for developing these ECMs.

- The government challenged this claim on jurisdictional grounds and for failure to state a claim. The Armed Services Board of Contract Appeals most recently denied that latter motion, finding that AECOM had adequately alleged the existence of a contract with the government, and rejecting the government's argument that it was allowed to retain AECOM's designs as "proposal materials."

Energy Services Contractors (ESCOs) provide valuable services to the government under a unique contracting regime. It is important for ESCOs to understand their rights vis-à-vis the government throughout each state of the contracting process and ensure they are being treated fairly.

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