

Small Business Training Week 2017
GAO Protest Case Studies

1. *Dorado Services, Inc., B-411691.4, Nov. 18, 2016*

Summary: GAO denied a protest that the awardee's proposal did not comply with the limitations on subcontracting where the proposal on its face did not indicate that the awardee would not comply and compliance is a matter of contract administration.

Facts: The Air Force issued a HUBZone set-aside RFP for municipal solid waste collection and disposal services at Joint Base San Antonio, Texas. The protestor argued that the awardee, GEO, did not comply with the limitations on subcontracting.

Held: Protest denied. An agency's judgment as to whether a small business offeror can comply with the limitations on subcontracting is generally a matter of responsibility. An offeror need not affirmatively demonstrate compliance with subcontracting limitations in its proposal. By submitting a proposal in response to an RFP that includes a limitations on subcontracting clause, the offeror agrees to comply with the limitation. The awardee's proposal did not contain any information that would lead the agency to conclude that the firm could not or would not comply with the subcontracting limitations. Whether the awardee will comply is a matter of contract administration and therefore not for GAO's review.

2. *Aldevra-Reconsideration, B-411752.2, Oct. 5, 2016*

Summary: GAO denied reconsideration of decision where the request for reconsideration relied on a Supreme Court decision issued eight months after the protest decision and the Supreme Court decision was prospective in effect.

Facts: The National Guard Bureau issued a solicitation for an ice machine/water dispenser valued at approximately \$4,300 using Federal Supply Schedule (FSS) procedures. The procurement was not set aside. In GAO's initial decision dated October 16, 2015, GAO found that 15 U.S.C. § 644(j), which requires that contracts between \$3,000 and \$150,000 be set aside for small businesses, did not apply to the placement of orders under FSS contracts. On June 16, 2016, the United States Supreme Court issued its decision in *Kingdomware Technologies v. United States*, finding that the Department of Veterans Affairs (VA) must follow the mandatory set-aside procedures in 38 U.S.C. § 8127(d) for FSS orders.

Held: The Supreme Court's decision governs "future contracting" of the VA and does not provide a valid basis for reconsideration of GAO's earlier decision. The Supreme Court's decision has only a prospective, rather than retroactive, effect, and GAO's decision preceded the Supreme Court's decision by eight months.

3. *Cascadian American Enterprises, B-412208.3, .4, February 5, 2016*

Summary: GAO sustained a protest from a small business that was found unacceptable under two factors—key personnel and relevant experience—because the agency held unequal discussions and did not refer a responsibility-type factor to SBA for a certificate of competency.

Facts: The Army Corps of Engineers issued a small business set-aside commercial item solicitation for removal of Scot's broom, brush, and other vegetation at Joint Base Lewis-McChord, Washington. The solicitation provided for award to the lowest-priced offeror whose proposal was technically acceptable

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under three technical evaluation factors: (1) relevant experience, (2) key personnel, and (3) past performance. The agency received six offers and requested additional information from two offerors. The agency found that all proposals except for Jimmy Church's were technically unacceptable. The protestor's proposal was found technically unacceptable under the relevant experience and key personnel factors.

Held: Protest sustained. When an agency conducts discussions with one offeror, it must afford all offerors remaining in the competition an opportunity to engage in meaningful discussions. GAO found that the agency engaged in discussions with the awardee, Jimmy Church, because the agency changed its evaluation of the awardee's key personnel from unacceptable to acceptable after receiving additional information. The agency was therefore required to conduct discussions with the protestor and provide the opportunity to address deficiencies and significant weaknesses in its proposal.

Regarding the COC protest ground, GAO held that the agency evaluated the small business offerors on an acceptable/unacceptable basis, as opposed to a comparative basis, with respect to relevant experience, a responsibility-type evaluation factor. Because the agency found the protestor's proposal to be unacceptable under that factor, the agency rejection of the proposal based on that rating, without first referring the matter to SBA for a COC determination, was improper.

4. *Latvian Connection, LLC, B-412701, April 22, 2016*

Summary: GAO denied a protest against an agency's decision to use a full-and-open procurement for fitness equipment, rather than a small business set-aside or SDVOSB set-aside.

Facts: The Air Force issued an unrestricted solicitation for various types of fitness equipment for gyms at Wright-Patterson Air Force Base in Ohio. An SDVOSB protested the agency's decision not to set aside the procurement. The Air Force responded that it had issued a sources sought synopsis, and those results and other market research indicated that a set-aside would not satisfy the Rule of Two.

Held: The GAO held that the agency conducted adequate and meaningful market research to determine that the Rule of Two was not satisfied. None of the respondents to the agency's sources sought were small business manufacturers of fitness equipment.

The protestor argued that the agency should have sought a waiver of the nonmanufacturer rule, but GAO concluded that the FAR grants an agency discretion to seek a waiver. Because requesting a waiver is discretionary, GAO found that the agency's decision not to seek a waiver of the nonmanufacturer rule was not unreasonable.

5. *Alutiiq-Banner Joint Venture, B-412952, July 15, 2016*

Summary: GAO sustained a protest that the agency improperly awarded an 8(a) contract to ineligible joint venture where SBA had rescinded approval of the awardee's eligibility.

Facts: CTR Management Group, an 8(a) firm, formed a joint venture called CGJV with a non-8(a) firm and obtained approval of the joint venture from SBA. CGJV submitted an offer on a competitive 8(a) set-aside issued by NASA. The protestor alleged that NASA improperly considered a contract for CGJV that

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lacked a record of performance. The protestor also alleged that CGJV could not have been approved by SBA as eligible for award.

Held: GAO sustained the protest on the past performance and SBA approval grounds. With respect to past performance, GAO noted that CTR Management Group included only one past performance contract and was to have overall management of the JV. The record, however, included no documentation of performance by CTR Management under the contract that the firm referenced. GAO found that NASA had no rational basis to consider the contract in its past performance evaluation of CGJV.

GAO also sustained the challenge to SBA's approval of the joint venture. During the protest, SBA explained to GAO that the joint venture was not eligible for award because the joint venture did not submit an addendum to its joint venture agreement for approval by SBA. SBA therefore rescinded its approval of CGJV's eligibility as being in violation of SBA regulations and recommended termination of NASA contract. GAO agreed that award to CGJV was improper and recommended that NASA terminate the award.

6. *AttainX, Inc.; FreeAlliance.com, LLC, B-413104.5, .6, Nov. 10, 2016*

Summary: GAO denied protests alleging that, when the agency excluded proposals based on the failure to submit specific verification of an adequate cost accounting system, the agency should have first referred the matter to the SBA under certificate of competency procedures.

Facts: For its CIO-SP3 Small Business GWAC, NIH required that proposals include verification of an adequate accounting system from a federal audit agency or a third-party CPA firm. If verification was from a third-party CPA, the verification letter was required to be on the letterhead of the firm. The protestors submitted accounting system verification from a third-party CPA on a government form, rather than on letterhead. NIH eliminated the protestors from competition for failure to provide the required verification on the letterhead of a third-party CPA firm.

Held: GAO denied the protests that the eliminations were based on non-responsibility determinations that should have been referred to SBA for COC consideration. GAO found that NIH's rejections were not based on evaluated problems with the accounting systems, but instead on the failure to submit the specific documentation required by the solicitation. Clearly stated RFP requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is unacceptable and may not form the basis for award.

7. *InfoReliance Corporation, B-413298, Sept. 19, 2016*

Summary: GAO denied the challenge to the agency's decision to set aside a Federal Supply Schedule order for small businesses.

Facts: The Federal Bureau of Prisons issued a request for quotations for Amazon Web Services under the FSS procedures as a small business set-aside. A large business protested, arguing that small business would not be able to comply with the limitations on subcontracting.

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Held: The FAR 8.4 procedures and FAR 19.502-4(c) provide that an agency may, in its discretion, set aside orders or BPAs under the FSS for small business concerns. The agency exercised its discretion to issue a set-aside RFQ, and the protestor failed to show that the agency violated any law or regulation. Agencies need not make actual determinations of responsibility or decisions tantamount to determinations of responsibility. Agencies need only make an informed business judgment that there are small businesses expected to submit offers that are capable of performing. With respect to the LOS allegation, an agency's determination whether a small business concern will comply with the solicitation's subcontracting limitation is to be made as part of the award decision and based on the particular quotation submitted.

8. *B&D Consulting, Inc., B-413310, Sept. 30, 2016*

Summary: GAO denied the protest against an 8(a) sole source award that alleged that SBA failed to perform an adverse impact analysis, that SBA was prohibited from accepting the procurement as an 8(a) award, and that the solicitation should have been an 8(a) competitive set-aside.

Facts: The protestor was a 2014 awardee of a contract from the Defense Information Systems Agency for technology integration engineering and network enterprise management services, with a total contract value of \$21.8 million after modification. The agency decided not to exercise option year two of the protestor's contract. The agency then issued a sole-source solicitation to Allegheny Science and Technology Corporation, an 8(a) firm, with an estimated value of approximately \$3 million. SBA accepted the requirement into the 8(a) program.

Held: The requirement for SBA to conduct an adverse impact analysis does not apply to new requirements, which SBA regulations define as those with a price adjustment of at least 25 percent. The anticipated value of the proposed requirement is more than 25 percent lower than the total dollar value of work previously awarded to the protestor, including modifications.

GAO also found that the new requirement had not been solicited as a small business set-aside. GAO further held that the agency's anticipated award value was less than \$4 million and therefore not subject to the 8(a) competition requirements.

9. *Technica Corporation, B-413339, Sept. 19, 2016*

Summary: GAO denied a protest from an RFQ offeror that was rejected for failing to recertify its small business size status on a Federal Supply Schedule task order solicitation.

Facts: The Defense Information Systems Agency issued a small business set-aside RFQ using FSS schedule 70 for solution engineering and implementation support services. The agency issued an amendment addressing the question "Will the prime offeror be required to certify as a small business at the time of submission?" The agency answered, "Yes." The agency rejected the protestor's quotation because it failed to certify its small business status as of the time of submission of quotations.

Held: Protest denied in part and dismissed in part. When a firm is awarded an ID/IQ contract such as an FSS contract as a small business, the firm is generally considered a small business throughout the life of that contract and is not required to recertify its size status for each order issued under the contract.

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Agencies have discretion, however, to request that vendors recertify their size status at time for submission of proposals or quotations for an order. The RFQ amendment required vendors to recertify their small business size status. Because the protestor could not represent that it was a small business, it is not eligible to compete for award.

10. *Analytical Graphics, Inc., B-413385, Oct. 17, 2016*

Summary: GAO denied a protest of an agency's decision to set aside the procurement for small businesses because the agency had a reasonable expectation that offers would be received from at least two responsible small business concerns and award would be made at a fair market price.

Facts: The Air Force issued a sources sought notice/request for information (RFI) seeking responses from firms interested in performing a contract to provide space situational awareness data. Fifteen firms responded, six of which were small businesses. Five firms, of which two were small, responded to a draft PWS. The Air Force found that one small business was capable of meeting all 10 of the agency's minimum requirements, and another small business could meet 9 of 10 requirements. The protestor, a large business, challenged the Air Force's decision to procure the software and services as a noncommercial small business set-aside.

Held: GAO denied the protest because agencies need not make either actual determinations of responsibility or decisions tantamount to determinations of responsibility in determining whether to set aside a procurement. The agency is not required to obtain—and a prospective small business offeror is not required to provide—a complete technically-acceptable approach in response to market research. 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. With respect to the determining whether it is reasonable to anticipate award at a fair market price, an agency may rely on the expectation of adequate price competition. The agency reasonably concluded that it was likely to receive proposals from at least two responsible small business offerors, and that this gave rise to a reasonable expectation that award would be made at a fair market price.

GAO found that, as a large business, the protestor was not an interested party to challenge the agency's decision to designate the solicitation as noncommercial. The protestor did not demonstrate why the agency's evaluation of the commerciality of services affects the assessment of the capabilities of the two potential small business offerors. Even if the requirements were deemed commercial, the protestor did not demonstrate that such designation would affect the agency's conclusion that the two small business firms were capable of meeting those requirements.

11. *Xtreme Concepts, Inc., B-413711, Dec. 19, 2016*

Summary: GAO sustained a protest from an offeror whose proposal was eliminated from the competitive range based solely on a neutral past performance rating.

Facts: The Army Corps of Engineers issued a small business set-aside RFP for installation of transformers at Millers Ferry Powerhouse in Camden, Alabama. The RFP required submission of past performance information for the prime contractor, and that past performance was the most important factor. The protestor submitted five past performance references for contracts performed by its proposed

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subcontractor. The agency determined that the subcontractor's past performance could not be submitted and assigned the protestor a "Neutral" past performance rating. The source selection authority determined that the protestor should not be included in the competitive range.

Held: The agency should make a new competitive range determination that does not exclude the protestor on the basis of its neutral past performance rating. FAR 15.305(a)(2)(iv) requires that an offeror without a record of relevant past performance, or for whom information on past performance is not available, may not be evaluated favorably or unfavorably on past performance. The protestor had a higher overall rating than one firm in the competitive range and the lowest overall price. The agency's conclusion that the protestor's neutral rating made it a lower-rated offeror was improper.

12. *NTELX, Inc., B-413837, Dec. 28, 2016*

Summary: GAO denied the protest of an 8(a) sole-source award alleging that the agency acted in bad faith.

Facts: The protestor previously held the 8(a) contract for the Consumer Product Safety Commission's software system to identify the potential risk of shipments of consumer products at U.S. ports of entry. The agency determined to procure a system with the same functionality but using open source software. The agency decided to again use the 8(a) program and awarded a sole-source contract to TTW Solutions. The protestor acted as a subcontractor on the second 8(a) contract. After completion of the second contract, the agency awarded TTW a sole-source 8(a) contract for operation and maintenance of the system.

Held: The agency did not act in bad faith by not holding a full-and-open competition. Contracts may be awarded to SBA under the Small Business Act for performance by eligible 8(a) firms on either a sole-source or competitive basis. Although the protestor may disagree with the agency's business decision, it failed to demonstrate any fraud or bad faith.

13. *Platinum Business Services, LLC, B-413947, Dec. 23, 2016*

Summary: GAO dismissed a protest alleging that the agency failed to verify the awardee's small business status when issuing a set-aside task order on a Federal Supply Schedule contract.

Facts: GSA set aside a task order for SDVOSB concerns under the FSS contract for information technology support services. The RFQ included standard FAR clauses concerning representations and certifications, but did not specifically require offerors to recertify their size status for the task order. The awardee was listed on SAM as other than small at the time of award of the task order.

Held: SBA found that a new size certification was not requested in connection with the task order. Because SBA has conclusive authority on size matters, GAO dismissed the protest allegation.