

Bid Protest Hub – January 2024

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In January 2024, the Government Accountability Office (“GAO”) published 31 bid protest decisions, two of which resulted in decisions sustaining the protesters’ challenges. There were also two requests for costs, one of which was denied, and one request for consideration, which was, unsurprisingly, denied. Below is a summary of the notable decisions from January and what potential protesters can learn from them.

Sustained Protests

In *American Material Handling, Inc.*, the GAO sustained a protest challenging the award of a task order by the International Boundary and Water Commission for a brand name or equal Caterpillar 980 wheel loader.^[1] The agency issued the solicitation through GSA’s e-Buy system, stating that the proposed “wheel loader equipment must meet the salient features or specification of the Caterpillar 980 or exceed the specifications attached” and included a two-page specification sheet. The agency received two quotations, one from the protester and one from Caterpillar. After receiving quotations, the contracting officer added salient characteristics to the technical evaluation form to be considered during evaluations that were not stated in the solicitation. Although the protester offered the lowest price, the agency found its proposal was technically unacceptable because it did not meet the new characteristics.

Consequently, the protester first filed an agency level protest challenging the evaluation, which was denied, and then filed a protest with the GAO. The agency argued that the additional characteristics, while not listed in the solicitation’s specification sheet, were easily identifiable on the Caterpillar website. The GAO rejected this argument, noting that “[i]n a brand name or equal acquisition, the contracting agency has an obligation to inform vendors of the characteristics that are essential to the government’s needs and a product offered as an ‘equal’ one need not meet unstated features of a brand name product.” The GAO also found that language in the solicitation that the wheel loader must meet the salient features of the Caterpillar 980 “cannot be reasonably interpreted as directing vendors to find and meet additional salient characteristics not expressly stated, even when considered with the broadest interpretation.” Thus, the GAO sustained the protest.

This decision was not surprising, as it is a basic tenet of public procurement law that agencies may only evaluate offerors based on the criteria stated in the solicitation. In a procurement with a solicitation that contains a specification sheet, a contractor likely will have strong protest grounds if its proposal was rejected for failing to meet an unspecified criteria, which was the case in this protest.

In *SierTeK-Peerless JV LLC*, the GAO sustained a protest challenging the award of a task order by the Transportation Security Administration (“TSA”) for support services to maintain TSA’s property management program.[2] Under the most important evaluation factor, prior experience, the agency was to “assess its level of confidence that the [o]fferor provided a detailed description of prior relevant experience examples where the [o]fferor provided property management support...of a similar size and scope as the TSA [p]roperty [m]anagement [p]rogram.” Thus, as the GAO explained, the solicitation contemplated the agency’s evaluation under this factor would consider, at least in part, the size of the offerors’ prior experience examples relative to the solicited requirement.

However, the GAO found the record contained no evidence the agency properly considered size. For the awardee’s first prior experience example, the TET report did not analyze or evaluate the size of the project. It mentioned some aspects of the example that may have a bearing on size, but did not compare them to the current requirement. For the second prior experience example, which had a value of \$12 million over 62 months, the agency found it was similar in size to the current requirement, but there was no rationale for this conclusion when considering the estimated value of the task order was \$23 million over 60 months. Similarly, the awardee’s third example was only valued at \$1.7 million over 14 months, but there was no discussion in the TET report explaining why the agency found this example to be similar in size. Because the record failed to demonstrate that the agency evaluated the awardee’s experience examples relative to the size of the solicited requirement in making its relevancy determination as required by the solicitation, the GAO found the agency’s evaluation was unreasonable. Additionally, because this was a best value procurement and prior experience was the most important factor, the GAO found a reasonable possibility the protester was prejudiced by the prior experience evaluation. Thus, the GAO sustained the protest.

This decision is consistent with other decisions we have analyzed in previous articles. If the agency does not adequately document its rationale, especially in light of contradicting facts, the GAO will find the record does not demonstrate the agency’s evaluation was reasonable.

Other Notable Decisions

In *Ernst & Young, LLP*, the protester challenged the agency’s evaluation of its proposal under the initial phase of the procurement before an award had been made, and the GAO dismissed the protest.[3] Specifically, during the initial phase of the procurement, the agency was to evaluate the offerors’ labor category mapping and assign ratings of either high, medium, or low confidence. The solicitation stated that vendors receiving low confidence ratings would be sent advisory notices recommending they not continue to compete for award, but they could continue notwithstanding receipt of such notice. After the initial phase of the procurement, the agency assigned the protester a low confidence rating and send the advisory notice stating it had “little to no chance of receiving an award.” The protester challenged this evaluation, but the GAO dismissed the protest because the protester had not been excluded from the competition and an award had not yet been made. The GAO noted that, while the agency’s future actions may create a set of facts appropriate for its consideration, the current protest was premature.

This decision demonstrates that there must be definitive adverse agency action before the GAO will hear a protest; typically, the agency must fully eliminate an offeror from competing in the next round of the procurement, or the agency must make an award. An agency’s finding that a proposal has “little to no chance of receiving an award,” while certainly a blow, is not yet ripe for protest. Contractors will have to submit a proposal for the second phase and wait for either full elimination from competition or award to another offeror before they can challenge the initial phase evaluation.

In *Skyward IT Solutions, LLC – Costs*, the GAO denied a protester's request for reimbursement of the costs of filing and defending its protests.[4] In this case, five unsuccessful vendors, including Skyward, filed protests challenging the Center for Medicare and Medicaid Services' award of multiple blanket purchase agreements. After development of the protests, the agency took voluntary corrective action in response to two protests, neither of which was Skyward's protest. The agency then requested dismissal of Skyward's protest because its corrective action rendered the protest academic. Skyward requested it be reimbursed for its protest costs because the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. The GAO found that, although the agency did not take corrective action until after the agency report was filed, Skyward's protest was not clearly meritorious. The GAO then analyzed the merits of Skyward's protest and found it would not have been sustained.

This decision demonstrates that even if an agency takes voluntary corrective action, a protester's individual protest grounds must be deemed clearly meritorious before the GAO will recommend reimbursement of costs.

And finally, in *ELS, Inc.*, the GAO dismissed a protest for lack of jurisdiction and reminded protesters how to calculate the dollar value of task orders for jurisdictional purposes.[5] As a refresher, the GAO has jurisdiction to hear protests challenging the award of task or delivery orders only if the dollar value of such awards are over \$10 million for civilian agencies and \$25 million for DOD, NASA, and the Coast Guard. In this case, the Navy awarded a task order, containing cost-reimbursable CLINs, to Green Expert Technology Inc. ("GreenXT") for \$24,848,774 but found that GreenXT's total evaluated price was \$25,116,561. The protester argued the GAO should use the evaluated price for jurisdictional purposes because it is a better representation of what the agency will likely spend on performance. The agency argued the GAO should use the award price, especially because the contract contains FAR 52.232-20, which states the government is not obligated to reimburse the contractor for costs incurred in excess of the amount listed in the contract. The GAO found that, under its precedent, when an award has been made, the GAO will use the award amount to determine the jurisdictional limit. The GAO rejected the protester's arguments that an exception to the general rule should apply here.

This decision reminds protesters that if the task order award amount is below the jurisdictional threshold, even if the evaluated price is above the threshold, the GAO will likely dismiss the protest, absent very unusual circumstances.

Conclusion

These decisions each serve as a reminder for what can make a successful protest and what traps to avoid so your protest isn't dismissed. Stay tuned for our update next month on other notable protest decisions from the GAO.

FOOTNOTES

[1] *American Material Handling, Inc.*, B-422171, Jan. 22, 2024.

[2] *SierTeK-Peerless JV LLC*, B-422085, B-422085.2, Jan. 2, 2024.

[3] *Ernst & Young, LLP*, B-422025, Dec. 29, 2023.

[4] *Skyward IT Solutions, LLC – Costs*, B-421561.11, Oct. 25, 2023.

[5] *ELS, Inc.*, B-421989, B-421989.2, Dec. 21, 2023.

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