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Army

GAO Sustains Protest of Army's Logistics Award to Lockheed Martin

An Army logistics task order award was unreasonable because its evaluation of the awardee's proposed level of effort didn't conform with solicitation terms, the Government Accountability Office (GAO) held (*DRS Tech. Servs. Inc.*, GAO, B-411573, 11/9/15, decision released 12/2/15).

The Army also failed to reasonably investigate a potential organizational conflict of interest and improperly penalized certain offerors' approaches to transition plans, the GAO said. In addressing the transition plans challenge, the GAO invoked a regulation allowing it to consider an untimely protest that raises a significant issue for the procurement system.

John E. McCarthy Jr., of Crowell & Moring LLP told Bloomberg BNA in an e-mail that the GAO went beyond its generally rigid timeliness rules to make an exception for a protest ground that the GAO conceded was untimely.

The transition plans issue was significant to the GAO, he said, "because agencies should not rely on evaluation criteria that produce misleading results, as was the case here."

Based on his review, he said this is only the fifth time the GAO has invoked the significant exception to the timeliness rules since 2001. The GAO last did so in *Cyberdata Techs. Inc.*, GAO, B-406692, 8/8/12, (98 FCR 305, 9/11/12).

Patrick T. Rothwell of PilieroMazza PLLC said "it is unusual for the GAO to consider an untimely raised argument. Nevertheless, by considering this issue, the GAO has performed a service to the procurement community and the taxpayer."

The Army issued a request for task execution plan under its Rapid Response Third Generation multiple-award contract program for system engineering, integrated logistics and fielding/training support services. The solicitation said the award would be made on a best-value basis considering technical factors, past performance and cost/price.

Five firms submitted timely proposals, including DRS Technical Services Inc. and Lockheed Martin Integrated Services Inc. The agency selected Lockheed Martin on the basis of cost, and DRS Technical protested.

The GAO sustained the protest because Lockheed Martin didn't propose a realistic level of effort. Specifically, the proposal deviated from the agency's esti-

mated number of labor hours, and Lockheed Martin failed to explain how it would perform the requirements and how its proposed level of effort was realistic.

Rothwell said it seems proper for the GAO to reach this conclusion when all the awardee did was reduce its labor-hours by hours which consisted of paid-time-off.

"This was a very crude way of reducing the number of labor hours for its level of effort, presumably for the purpose of gaining a competitive advantage. The cost savings arising from this reduced labor of effort may well have been illusory. It is not clear to me how the awardee could show the work could be accomplished with that lower level of effort," he said.

Significant Issue Exception. The GAO also said the Army unreasonably evaluated offerors' transition plans.

Although DRS Technical's protest was untimely, the GAO invoked 4 C.F.R. § 21.2(c), which allows for the consideration of an untimely protest that raises issues that are significant to the procurement system.

In this case, the GAO said it needed to address whether an agency's evaluation scheme is reasonable if it fails to fairly account for offerors' differing transition approaches.

DRS Technical proposed full staffing from the beginning of performance, the GAO said, which adhered to the solicitation's statement that there would be no work stoppage as a result of the award. This contrasted with Lockheed Martin's approach, which involved the Army paying incumbents to prevent a work stoppage.

By not accounting for these disparities, the GAO concluded, the agency unreasonably penalized offerors that proposed to provide full contract performance sooner than those with a more prolonged transition period.

Finally, the GAO said the Army failed to reasonably investigate a potential impaired objectivity organizational conflict of interest (OCI)— i.e., whether Lockheed Martin's functions under a separate task order would overlap with its work here.

This decision was unique, McCarthy said, "because the GAO usually gives contracting officer OCI investigations and findings great deference. Here, though, the GAO parsed through the OCI analysis with a fine-toothed comb and made sure that all potential OCI risks were considered. When the GAO concluded that the investigation was incomplete, it sustained the protest and remanded the issue to the contracting officer for further analysis."

Neil H. O'Donnell and others Rogers Joseph O'Donnell PC, San Francisco, represented the protester. Michael F. Mason and others from Hogan Lovells US LLP, Washington, D.C., represented the intervenor-awardee. Annemarie Drazenovich and oth-

ers from the Department of the Army, Army Materiel Command, represented the agency. Susan A. Poling and others from the Office of the General Counsel, GAO, participated in the preparation of the decision.

BY DANIEL SEIDEN

To contact the reporter on this story: Daniel Seiden in Washington at dseiden@bna.com

To contact the editor responsible for this story: Jeff Kinney in Washington at jeffkinney@bna.com

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