

Bid Protest Spotlight: Methodology, Conflict, Corrective Scope

By **Caitlin Crujido** (October 6, 2020, 4:02 PM EDT)

This month's bid protest roundup examines three recent decisions by the U.S. Government Accountability Office.

Sumaria Systems Inc. evaluates whether an agency's use of the highest technically rated, reasonably priced offeror methodology violates the Federal Acquisition Regulations.[1]

AT&T Corporation examines a conflict of interest wherein the awardee would effectively evaluate its own performance under a separate contract.[2]

CenturyLink QGS addresses the scope of a corrective action that allegedly resulted in the disparate treatment of offerors.[3]



Caitlin Crujido

Sumaria Systems

Given Congress' recent crackdown on the use of lowest-price technically acceptable procurements for certain acquisitions, agencies have turned to different source selection methodologies in an effort to identify reasonably priced, qualified offerors.

In Sumaria, the U.S. Department of the Air Force issued a fair opportunity proposal request for support services for the F-15 aircraft under the One Acquisition Solution for Integrated Services program.

The fair opportunity proposal request provided that the agency would issue a task order to the highest technically rated offeror with a realistic and reasonable price.

The proposal request established two evaluation factors: technical and price. With respect to the technical evaluation, the request provided a scoring system to measure the quality and extent of offerors' past performance. Price would be evaluated for reasonableness, realism and balance.

Offerors were required to self-score their proposals against the fair opportunity proposal request's technical criteria and submit work samples to support their scores.

After proposal submission, the Air Force was to rank offerors based on the offeror-assessed scores, and then evaluate the technical proposals starting with the highest self-ranked offeror.

If the Air Force determined the offeror did not adequately support its score, the Air Force would evaluate the proposal with the next highest offeror-assessed score.

If the Air Force determined the self-assessed score was supported, it would evaluate the offeror's price. If the price was found to be unreasonable, unrealistic or unbalanced, the agency would reject the proposal.

Sumaria Systems Inc. filed a preaward protest challenging the source selection methodology on the grounds that it did not contemplate a tradeoff between the technical ratings and price, effectively preventing Sumaria from offering a lower price in exchange for a lower technical rating.

Sumaria argued this violated FAR 16.505(b)(1)(ii)(E), which requires an agency, in awarding task orders under a multiple-award indefinite delivery, indefinite quantity contract, to consider price as a factor in the selection decision.

The agency argued that not only is the highest technically rated offeror methodology acceptable under the FAR, but it is used to avoid running into the same problems that plagued the lowest-price technically acceptable methodology.

In fact, the agency noted that it previously used the lowest-price technically acceptable method for its engineering, professional and administrative support services, but found that it led to an unstable workforce and negatively affected contract performance.

The GAO agreed and explained that because FAR subpart 16.5 provides the contracting officer with broad discretion in establishing the methodology by which it selects offerors and does not prohibit use of the highest technically rated offeror methodology, the procurement procedure is presumed to be permissible.[4]

Additionally, the GAO has previously held that, although agencies are required to consider price in the source selection, they are not required to perform a tradeoff between price and nonprice evaluation factors.

Thus, the GAO found the protester's allegations related to the highest technically rated offeror selection methodology without merit and denied the protest.

Takeaway

As they move away from lowest-price technically acceptable procurements, agencies are turning to alternative methodologies, such as the highest technically rated offeror methodology.

Agencies have broad discretion to establish their source selection methodology and, as long as it is not prohibited by law or addressed in the FAR, the methodology is presumed to be acceptable.

AT&T

In AT&T, the GAO considered organizational conflicts of interest. The issues in this case were similar to those presented in Solers Inc., discussed in last month's bid protest spotlight, but with a different outcome.

There are three kinds of organizational conflicts of interest that contractors and contracting officials must avoid or mitigate: (1) unequal access to information, (2) biased ground rules, and (3) impaired objectivity.

Relevant here is the impaired objectivity organizational conflict of interest, which arises when a firm's ability to render advice to the government is undermined by the firm's competing interests.

In AT&T, the Social Security Administration issued the Next Generation Telephony Project, or NGTP, solicitation to replace the agency's three legacy telephone systems. The solicitation contemplated award of a single contract under which the agency may issue task orders to provide telephony, video, presence, instant messaging, web-based applications and contact center services in an enterprise solution on the SSA Network.

The SSANet carries all of the agency's data, video and voice traffic. The agency acquires all services related to the SSANet through task orders issued under a different indefinite delivery, indefinite quantity contract.

The agency originally awarded the contract to Verizon; however, two disappointed offerors filed protests with the GAO. The agency elected to take corrective action on Sept. 11, 2019.

On Sept. 27, 2019, in the midst of corrective action, the agency issued task orders to Verizon and CenturyLink under the General Services Administration Enterprise Infrastructure Solutions, or EIS, indefinite delivery, indefinite quantity contract to provide support for the SSANet.

On Oct. 4, 2019, AT&T sent a letter to the agency arguing that Verizon's SSANet task order created an impaired objectivity organizational conflict of interest. AT&T argued that this conflict could not be mitigated and should prevent Verizon from competing for the NGTP contract.

The contracting officer reviewed the allegations and concluded there was no potential organizational conflict of interest for two reasons: (1) the statement of work does not require the NGTP contractor to monitor or evaluate the performance of the SSANet contractor, and (2) the statement of work does not require the NGTP contractor to be responsible for the performance of the SSANet.

On March 3, the agency re-awarded the NGTP contract to Verizon. Shortly thereafter, AT&T protested at the GAO, arguing in part that Verizon's SSANet task order created a disqualifying organizational conflict of interest.

AT&T argued that the solicitation required the contractor to inform the agency of any problems with the SSANet that affect performance of the NGTP contract.

After finding that AT&T's conflict of interest challenge was timely, the GAO considered whether the NGTP solicitation required Verizon to perform tasks that would cause Verizon to have an impaired objectivity organizational conflict of interest given its role supporting the SSANet.

The GAO reviewed the contracting officer's assessment of the potential conflict following AT&T's Oct. 4 letter to determine whether the contracting officer reasonably concluded an organizational conflict of interest did not exist. Two things led the GAO to find the contracting officer's assessment unreasonable.

First, the GAO found specific provisions from the solicitation contradicted the contracting officer's

assessment that the statement of work did not require the NGTP contractor to monitor or evaluate the performance of the SSANet contractors.

The statement of work required the NGTP contractor to advise the agency of performance or quality of service issues, which would essentially require Verizon to provide the agency advice about its own performance of the SSANet task order.

Although the statement of work did not specifically require the contractor to monitor or evaluate the entirety of the SSANet, it did require the contractor to assess the performance of the SSANet with respect to its effect on the NGTP contract.

Second, although the GAO agreed that the statement did not make the contractor responsible for performance of the SSANet task order requirements, the GAO found that Verizon would undoubtedly be required to evaluate the quality of services provided under SSANet task order. As such, the GAO determined the contracting officer's organizational conflict of interest determination was unreasonable and sustained the protest.

Takeaway

Although agency organizational conflict of interest determinations receive considerable deference, this case demonstrates that a deficient conflict of interest investigation is unlikely to result in a determination to which the GAO will give deference. This case is also a helpful reminder to contractors to be aware of certain contract requirements that might disqualify your company from other competitions.

This is particularly true for contracts and task orders issued by the same government agency. In a situation like this, where a contractor is evaluating its own products or services under a separate contract, there is a high likelihood the GAO will find an organizational conflict of interest.

CenturyLink

When an agency elects to take corrective action, the scope of the corrective action does not always adequately remedy the agency's procurement error. If a contractor determines that is the case, it has the option to protest the corrective action.

Deciding whether to protest a corrective action, however, can be tricky as notices of corrective actions often lack detail. This next protest is an example of an unsuccessful challenge to an agency's corrective action.

In CenturyLink QGS, the U.S. Department of Veterans Affairs issued a request for task order proposals under the EIS indefinite delivery, indefinite quantity contract vehicle for the delivery of voice (telephone), transport and associated services including installation and maintenance across the U.S. and its territories.

The solicitation required proposals to comply with the provisions of the offerors' underlying EIS contracts. The EIS contract included a provision that would allow an EIS contract holder to compete for a task order even if the contractor did not have all of the required services included on its EIS contract, so long as the contractor, at the time of proposal submission, submitted a modification adding the required services to its EIS contract.

The solicitation further prohibited a contractor from accepting a task order for services not included on its EIS contract.

The agency awarded the task order to Manhattan Telecommunications Inc., or MetTel. CenturyLink protested the award, arguing that MetTel was ineligible for award because it did not have the necessary modifications to its EIS contract, in violation of the solicitation.

The agency elected to take corrective action and advised offerors that it intended to confirm whether MetTel's EIS contract contained the required services, and if the contract did, the agency planned to reissue the task order to MetTel.

If MetTel's EIS contract did not contain the required services, the agency would make a new award decision. Shortly after the GAO dismissed CenturyLink's protest as academic, CenturyLink filed a new protest challenging the scope of the award.

CenturyLink argued that the agency's corrective action would result in disparate and unequal treatment of offerors. The protester argued MetTel should have been eliminated from the competition for failure to submit the required modification to its EIS contract. By continuing to consider MetTel for award, CenturyLink asserted the agency had effectively allowed MetTel to revise its proposal without affording others the same opportunity.

CenturyLink requested the agency reopen the competition to allow all offerors the chance to revise their price proposals.

Although the agency explained that the corrective action did not permit any offeror, including MetTel, to revise its submitted proposal, the record shows that MetTel did, in fact, submit its EIS contract modification after the proposal due date. The GAO, however, determined this did not affect this competition, but rather was an issue of the administration of MetTel's existing EIS contract.

The GAO reached this conclusion because the provision upon which CenturyLink based its protest pertained to the EIS contract, not the task order being competed. The contract modification process — which allows the agency to confirm whether the offeror has the required services — does not affect the evaluation of the task order proposals.

In addition, any change would affect MetTel's EIS contract, not the task order proposal. As a result, the agency's corrective action did not permit any offeror to revise or alter its proposal, and did not otherwise provide any offeror with a competitive advantage.

Takeaway

This case serves as a reminder of an agency's broad discretion in determining the scope of corrective action. The corrective action must simply be appropriate to remedy the concern that caused the agency to take corrective action in the first place.

Here, the disappointed offeror's preferred course of action would have been far more extensive, requiring the agency to reopen the competition and allow offerors to resubmit proposals. However, at the end of the day, confirmation that the awardee possessed the required services was sufficient to quell any concerns that it could or could not perform.

Caitlin A. Crujido is an associate at Morrison & Foerster LLP.

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[1] Sumaria Systems Inc. B-418796, Sept. 9, 2020, 2020 WL 5544560.

[2] AT&T Corporation, B-417107.4, July 2, 2020, 2020 WL 5231436.

[3] CenturyLink QGS, B-418556.3, Sept. 8, 2020, 2020 WL 5593912.

[4] See FAR 1.102(d) ("[I]f a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR nor prohibited by law (statue or case law), Executive order or other regulation ... the strategy, practice, policy or procedure is a permissible exercise of authority.").