

RECENT DEVELOPMENTS

Civilian Board of Contract Appeals

Effective January 6, 2007, most civilian agency boards of contract appeals were consolidated into a single Civilian Board of Contract Appeals (CBCA). The Board's authority extends to all agencies except the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Rate Commission and the Tennessee Valley Authority.

Notification of Potential Safety Issues Under DoD Contracts

DoD issued a final rule, effective January 22, 2007, that amended the Defense Federal Acquisition Regulation Supplement (DFARS) to require contractors to notify the Government of certain potential safety issues. The rule applies to DoD contracts for the acquisition of (1) repairable or consumable parts identified as critical safety items, (2) systems and subsystems, assemblies and subassemblies integral to a system, or (3) repair, maintenance, logistics support, or overhaul services for systems and subsystems, assemblies, subassemblies and parts integral to a system. The rule requires contractors to notify the administrative contracting officer and the procuring contracting officer within 72 hours after discovering or acquiring credible information concerning any (1) nonconformances for parts identified as critical safety items acquired by the Government under covered DoD contractor, or (2) nonconformances or deficiencies that may result in a safety impact for systems, etc., acquired by or serviced for the Government under covered DoD contracts. The notification requirement is implemented through a new DFARS clause, Notification of Potential Safety Issues, DFARS 252.246-7003, that is to be included in covered solicitations, contracts and subcontracts.

Contractor Code of Ethics and Business Conduct

A proposed rule was issued amending the Federal Acquisition Regulation to add a new section, FAR 3.10, that provides that contractors and subcontractors that receive awards in excess of \$5 million must within 30 days of award have a written code of ethics and business conduct and within 90 days of award, establish an employee ethics and compliance training program and an internal control system proportionate to the size of the company and the extent of its business with the Federal Government. The proposed rule does not apply to commercial item contracts awarded pursuant to FAR Part 12, contracts performed outside the United States, or contracts with performance periods less than 120 days. The proposed rule also requires the workplace display of Office of the Inspector General Fraud Hotline Posters. Penalties for non-compliance include loss of award fees for noncompliant performance periods.

Online Representations and Certifications

DoD issued a proposed rule amending the DFARS to list the existing DFARS representations and certifications that will be included in ORCA, the Online Representations and Certifications Application. Currently, ORCA includes only rep's and cert's required by FAR.

RECENT GOVERNMENT CONTRACT CASES OF INTEREST

Comp. Gen. Dec. B-299533, Battelle Memorial Institute, May 14, 2007

An agency's decision to exclude a protester's proposal from competition for failing to include option year pricing, as required by the solicitation, was reasonable as the intended option year pricing was not apparent for the information provided in the protester's proposal, and correction of this deficiency was not required since the solicitation permitted an award without discussions.

Comp. Gen. Dec. B-299382, C. Martin Co. Inc., April 17, 2007

When an agency excludes a proposal as technically unacceptable due to its inclusion of outdated regulations, procedures and requirements, the decision is justified as reasonable as this indicates a lack of understanding or awareness by the offeror of the solicitation requirements. Even if the deficiencies viewed individually are minor in nature, the cumulative effect of all the deficiencies is sufficient to support the agency's conclusion that the proposal was unacceptable.

Comp. Gen Dec. B-299469, Knight's Armament Co., April 7, 2007

Agency's decision to cancel solicitation after receipt and evaluation of proposals was unobjectionable where the record shows that the agency's contracting officer reasonably concluded that none of the offered products met the solicitation's requirements and that the stated requirements do not adequately reflect the agency's needs. Further, as the funds that were allocated for this procurement were withdrawn, the lack of funding for the requirements covered by the solicitation also supported a decision to cancel. So long as a reasonable basis exists, an agency may cancel the solicitation no matter when the information precipitating the cancellation first surfaces or should have been known, even if the cancellation occurs after proposals have been submitted and evaluated, or even if discovered during the course of a protest.

Comp. Gen . Dec. B-299393, Northern Sealcoating & Paving, Inc., March 30, 2007

The agency properly rejected an offer as nonresponsive to the solicitation's terms and conditions since the offer failed to acknowledge a material solicitation amendment that changed the color of exterior shingles, and specified the use of cedar lap siding and a color additive for concrete. A bidder's failure to acknowledge a material amendment would not legally obligate the offeror to meet the government's needs as identified in the amendment.

Comp. Gen. Dec. B-297950.3; B-297950.4; B-297950.5, Propper International, Inc., March 19, 2007

Award of a contract to an offeror with a slightly higher-priced, higher technically rated proposal is supported where the record shows that the evaluation and source selection were reasonable and consistent with the terms of the solicitation. As past performance was the second most important technical factor evaluated, the agency reasonably concluded that failure to provide sufficient detail did not demonstrate favorable past performance and justified its ultimate determination that overall, the offeror's technical proposal was less favorable than that of the awardee. Therefore, the award to a slightly higher priced and higher technically rated offer was justified.

Comp. Gen. Dec. B-298364.6; B-298364.7; TYBRIN Corp., March 13, 2007

The award of a contract under a solicitation set aside exclusively for small businesses was improper where the awardee's proposal did not meet the material solicitation requirement and the applicable Federal Acquisition Regulation (FAR) that at least 50 percent of the cost of contract performance incurred for personnel be expended for employees of the small business awardee. The fact that the original awardee subcontracted with other small businesses, thereby jointly meeting the 50 percent requirement, did not comply with the FAR requirement that personnel costs must be incurred only by the proposer's personnel.

Dismas Charities, Inc., v. United States, No. 06-825C, February 7, 2007

When an offeror submits a bid that does not meet the minimum solicitation requirements, it is considered non-responsive and as a result, did not have a substantial chance of award and the offeror cannot be considered an "interested party" for the purposes of the court's bid protest jurisdiction. Here, although the offeror believed it was submitting an alternative proposal that could have been evaluated for award purposes, in fact, it was clear from the record that it was a revised proposal and therefore non-responsive.

Comp. Gen. Dec. B-299072, Hydroid LLC, January 31, 2007

In order to qualify as a small business eligible to provide manufactured products under a small business set aside, an offeror must either be a small business manufacturer of the end item or provide the product of another domestic small business manufacturing or processing concern. An award cannot be sustained where the agency awarded the purchase order to a small business that offered to supply the requisite item that is manufactured by a large business under the "nonmanufacture rule," and where there has not been an SBA waiver of the rule.

Comp. Gen . Dec. B-298047.3, Family Entertainment Services, Inc., September 20, 2006

Protest that the agency's evaluation of the protester's past performance was unreasonable is sustained where the record evidences that the protester and awardee were not treated equally with regard to the agency's efforts to contact past performance references. Agencies are required to make a reasonable effort to contact the references identified by an offeror. However, where the agency evidences disparate treatment, as setting tighter deadlines for the submission of questionnaires from the references of one offer versus another, a protest of such disparate treatment will be sustained.