**Protest Decision Summaries**

**(conflict of Interest protest decisions summarized separately)**

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# Price considerations in competitive range determinations

**Arc-Tech, Inc. – B-400325.3 (Feb. 2009)**

GAO concluded that the agency’s (NIH) competitive range determination was unreasonable in that there is no evidence that price was considered in deciding whether a proposal should be included or excluded.  Although contracting officers may properly exclude a technically unacceptable proposal from the competitive range regardless of price, they may not exclude a technically acceptable proposal from the competitive range simply because the proposal received a lower technical rating than another proposal or proposals, without taking into consideration the proposal’s price.

Post-award right to challenge source selection decision in task orders in excess of $10M

**Triple Canopy, Inc. – B-310566.4 (Oct. 2008)**

The Army argued that "IDIQ holders essentially have a right to file a 'pre-award' protest to challenge the sufficiency of the task order solicitation, but they do not have a right to a 'post-award' protest to challenge the rationale of the award decision itself." GAO disagreed, saying it views its authorization to review orders in excess of $10,000,000 as providing the same substantive protest jurisdiction as conferred by FASA and the Competition in Contracting Act—including consideration of whether the agency's source selection decision was reasonably consistent with the terms of the underlying solicitation. GAO also stated that protests that challenge defects or improprieties that are obvious from the face of the solicitation must be filed prior to the time established for submission of proposals otherwise the protest will be considered untimely.

RFP silent on weight of evaluation subfactors

**Fintrac, Inc. – B-311462.2 (Oct. 2008)**

Solicitations must advise offerors of the basis upon which their proposals will be evaluated. Lloyd H. Kessler, Inc., B-284693, May 24, 2000, 2000 CPD para. 96 at 3. Contracting officials may not announce in the solicitation that they will use one evaluation scheme and then follow another without informing offerors of the changed plan and providing them an opportunity to submit proposals on that basis. Kumasi Ltd./Kukawa Ltd. et al., B-247975.7 et al., May 3, 1993, 93-1 CPD para. 352 at 7. The RFP clearly stated that the phrase “descending order of importance” applied to the major evaluation factors, as follows: “The following technical evaluation criteria shall be evaluated in descending order of importance. (a) Technical Approach, (b) Personnel. . . .” RFP at 96 (emphasis added). In contrast, the RFP was silent as to the weight of the subfactors. We have recognized where a solicitation does not disclose the relative weight of evaluation factors or subfactors in a FAR Part 15 procurement, they should be considered approximately equal in importance or weight. Bio-Rad Labs., Inc., B-297553, Feb. 15, 2006, 2007 CPD para. 58 at 6.

Requirement to consider set-asides for HubZone firms before considering SBVOSBC firms

**International Program Group, Inc. – B-400278**

Agencies must first consider if a solicitation can be set-aside for a HUBZone firm before they consider a service-disabled-veteran-owned business (SBVOSBC) concern set-aside. GAO found in favor of a HUBZone business where the Agency failed to consider the possibility of the availability of HUBZone firms before they made award made to a SBVOSBC firm.

Need to take corrective action promptly in the face of a clearly meritorious protest

**Alaska Structures – B-298156.2 (July 2006)**

Our Regulations do not contemplate a recommendation for the reimbursement of protest costs in every case in which an agency takes corrective action, but rather only where an agency unduly delays taking corrective action in the face of a clearly meritorious protest.[[1]](#footnote-1)[6] Information Ventures, Inc.--Costs, B-294580.2 et al., Dec. 6, 2004, 2004 CPD para. 244 at 2; Oklahoma Indian Corp.--Claim for Costs, B-243785.2, June 10, 1991, 91-1 CPD para. 558 at 2. As a general rule, so long as an agency takes corrective action in response to a protest by the due date of its protest report, we regard such action as prompt and decline to consider favorably a request to recommend reimbursement of protests costs. The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD para. 173 at 2-3; Envirosolve--Costs, B-294420.3, Feb. 17, 2005, 2005 CPD para. 35 at 3. Our rule is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. PADCO, Inc.--Costs, supra, at 3-4.

**Information Ventures – B-294580.2 and others (Dec. 2004) – Several cases**

In each case, agency took prompt corrective action that rendered protests academic, and where the record, in any event, provides no support for protester's allegation that agency corrective action indicates a pattern of improper agency conduct of procurements. HHS reports that in response to each protest, it promptly canceled the procurements in order to allow it time to reassess its needs and the best method to meet those needs, including further consideration of whether additional sources were available to compete for the work. The agency reports that it did not know of the protester's apparent interest in any of the work until it received notice of the protests. HHS adds that although Information Ventures filed 19 protests within a 2-month period against HHS proposed sole-source procurements, the firm failed to submit statements of interest or capability to the agency for consideration as an alternate source for any of the work. The agency also reports that in instances where the agency has taken corrective action and converted sole-source acquisitions to competitive procurements, Information Ventures has not participated in the competitions. our rule limiting recovery of protest costs to those cases where agency corrective action is unduly delayed was intended not as an award to prevailing protesters or as a penalty to agencies, but rather to encourage agencies to take prompt action where warranted, and thereby save protesters from expending additional costs in pursuing their protests. See Wall Comonoy Corp.--Entitlement to Costs , B-257183.3, Nov. 16, 1994, 94-2 CPD 189 at 2.

**Padco – B-289096.3 (May 2002)**

Our Bid Protest Regulations provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the agency pay the protester the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e) (2001). We will make such a recommendation where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, B-243785.2, June 10, 1991, 91-1 CPD ¶ 558 at 2. A protest is clearly meritorious when a reasonable agency inquiry into the protester's allegations would show facts disclosing the absence of a defensible legal position (i.e., not a close question). As a general rule, so long as an agency takes corrective action in response to a protest by the due date of its protest report, we regard such action as prompt and decline to consider favorably a request to recommend reimbursement of protest costs. J.A. Jones Mgmt. Servs., Inc.--Costs, B‑284909.4, July 31, 2000, 2000 CPD ¶ 123 at 4. Our rule is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. Innovative Logistics Techniques, Inc.--Costs, B-289031.3, Feb. 4, 2002, 2002 CPD ¶ 34 at 4.

Basis for canceling a requirement

A contracting agency need only establish a reasonable basis to support a decision to cancel a request for quotations. Quality Tech., Inc., B-292883.2, Jan. 21, 2004, 2004 CPD para. 29 at 2. An agency’s lack of funding for a procurement provides a reasonable basis for cancellation, as agencies may not award contracts that exceed available funds. Quality Support, Inc., B-296716, Sept. 13, 2005, 2005 CPD para. 172 at 2. Here, the agency states that funds for the procurement at issue have been withdrawn and the solicitation has been cancelled, and has submitted documents showing that the funds are no longer available. Also see Geln/Mar Construction, Inc. B-298355, Aug. 3, 2006.

**Global Solutions Network, Inc. – B-299424 (April 2007)**

Cancellation is appropriate where an agency conducts a reassessment that suggests the solicitation may not reflect its needs, such that the agency is uncertain whether the requirement will exist in the future. Peterson-Nunez Joint Venture, B-258788, Feb. 13, 1995.

Sole source requirements require advance planning

**eFedBudget Corporation – B-298627 (Nov. 2006)**

Although the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for full and open competition in government procurements obtained through the use of competitive procedures, 41 U.S.C. sect. 253(a)(1)(A), CICA permits noncompetitive acquisitions in certain circumstances, such as when the services needed are available from only one responsible source. 41 U.S.C. sect. 253(c)(1). When an agency uses noncompetitive procedures under section 253(c)(1), it is required to execute a written J&A with sufficient facts and rationale to support the use of the cited authority. 41 U.S.C. sect. 253(f)(1)(A), (B); FAR sections 6.302-1(d)(1), 6.303, 6.304. Our review of an agency’s decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. As a result, an agency’s decision in this regard will not be questioned by our Office so long as the J&A sets forth reasonable justifications for the agency’s actions. Lockheed Martin Sys. Integration--Owego, B-287190.2, B‑287190.3, May 25, 2001, 2001 CPD para. 110 at 10. Moreover, an agency has broad discretion to determine its needs and the method for accommodating those needs. Digital Controls Corp., B-255041.2, Mar. 28, 1994, 94-1 CPD para. 219 at 12. Use of noncompetitive procedures is not justified, however, where the agency created the need for the sole-source award through a lack of advance planning. 41 U.S.C. sect. 253(f)(5)(A).

Under CICA, 41 U.S.C. sect. 253(a)(1)(A), contracting officers have a duty to promote and provide for competition and to provide the most advantageous contract for the government. In their role of promoting and providing for competition, contracting officials must act affirmatively to obtain and safeguard competition; they cannot take a passive approach and remain in a noncompetitive position where they could reasonably take steps to enhance competition. VSE Corp., Johnson Controls World Servs., Inc., B-290452.3 et al., May 23, 2005, 2005 CPD para. 103 at 8; HEROS, Inc., B-292043, June 9, 2003, 2003 CPD para. 111 at 7; National Aerospace Group, Inc., B-282843, Aug. 30, 1999, 99-2 CPD para. 43 at 8. See also S. Rep. No. 98-50, at 18 (1984), reprinted in 1984 U.S.C.C.A.N. 2174, 2191 (stating that CICA requires agencies to “make an affirmative effort to obtain effective competition”).

CICA further provides that under no circumstance may noncompetitive procedures be used due to a lack of advance planning by contracting officials. 41 U.S.C. sect. 253(f)(5)(A); Signals & Sys., Inc., B-288107, Sept. 21, 2001, 2001 CPD para. 168 at 9. Although the requirement for advance planning is not a requirement that such planning be successful or error-free, see Abbott Prods., Inc., B-231131, Aug. 8, 1988, 88-2 CPD para. 119, at 8, the advance planning must be reasonable. Signals & Sys., Inc., supra, at 13. Here, we conclude that the agency has failed to comply with the CICA mandate for reasonable advance planning.

Under the circumstances here--where the agency ceded substantial rights in the software created by RGII under the development contract, and where there is no indication that the agency has explored the possibility of acquiring additional rights from RGII--we think that, to satisfy its obligation to engage in reasonable advance planning and to promote competition, the agency was required to consider whether the costs associated with a purchase of additional license rights, or some other alternative, outweigh the anticipated benefits of competition. See HEROS, Inc., supra, at 7, 10.

**Worldwide Language Resources – B-296984 (Nov. 2005)**

With regard to the requirement for advance planning, our Office has recognized that such planning need not be entirely error-free or successful. See, e.g., HEROS, Inc., B-292043, June 9, 2003, 2003 CPD para. 111 at 6; New Breed Leasing Corp., B-274201, B‑274202, Nov. 26, 1996, 96-2 CPD para. 202 at 6; Sprint Communications Co., L.P., B‑262003.2, Jan. 25, 1996, 96-1 CPD para. 24 at 9. As with all actions taken by an agency, however, the advance planning required under 10 U.S.C. sect. 2304, must be reasonable. In enacting CICA, Congress explained: “Effective competition is predicated on advance procurement planning and an understanding of the marketplace.” S. Rep. No. 50, 98th Cong., 2d Sess. 18 (1984), reprinted in 1984 U.S.C.C.A.N. 2191.The record reflects that the contracting officer sought support from OSD in preparing the J&A for “only one responsible source,” pursuant to 10 U.S.C. sect. 2304(c)(1) and FAR sect. 6.302-1, and expressly informed OSD that it would be required to conduct market research certifying that OSS was the only responsible source capable of providing the BBA-SME requirement without significant duplication of cost and loss of schedule.AR, Tab 12.b., E-mail, Subject: OSS-BBA Extension 4‑22‑05, Apr. 22, 2005. In support of this contention the contracting officer maintained that OSD conducted market research, considered the capabilities of other firms, and certified that OSS was the only capable source. As argued by the Air Force, we have held that an agency has the authority under the urgency exception to full and open competition to limit the procurement to the only firm it reasonably believes can properly perform the work in the available time. See, e.g., Total Industry & Packaging Corp., B-295434, Feb. 22, 2005, 2005 CPD para. 38 at 2; McGregor Mfg. Corp., B-285341, Aug. 18, 2000, 2000 CPD para. 151 at 6. In these cases, unlike the case at hand, however, we have upheld the agency’s decision to limit the procurement to a single source only where the decision was made after considering the capabilities of other firms and the agency reasonably decided to exclude them from the competition based on their capabilities.

Market Research

**Information Ventures B-294267 (Oct. 2004)**

Information Ventures protests the adequacy of the market research conducted by the agency to determine not to set aside the acquisition, arguing that a proper market survey should have included researching the Central Contractor Registration (CCR) database, and not just the GSA database, and obtaining the input of the Small Business Administration (SBA), the Interior small business representative, and the ODPHP small business representative. While we have recognized that the use of any particular method of assessing the availability of small businesses is not required, and measures such as prior procurement history, market surveys, and advice from the agencies small business specialist and technical personnel may all constitute adequate grounds for a contracting officers decision not to set aside a procurement, American Imaging Servs., Inc. , B246124.2, Feb. 13, 1992, 92-1 CPD 188 at 3, the assessment must be based on sufficient facts so as to establish its reasonableness. Rochester Optical Mfg. Co. , supra , at 5.

**(Involvement of SBA rep.)** FAR 19.202-2 generally requires contracting officers, before issuing solicitations, to make every reasonable effort to find additional small business concerns, which should include contacting the agency SBA procurement center representative, or if there is none, the SBA. Likewise, FAR 19.202 requires contracting officers to consider recommendations of the agency Director of Small and Disadvantaged Business Utilization, or the Directors designee, as to whether a particular acquisition should be set aside for small businesses, while FAR 19.501(e) states that the contracting officer shall review acquisitions to determine if they can be set aside for small business, giving consideration to the recommendations of agency personnel having cognizance of the agencies small business programs. Again, however, the contracting officer failed to utilize these available sources of information concerning potential small business participation. Since the contracting officer did not assess the capability of the small business concerns that had responded to the presolicitation notice, and otherwise did not make a reasonable effort to survey the market to ascertain whether there was a reasonable expectation that two or more responsible small business concerns would submit bids at fair market prices, before issuing the solicitation on an unrestricted basis, we find that the determination that there was no reasonable expectation of receiving offers from at least two responsible small business concerns was not based on sufficient facts to establish its reasonableness.

**Information Ventures – B-293541 (April 2004)**

**(short response period not sufficient)** Where agency contemplated a sole source purchase under simplified acquisition procedures, and its December 31, 2003, announcement of the intended award established a response period for capability statements from potential sources of 1 ½ business days (until January 5, 2004), the agency did not provide potential sources with a reasonable opportunity to respond, particularly where the record does not show a need for the short response period and the agency knew of the requirement well in advance of issuing the notice.

**Information Ventures – B-290785 (Aug. 2002)**

Under the Federal Acquisition Streamlining Act of 1994 (FASA), simplified acquisitions--used to purchase supplies and services, including construction, research and development, and commercial items, the aggregate amount of which does not exceed $100,000 (Federal Acquisition Regulation (FAR) §§ 2.101, 13.000, 13.003(a))--are excepted from the general requirement that agencies obtain full and open competition through the use of competitive procedures when conducting procurements.[[2]](#footnote-2)[1] See 41 U.S.C. §§ 253(a)(1)(A), (g)(1), and (g)(4) (2000). These simplified procedures are designed to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors. To facilitate these stated objectives, FASA only requires that agencies obtain competition to the maximum extent practicable when they utilize simplified acquisition procedures. 41 U.S.C. § 427(c); FAR § 13.104; Bosco Contracting, Inc., B-270366, Mar. 4, 1996, 96-1 CPD ¶ 140 at 2. Consistent with the maximum-extent-practicable standard, an agency may solicit from a single source if the contracting officer determines that, under the circumstances of the contract action, only one source is reasonably available. FAR § 13.106-1(b)(1). As a general rule, we will not object to a sole-source award unless it is shown that the agency acted without a reasonable basis. Aleman & Assocs., Inc., B-287275, May 17, 2001, 2001 CPD ¶ 93 at 3; see also Ion Exchange Prods., Inc., B-218578, B-218579, July 15, 1985, 85-2 CPD ¶ 52 at 4. We have reviewed the record here and find the agency's actions unobjectionable. Information Ventures has given us no basis to question the agency's expressed needs, no basis to find that the agency should have conducted more extensive market research under the circumstances, no basis to conclude that it could have met the government's needs, and no basis to conclude that the agency acted without a reasonable basis in awarding this sole-source contract. See Litton Computer Servs., B-256225.4, B-256225.5, July 21, 1994, 94-2 CPD ¶ 36 at 6 (proposed sole-source award was unobjectionable where protester's responses to notices consisted of minimal information and failed to establish that the firm could met the agency's requirements; as a result, the agency reasonably determined that only one firm could met the requirements).

Cost Realism Analysis

**Padco – B-289096.3 (May 2002)**

When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated cost of contract performance should not be considered controlling since, regardless of the costs proposed by an offeror, the government is bound to pay the contractor its actual and allowable costs. Consequently, the agency must perform a cost realism analysis to determine the realism of the offeror's proposed costs and to determine what the costs are likely to be under the offeror's technical approach, assuming reasonable economy and efficiency. Federal Acquisition Regulation (FAR) § 15.404-1(d)(1), (2); The Futures Group Int'l, B‑281274.2, Mar. 3, 1999, 2000 CPD ¶ 147 at 3. Proposed costs should be adjusted when appropriate based on the results of the cost realism analysis. FAR § 15.404‑1(d)(2)(ii). Our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based. The Futures Group Int'l, supra.

Past Performance

**Singleton Enterprises – B-298576 (Oct. 2006)**

**(past performance of subcontractors)** Solicitation provision stating that under the solicitation’s past performance evaluation factor the agency would evaluate the “offeror’s actions under previously awarded contracts” created a latent ambiguity where in addition to the agency’s intended meaning that only the offeror’s corporate past performance would be considered, the solicitation was reasonably read by the protester as providing for the evaluation of the past performance of the proposed subcontractors that will perform major or critical aspects of the work required. Singleton argues that the agency “did not properly evaluate Singleton’s past performance by failing to take into account past performance information regarding Singleton’s subcontractor who would perform major or critical aspects of the solicitation’s requirements.” Protest at 4. In this regard, the protester points out that Federal Acquisition Regulation (FAR) sect. 15.305(a)(2)(iii) states that a past performance “evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.” The protester also points out that the RFP did not state that the agency would not consider the past performance of proposed subcontractors in evaluating past performance, and that our Office has previously found that the past performance of a proposed subcontractor may be considered in determining whether an offeror meets experience or past performance requirements in a solicitation where the solicitation does not expressly prohibit its consideration. Protester’s Comments at 1, 3; see The Paintworks, Inc., B‑292982; B‑292982.2, Dec. 23, 2003, 2003 CPD para. 234 at 3.

**Capps Shoe Company – B-298196 (July 2006)**

The evaluation of past performance, including the agency’s determination of the relevance and scope of the offeror’s performance history to be considered, is a matter of agency discretion, which we will not find improper unless unreasonable or inconsistent with the solicitation criteria or with procurement statutes or regulations. National Beef Packing Co., B‑296534, Sept. 1, 2005, 2005 CPD para. 168 at 4. An agency’s past performance evaluation may be based on a reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency’s interpretation of the underlying facts, and the protester’s mere disagreement with the agency’s judgment is not sufficient to establish that the agency acted unreasonably. General Dynamics-Ordnance & Tactical Sys., B-295987, B-295987.2, May 20, 2005, 2005 CPD para. 114 at 7.

**East West-Industries – B-297391.2 (July 1996)**

**(relevance)** Evaluation of protester’s proposal under past performance evaluation factor was unobjectionable where agency reasonably concluded that only one of four prior contracts was of a magnitude and complexity essentially the same as the solicitation’s, and thus met the solicitation’s definition of very relevant; two of the remaining contracts were reasonably evaluated as only relevant and semi-relevant due to lesser magnitudes of effort, and the fourth contract was reasonably evaluated as not relevant because it was completely unrelated to the solicitation’s work. Evaluation of awardee’s past performance and risk was reasonable, notwithstanding protester’s identification of alleged quality, safety, and delivery issues, where contracting officials did not have personal knowledge of majority of the issues, and fully considered those of which they were aware in finding no negative impact on awardee’s past performance rating. The evaluators assigned East-West’s four contracts relevance ratings of very relevant, relevant, semi‑relevant, and not relevant, resulting in an overall very good/significant confidence rating. Performance of a prior contract was considered very relevant if it involved essentially the same requirements, relevant if it involved most of the requirements, semi-relevant if it involved some of the requirements, and not relevant if performance did not involve any significant aspects of the current requirements. **(Also see B-298099.4, Overlook System Technologies, Inc.).**

**Clean Harbors Environmental Services – B-296176.2 (Dec. 2005)**

**(relevance)** Protest that past performance evaluation was unreasonable is sustained where record shows that agency made no attempt during evaluation to assess the relevance of the offerors’ prior contracts, notwithstanding solicitation term requiring such an assessment.  As a general matter, the evaluation of an offeror’s past performance is a matter within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. However, we will question an agency’s evaluation conclusions where they are unreasonable or undocumented. OSI Collection Servs., Inc., B-286597, B-286597.2, Jan. 17, 2001, 2001 CPD para. 18 at 6. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation’s evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination of the offerors’ past performance. Id. Significantly, there is no indication--in the RSSD or elsewhere in the record--that the agency went beyond the questionnaires and considered the relevance of the offerors’ past performance references. This is problematic because, as noted, the RFP provided for consideration of the relevance of the past performance information received, RFP at 137, and the two references received for Clean Venture--from the Smithsonian Institution and the Washington Metropolitan Area Transit Authority--involved substantially smaller, less complex contracts than the current requirement.

**Frontier Systems Integrators – B-298872.3 (Feb. 2007)**

Protest that awardee’s proposal should have been rated “unacceptable” for failing to comply with solicitation requirement that offerors submit “at least” three relevant past performance questionnaires is denied where past performance was evaluated according to a pass/fail evaluation scheme and was therefore ultimately a matter of responsibility and the protester did not challenge the agency’s affirmative determination of responsibility with respect to the awardee. Where an agency utilizes a lowest price technically acceptable source selection process, the FAR provides that past performance need not be an evaluation factor at all. However, when it is included, it cannot be utilized for the purpose of making a “comparative assessment”; rather, past performance is to be determined solely on a pass/fail basis. FAR sect. 15.101-2. Our Office has long held that pass/fail evaluations of capability issues, such as past performance, are tantamount to responsibility determinations, with the result that a rating of “unacceptable” in these areas is the same as a determination of nonresponsibility. See, e.g., Phil Howry Co., B-291402.3, B-291402.4, Feb. 6, 2003.

An agency may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm’s proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror. Perini/Jones, Joint Venture, B-285906, Nov. 1, 2000, 2002 CPD para. 68 at 4. The relevant consideration is whether the resources of the parent or affiliated company--its workforce, management, facilities, or other resources--will be provided or relied upon for contract performance, such that the parent or affiliate will have meaningful involvement in contract performance.

Timely Submission of protests

**Celadon Laboratories – B-298533 (Nov. 2006)**

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. Peacock, Myers & Adams, B-279327, Mar. 24, 1998, 98-1 CPD para. 94 at 3-4; Professional Rehab. Consultants, Inc., B-275871, Feb. 28, 1997, 97-1 CPD para. 94 at 2. Under these rules, a protest such as Celadon’s, based on other than alleged improprieties in a solicitation, must be filed not later than 10 days after the protester knew or should have known of the basis for protest, whichever is earlier. 4 C.F.R. sect. 21.2(a)(2) (2006). An exception to this general rule is a protest that challenges “a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required.” Id. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the protest must be filed not later than 10 days after the date on which the debriefing is held. Id.

**VES Corporation; Johnson Controls – B-209452.3 (May 2005)**

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules require that a protest based on other than alleged improprieties in a solicitation be filed no later than 10 calendar days after the protester knew or should have known its basis for protest, whichever is earlier. 4 C.F.R. 21.2(a)(2) (2005). We have previously recognized that publication in the Commerce Business Daily (CBD) of an agency's intent to enter into a sole-source contract constitutes constructive notice of that proposed contract action. See Fraser-Volpe Corp. , B-240499 et al. , Nov. 14, 1990, 90-2 CPD 397 at 3; S.T. Research Corp. , B sources submit an expres-232751, Oct. 11, 1988, 88-2 CPD 342 at 1. In those cases where the CBD requested that potential sion of interest and demonstration of capabilities, we have found that the protester's timely filing of the requested submission to the agency was a prerequisite to timely protesting to our Office. Fraser-Volpe Corp. , supra . In situations where no such request for responses from potential sources was made, we have found that a protest of the proposed sole-source award must be filed within 10 days of the CBD announcement. S.T. Research Corp. , supra . Similarly, we have found that publication on the FedBizOpps Internet site (which has replaced the CBD) puts prospective contractors on constructive notice of contract awards, such that protests of the awards must be filed within 10 days of publication. CBMC, Inc. , B-295586, Jan. 6, 2005, 2005 CPD 2 at 2.

Failure by Protestor to express timely interest in a requirement following issuance of a presolicitation notice

**Sabreliner Corporation – B-288030 (Sept. 2001)**

As an initial matter, the agency argues that Sabreliner's protests should be dismissed as untimely because Sabreliner did not respond to Note 22 included in the CBD notice. Note 22 gives potential sources 45 days to submit expressions of interest showing their ability to meet the agency's stated requirements. Our Office generally requires that a protester respond to the CBD notice with a timely expression of interest in fulfilling the agency's requirement, and must receive a negative response as a prerequisite of filing a protest challenging an agency's sole-source decision. Magnavox Elec. Sys. Co., B-258037, B-258037.2, Dec. 8, 1994, 94-2 CPD ¶ 227 at 6.

**Forensic Quality Services-International – B-299723 (May 2007)**

As a prerequisite to filing a protest against a sole source requirement, a protestor must have submitted a timely expression of interest in response to the published notice and the agency must have rejected its proposal and proceeded with the noncompetitive procurement. A protest challenging the sole source and related issues prior to rejection is considered premature.

Guaranteed minimum amount under IDIQ contracts

**CW Government Travel – B-295530 (March 2005)**

An agency may use an ID/IQ contract where it cannot predetermine, above a specified minimum, the precise quantity of supplies or services that will be required during the contract period and where it is inadvisable for the government to commit itself for more than a minimum quantity. Federal Acquisition Regulation (FAR) 16.504(b); Aalco Forwarding, Inc., et al. , B-277241, B-277241.15, Mar. 11, 1998, 98-1 CPD 87 at 6. Because an ID/IQ contract does not specify the precise work that will be provided and is not a requirements contract, a specific guaranteed amount or quantity is required as consideration to bind the parties. To ensure that a contract is binding, the minimum quantity must be more than a nominal amount, but should not exceed the amount the agency is fairly certain to order. FAR 16.504(a). There is no "magic number" that the FAR or our decisions set as adequate consideration for a contract; instead, the determination of whether a stated minimum quantity is "nominal" must consider the nature of the acquisition as a whole. Carr's Wild Horse Ctr. , B-285833, Oct. 3, 2000, 2000 CPD 210 at 3; ABF Freight Sys., Inc. , et al. , B-291185, Nov. 8, 2002, 2002 CPD 201 at 4; Sea-Land Serv., Inc. , B-278404, et al. , Feb. 9, 1998, 98-1 CPD 47 at 12. In light of the purpose of FAR 16.504(a) to establish a binding minimum--in effect, consideration for the ID/IQ contract--we do not believe that a contract's minimum order establishes the minimum guarantee or serves as a firm target against which the reasonableness of the minimum guarantee must be evaluated. Instead, the minimum guarantee must be evaluated in the context of all of the specific facts and circumstances of the procurement.

**Interagency Agreements – Obligation of Funds under an IDIQ – B-308969 (May 2007)**

“When an agency executes an indefinite-quantity contract such as an IDIQ contract, the agency must record an obligation in the amount of the required minimum purchase. . . . At the time of award, the government has a fixed liability for the minimum amount to which it committed itself. *See* FAR 16.504(a)(1) (specifying that an IDIQ contract must require the agency to order a stated minimum quantity). An agency is required to record an obligation at the time it incurs a legal liability. 65 Comp. Gen. 4, 6 (1985); B-242974.6, Nov. 26, 1991. Therefore, for an IDIQ contract, an agency must record an obligation for the minimum amount at the time of contract execution.

Use of Appropriations to purchase mementoes to award to federal employees or guest speakers

**Matter of INS service-Appropriations – Purchase of Medals – B-280440 (Feb. 1999)**

An appropriation is available only for the objects for which the appropriation was made. 31 U.S.C. Sec. 1301(a). When the appropriation in question does not specifically authorize the proposed purchase, the standard for measuring the propriety of the expenditure is the "necessary expense" rule. 66 Comp. Gen. 356, 359 (1987). An expenditure is permissible if it is reasonably necessary to carry out an authorized function or will contribute materially to the effective accomplishment of that function, and is not otherwise prohibited by law. The application of the necessary expense rule, in the first instance, is a matter of agency discretion. Our inquiry focuses on whether the relationship of the proposed expenditure to the appropriation sought to be charged is so attenuated as to take the proposed expenditure beyond the agency's legitimate range of discretion. See B-247563, B-247563.2, May 12, 1993. Items such as the commemorative medals at issue here are often viewed as gifts or souvenirs of a personal nature, for which appropriations, generally, are not available. See generally 70 Comp. Gen. 248, 250-52 (1991); 57 Comp. Gen. 385, 386-87 (1978). Such items, while clearly personal in some contexts, nevertheless may advance legitimate agency goals and policies in other contexts, particularly where the items have no independent intrinsic value to the recipients.

**Matter of FDA – Use of Appropriations for purchasing buttons – B-257488 (Nov. 1995)**

Under a “necessary expense” analysis, where the item, such as the buttons at issue here, has no intrinsic value to its recipient, and is designed solely to assist in achieving internal agency management objectives, the agency must show that the item will contribute to the agency’s mission. The Govt. Employees’ Incentive Awards Act, 5 U.S.C. Secs. 4501-4506, authorizes agency heads to “pay a cash award to, and incur necessary expenses for the honorary recognition” of, federal employees. 5 U.S.C. Sec. 4503.

Clarifications vs. Discussions

**Dyncorp International LLC vs. M1 Support Services (US. Ct. of Federal Claims)**

**Standing to bring the suit**: As a threshold jurisdictional matter, the plaintiff in a bid protest must show that it has standing to bring the suit. Info. Tech. & Applications Corp. v. UnitedStates, 316 F.3d 1312, 1319 (Fed. Cir. 2003). This may be accomplished by demonstrating that the plaintiff was an actual bidder and that it was prejudiced by the award to the successful offeror. Id. (citing Am. Fed’n of Gov’t Employees v.United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001)). Plaintiff again bears the burden of proof, and must “show that there was a ‘substantial chance’ [plaintiff] would have received the contract award but for the [government’s] errors in the bid process.”

**Clarifications vs. Discussions:** According to FAR 15.306(c), “[a]gencies shall evaluate all proposals, and, if discussions are to be conducted, establish the competitive range.” 48 C.F.R. § 15.306(c). When an agency decides not to hold discussions, a competitive range is neither required nor permitted by FAR 15. Clarifications, as a term of art in negotiated procurements, are defined as “limited exchanges, between the Government and offerors, that may occur (discretionary) when award without discussions is contemplated[, in which case] offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror’s past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond as well as correction of an obvious mathematical error or a mathematical error that raises the offeror’s price) or to resolve minor or clerical errors.” 48 C.F.R. § 15.306(a). All contractors and prospective contractors shall be treated fairly and impartially but need not be treated the same. Upon review of the relevant FAR provisions, the court concludes that a procuring agency has the discretion to decline to enter into clarifications with an offeror, even if the agency has engaged in clarifications with another offeror. Discussions, on the other hand, are “exchanges . . . between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal.” Id. § 15.306(d). “The acid test for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal.” Priority One Servs., Inc., B-288836, B288836.2, 2002. **Also see Global Analytic Information Technology Services, Inc. B-298840.2, Feb. 6, 2007.**

**Responsiveness vs. Responsibility:** GAO decisions define responsiveness items as “information affecting the legal obligation of the contractor to perform the contract and provide the goods or services called for” and define responsibility items to be “collateral data, such as information regarding a bidder’s ability”. [m]atters of bid responsiveness must be discerned solely

by reference to the materials submitted with the bid and facts available to the government at the time of bid opening. However, responsibility determinations are made at the time of award. A bidder may present evidence subsequent to bid opening but prior to award to demonstrate the bidder’s responsibility.

Reasonableness of attorney and legal assistant fees

**CourtSmart Digital Systems, Inc. – B-292995.7 (Mar. 2005)**

Where the contracting agency challenges the reasonableness of hourly rates claimed for outside legal services for both attorney and legal assistant fees, GAO will recommend reimbursement of actual costs claimed to the extent relevant evidence establishes that the actual costs reflect customary rates charges for similar services; to the extent customary rates for costs claimed are not established, GAO will recommend reimbursement of a portion of the costs by applying rates that the record establishes as customary rates charged for similar services. The amount claimed may be recovered to the extent that the claim is adequately documented, and is shown to be reasonable. Id. We will determine the reasonableness of hourly rates for legal fees by considering the customary fee charged for similar work in the community, as well as the experience, reputation and ability of the practitioner. Id. at 7; KPMG Peat Marwick, LLP--Costs , B-259479.4, July 25, 1996, 962CPD 43 at 5 (attorneys' fees); E&R, Inc.--Costs , B255868.2, May 30, 1996. $475/hr. was determined to be a reasonable fee for an attorney in DC with 30 yrs. experience. $80/hr. was considered reasonable for a legal assistant in DC. Both were supported with relevant evidence.

Requirement for SB Set-asides

**Information Ventures, Inc. – B-400604 (Dec. 22, 2008)**

The determination as to whether there is a reasonable expectation of receiving offers from two or more small businesses that are capable of performing the required work is a matter of business judgment within the contracting officer’s discretion that we will not disturb absent a showing that it was unreasonable. ViroMed Labs., B-298931, Dec. 20, 2006, 2007 CPD para. 4 at 3-4; Information Ventures, Inc., B-279924, Aug. 7, 1998, 98-2 CPD para. 37 at 3. While the use of any particular method of assessing the availability of capable small businesses is not required, an analysis of factors such as the prior procurement history, the recommendations of appropriate small business specialists, and market surveys that include responses to sources sought announcements, may all constitute adequate grounds for a contracting officer’s decision not to set aside a procurement. Quality Hotel Westshore; Quality Inn Busch Gardens, B-290046, May 31, 2002, 2002 CPD para. 91 at 3-4. This protest was denied since NIAID demonstrated that the agency was not likely to receive proposals from at least 2 small businesses capable of performing the required services and the protester failed to support his allegations.

**Delex Systems, Inc. – B-400403 (Oct. 8, 2008)**

The set-aside provisions of Federal Acquisition Regulation (FAR) § 19.502-2(b) apply to competitions for task and delivery orders issued under multiple-award contracts. The Rule of Two is intended to implement the Small Business Act language in 15 U.S.C. § 644(a) (thus based on statute) requiring that small businesses receive a “fair proportion of the total purchases and contracts for property and services for the Govt.” FAR 19.502-2(b) applies to task and delivery order competitions among multiple-award contract-holders.  Accordingly, the [government] is required to limit the competition for these delivery orders to small businesses if it concludes that it has a reasonable expectation of receiving offers from at least two responsible small business concerns, and concludes that award can be made at a fair market price. While the use of any particular method of assessing the availability of firms is not required, measures such as prior procurement history, market surveys, and advice from the appropriate small business specialists may all constitute adequate grounds for a CO’s decision to set aside, or not to set aside, a procurement. The assessment must be based on sufficient facts so as to establish its reasonableness.

Effect of Bankruptcy on Responsibility Determination (FAR 9.1)

A bankruptcy filing does not, in and of itself, mandate a determination that the contractor is not responsible.  See, e.g., Harvard Interiors Manufacturing Co., B-247400, 1992 U.S. Comp. Gen. LEXIS 532 at \*17 (May 1, 1992); Hugo’s Cleaning Service, Inc., B-228396.4, 1988 U.S. Comp. Gen. LEXIS 813 at \*4 (Jul. 27, 1988); and Security America Services, Inc., B-225469, 1987 U.S. Comp. Gen. LEXIS 1696 at \*4 (Jan. 29, 1987) (“[T]he mere fact that a contractor is undergoing bankruptcy does not require a finding of nonresponsibility.”).  Rather, even when a prospective contractor has filed for bankruptcy protection, the determination of responsibility must be “based upon the circumstances of each procurement which exist at the time the contract is to be awarded and the nature of the procurement.”  See Harvard Interiors Manufacturing Co., B-247400 at \*4.

1. [↑](#footnote-ref-1)
2. [↑](#footnote-ref-2)