

Snatching Defeat from the Jaws of Victory

Common Errors Made by Government Contractors During the Bidding Process

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Introductions

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Background

Key Aspects of the Procurement Process

Key Solicitation Sections

Section B – Supplies or Services and Prices/Costs (the “Schedule,” with Contract Line Item Numbers)

Section C – Description/Specifications/Statement of Work (SOW)

Section I – Contract Clauses

Section K – Representations, Certifications, and Other Statements of Offerors

Section L – Instructions, Conditions and Notices to Offerors

Section M - Evaluation Factors for Award

Case Studies

Common Mistakes to Avoid

Formatting and Clerical Errors

Def. Sols. Grp., LLC, [B-420353](#), Feb. 15, 2022, 2022 CPD ¶ 124

- RFP listed “administrative requirements” and stated “[i]f an offeror is considered to not meet or adhere to any part of the administrative requirements of the RFP ... the offeror’s proposal will not be further evaluated or considered for award.”
- Contractor submitted DD Form 254 as an image pasted into a Word document, whereas RFP required submission as a PDF.
- GAO denied the protest, explaining that it amounted to a challenge to the terms of the RFP which should have been filed prior to proposal submission.

Ecolog Deutschland GmbH, [B-421531](#), May 9, 2023, 2023 CPD ¶ 114

- RFP required proposed personnel to have 3 years of experience as an assistant manager or a manager of a DOD dining facility.
- Agency rejected incumbent Contractor’s proposal for stating personnel had been assistant manager since 2021.
- GAO rejected Contractor’s argument that Agency knew this was a clerical error because of Contractor’s incumbent status. Burden was on Contractor to submit well-written proposal.

More Failures to Submit A Well-Written Proposal

The Lioce Grp., Inc., [B-421582](#), July 5, 2023, 2023 CPD ¶ ____

- RFQ was set aside for small businesses.
- Most of proposal was in name of SB Contractor, but proposal also attached a “GSA Contractor Team Arrangement (‘CTA’)” listing a large business.
- Agency rejected the proposal as creating an ambiguity regarding Contractor’s size. Contractor tried to explain that the CTA document was included by accident and the large business was just a subcontractor, not a GSA CTA teaming partner.
- GAO denied the protest: “It is the vendor’s responsibility to submit an adequately written quotation which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency” and “agencies are not required to piece together general statements and disparate parts of a protester’s quotation or proposal to determine the protester’s intent.”

Wright Tool Co., [B-420553](#), July 20, 2022, 2022 CPD ¶ 188

- Agency reasonably rejected proposal that “propose[d] 150 day delivery on the first delivery order” and only promised to “strive to meet the 90 day delivery” timeline required by solicitation.

Third-Party Registration/Certification Defects

CGS-ASP Sec. JV LLC, [B-420497](#), Feb. 18, 2022, 2022 CPD ¶ 39

- RFP included FAR 52.204-7, requiring registration in SAM at the time of proposal submission.
- RFP also expressly stated: “Any offeror whose registration is not active in SAM at the time of proposal submission will be excluded from the process and their proposals will not be evaluated.”
- Despite multiple attempts, Contractor was not able to register in SAM before proposal submission.
- GAO denied protest challenging Agency’s exclusion of proposal from competition.
- FAR Part 14 would have permitted a bidder to fix the issue post-award for an IFB, but this was a negotiated procurement (an RFP) to which FAR Part 14 did not apply. The solicitation’s terms governed.

Metrostar Sys., Inc., [B-416377.5](#), [B-416377.8](#), Apr. 2, 2020, 2020 CPD ¶ 135*

- RFP required offeror to have ISO 9001 certification.
- Agency awarded to Contractors whose proposals relied on certifications of corporate affiliates.
- GAO sustained protest of the awards because Contractors’ proposals did not show that the affiliates’ certifications applied to the Contractor’s systems at the time of proposal submission.

* Chris Griesedieck represented the protester in this matter.

Improperly Taking Credit for Affiliates' Performance

Metrostar Sys., Inc., [B-416377.5](#), [B-416377.8](#), Apr. 2, 2020, 2020 CPD ¶ 135

- General GAO rule: “An agency properly 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.”
- “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.”
- GAO sustained protest that awardee Contractor’s proposal failed to evidence meaningful involvement for two of three affiliates upon which it relied for past performance/corporate experience.

KGJJ Eng’g Sols., LLC v. United States, [161 Fed. Cl. 556](#) (2022)

- Court did not apply GAO rule, instead stating that: “in general, an agency is free to consider the experience of an offeror’s parent, subsidiary, or affiliated companies unless there is an express exclusion in the solicitation.”
- Court sustained protest of awardee Contractor’s reliance on sister company experience because solicitation expressly excluded experience from any entity other than the offeror.

Unmitigated Organizational Conflicts of Interest

Mandex, Inc., [B-421664 et al.](#), Aug. 16, 2023, 2023 CPD ¶ ___

- Contractor was competing for award of an engineering support task order.
- Two weeks before submitting that proposal, it received another task order for management support of the same government program.
- GAO sustained protest of Agency’s issuance of the engineering task order to Contractor.
 - Agency’s OCI investigation unreasonably focused on whether Contractor had begun “substantive” performance of the management task order, rather than whether Contractor had access to competitively useful information.
 - Contractor’s declarations “focused on the protester’s specific allegations rather than whether [Contractor] employees more broadly had access to nonpublic competitively useful information” (i.e., whether a firewall had been in place).
- GAO also sustained protest on basis of an unmitigated impaired objectivity OCI.
 - Performance of management task order would involve providing input on Contractor’s work and performance under engineering task order.

Key Personnel or Materials No Longer Available

Sehlke Consulting, LLC, [B-420538](#), May 18, 2022, 2022 CPD ¶ 119

- GAO sustained protest of awardee Contractor’s proposal because agency had actual notice prior to award that key subcontractor personnel was resigning and leaving prior to performance.
 - GAO “has explained that offerors are obligated to advise agencies of material changes in proposed staffing, even after the submission of proposals” because “a firm may not properly receive award of a contract based on a knowing material misrepresentation in its offer.” *ASRC Fed. Data Network Techs., LLC*, [B-419519.4](#), Sept. 19, 2022, 2022 CPD ¶ 241 at 6.
 - GAO has applied this rule to other material changes outside of staffing, too.
- GAO noted in *Sehlke* that it was not bound by COFC’s decision in *Golden IT* (below).

Golden IT, LLC v. United States, [157 Fed. Cl. 680](#) (2022)

- COFC (Judge Solomson) rejected GAO rule requiring notice to agency of change in key personnel after submission of final proposal revision, in the absence of an RFP clause requiring it.
- COFC noted GAO’s rule “strikes the Court, candidly, as without legal basis and ‘unfair.’”

Issue Should Have Been Protested Sooner

US21, Inc., [B-419747](#), Apr. 27, 2021, 2021 CPD ¶ 180

- On December 8th, Agency issued solicitation seeking proposals by January 25th, but mistakenly listed it as a “Sources Sought” notice instead of a “Solicitation” on SAM.gov.
- On March 5th, Contractor discovered the mistake and requested that competition be reopened, but agency declined and made award on April 1st. Contractor did not protest until April 12th.
- GAO dismissed protest as untimely. Under GAO’s rules, protest should have been filed within 10 days of when Contractor knew or should have known of the issue (10 days from March 5th).

U.S. Marine Mgmt., Inc., [B-420468](#), Apr. 14, 2022, 2022 CPD ¶ 100*

- Contractor submitted three alternative proposals in response to solicitation.
- Agency deemed two technically unacceptable and Contractor withdrew its other proposal.
- As a result, Contractor was not an interested party to protest technical and price evaluation of awardee’s proposal.
- Moreover, Contractor’s protest that Agency had relaxed solicitation requirements for awardee was untimely. Although Contractor received a debriefing, it had never requested it, such that the “requested-and-required” debriefing exception to GAO’s 10-day rule did not apply.

* Venable represented the awardee in this protest.

Not Your Fault ... But You Lose Anyway

DirectViz Sols., LLC, [B-421598](#), [B-421598.4](#), July 19, 2023, 2023 CPD ¶ 175

- Contractor submitted 28-minute video proposal.
- Agency claimed it would not play past the 12th minute.
- GAO denied protest because “absent evidence of a deliberate agency attempt to exclude an offeror or a systemic failure to safeguard proposals, the loss of a proposal (or a portion thereof) does not entitle an offeror to relief.”
- GAO reasoned that this “arguably draconian result is justified by the unique circumstances arising in protests concerning lost information because the only means generally available to establish the content of allegedly lost information is for an offeror to reconstruct that information” and “allowing an offeror to establish the contents of its lost proposal after the closing date has passed is inconsistent with maintaining a fair competitive system.”

AttainX, Inc., [B-420313](#), Jan. 31, 2022, 2022 CPD ¶ 50

- Contractor properly emailed quotation to address specified in solicitation.
- Agency’s server quarantined email such that contracting personnel never received it.
- GAO denied protest based on same rule above.

Not Your Fault ... But You Lose Anyway, Cont'd.

Firebird Analytical Sols. & Techs., [B-420238](#), Jan. 10, 2022, 2022 CPD ¶ 156

- Contractor emailed proposal at 9pm the night before the deadline.
- Outlook stated: “Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server.”
- Contractor did not seek to confirm receipt with Agency prior to submission deadline.
- GAO denied protest: Contractor had not established Agency received its proposal.

RX Joint Venture, LLC v. United States, [140 Fed. Cl. 13](#) (2018)

- Agency asserted Contractor’s proposal contained scoring sheet and DVDs on subcontractors, but not DVD for Contractor itself.
- Contractor submitted affidavits swearing its proposal package contained the DVD.
- Court denied the protest, holding that uncorroborated affidavits did not overcome the presumption of regularity (i.e., the presumption that, absent clear and convincing evidence to the contrary, public officers have properly discharged their official duties).
- Court declined to adopt GAO’s “systemic failure” test, but concluded Contractor could not meet it, anyway, in part because it had only shown that its own DVD was missing, and not that Agency lost multiple items during the proposal evaluation process.

Strategies for In-House Counsel

Catching the Mistakes Early

“Keep Me Awake At Night” Questions

- Who tracks and compares our future business pipeline and in-flight proposals for OCIs? Does that person have an adequate system in place and sufficient resources (e.g., effective access to capture team and legal) to succeed?
- Who sets up and monitors our compliance with OCI firewalls? Does that system have adequate backups for vacations and succession-planning built-in?
- Are our capture and operations teams siloed? Do they communicate early and often to ensure alignment (e.g., pricing a proposal to win without a plan to ensure realistic staffing)?
- Who is on the team performing the “white glove” review of proposals? Are they trained and familiar with the details of GAO and COFC case law (e.g., would they know to demonstrate an affiliate’s involvement in performance if we are relying on the affiliate’s corporate experience)?
- How do we, as an organization, approach GAO’s “unfair,” can’t-win rule on notice to agencies of personnel changes on in-flight proposals?
- Do we have any preventive measures for reducing the “You Lose Anyway” scenarios (e.g., submitting proposals a day early and confirming receipt with the agency)?
- Do our capture team members know when to escalate to legal so that bid protest issues are spotted early enough that key arguments are not waived?

Develop a “Proposal and Protest Checklist”

- Work internally, or with bid protest counsel, to develop a Proposal and Protest Checklist.
- Tailor it to the biggest risk areas for your organization. Potential items include:
 - Review new opportunities for potential conflicts with existing contracts and in-flight proposals.
 - Screen new hires (especially proposed personnel) for conflicts.
 - Break down SOW/PWS requirements into logical pieces that map clearly to proposal sections.
 - White glove review should compare to all section L and M criteria (including interpretations provided in Q&As or discussions), consider key bid protest grounds competitors often raise, and freely engage legal for advice.
 - Have a “submit early and confirm receipt” plan in place and follow it where possible.
 - Build in milestones at which teams (capture, operations, legal) have check-ins to discuss procurement and surface potential bid protest grounds to raise or avoid.
 - Use Questions-and-Answers to clarify solicitation ambiguities strategically
 - Remind employees during the procurement of key bid protest deadlines (e.g., when a debriefing request must be made to ensure the debriefing exception applies).
 - Double-check even the most administrative of requirements (font size, page limits).

Questions?

Don't be shy!

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