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28 NO. 9 NASHCIBINIC-NL ¶ 48
28 No. 9 Nash & Cibinic Rep. NL ¶ 48

Nash & Cibinic Report
September 2014
The Nash & Cibinic Report
Competition & Award

¶ 48. POSTSCRIPT IX: THE SOURCE SELECTION DECISION

Ralph C. Nash

What's wrong with this picture? The evaluators give the protester very high ratings in its technical proposal for "a multitude of highly innovative processes and insightful technology trends." Because the probable costs and ratings of the other evaluation factors of the two competitors are essentially equal, this makes the protester the apparent winner of the competition. However, the Source Selection Authority chooses the competitor with the justification that these innovative processes will cost extra money and the budget situation is tight. To figure out what happened, the Government Accountability Office holds a hearing where the Chairman of the Source Evaluation Board testifies that a number of the significant innovations identified in the protester's proposal, which formed the basis for the protester's significant strengths, do not in fact require any implementation funding and that, for other innovations, funding was in fact included in the protester's cost proposal.

The case is *Gaver Technologies, Inc.*, Comp. Gen. Dec. B-409535, 2014 CPD ¶ 168, 2014 WL 2754616. The GAO granted the protest, stating:

> In sum, we find that the record fails to support the SSA's conclusion that the protester's proposal should not be given any meaningful credit for the multiple proposed innovative approaches for which implementation funding either was included in the protester's proposal or was not required. That is, while we recognize that the overall impact of the SEB's findings pertaining to the protester's proposed innovations is diminished when items with unknown implementation costs are excluded, we nonetheless fail to see a reasonable basis for the SSA to have given the innovations for which unknown implementation costs was not an issue—in particular, those pertaining to [information technology] security—essentially no weight. Accordingly, we sustain [the protester's] complaint pertaining to the evaluation of its proposed innovative approaches.

We will add this decision to our catalog of source selection decisions where the SSA did not adequately perform her job. See *The Source Selection Decision: What Is Rational?*, 17 N&CR ¶ 11, and *Postscripts* at 19 N&CR ¶ 36, 21 N&CR ¶ 2, 22 N&CR ¶ 64, 23 N&CR ¶ 37, 25 N&CR ¶ 47, 26 N&CR ¶ 2, 26 N&CR ¶ 22, and 26 N&CR ¶ 54. Although the SSA stated that she had extensive discussions with the SEB Chair, it seems apparent that she never dug into the costs of the innovations or whether they were covered by the protester's cost proposal. Thus, at the GAO hearing, the SEB Chair, in effect, directly demonstrated that the SSA's reasoning was flawed. It's hard to imagine anything worse happening to a selection official. The discussions between the two officials were clearly not sufficient.

Other Cases

Along the way, we found two other recent instances where source selection officials did not do an adequate job. In *Prism Maritime, LLC*, Comp. Gen. Dec. B-409267.2, 2014 CPD ¶ 124, 2014 WL 1745023, 56 GC ¶ 175, the SSA performed an "independent evaluation" of the technical proposals and concluded that the two competitors were

essentially equal in contrast to the initial evaluations that had rated the protester significantly higher than the winning contractor. The GAO stated the basic rule in this situation, as follows:

> [W]hile source selection officials reasonably may disagree with the evaluation ratings and results of lower-level evaluations, they are nonetheless bound by the fundamental requirements that their independent judgments be reasonable, consistent with the stated evaluation factors, and adequately documented. *AT&T Corp.*, B-299542.3, B-299542.4, Nov. 16, 2007, 2008 CPD ¶ 65 at 16; *AIU N. Am., Inc.*, B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39 at 8–9.

In this case, the SSA changed two of the technical ratings of the selected contractor from "unacceptable" to "acceptable." In the first instance, the "unacceptable" rating had been assigned because the offeror had not met the Request for Proposals' requirement that it name a cleared facility that would be used for the work. The evaluators concluded that its naming the protester's facility did not meet this requirement because it had no agreement with the protester to lease the facility and no basis for concluding that it could obtain a security clearance in the required 30 days. The SSA disagreed, but the GAO found the SSA's justification for the disagreement unreasonable. In the second instance, the "unacceptable" rating had been assigned because the offeror had not met the RFP's requirement that it provide detailed information on the personnel it would use to perform the work. The SSA disagreed, but the GAO found that the SSA's disagreement amounted to totally disregarding this requirement, which was unreasonable. In effect, the SSA in this instance did not follow the RFP evaluation scheme—a cardinal error. In addition to granting a protest for these errors, the GAO also found that the SSA had committed another cardinal mistake—he had used estimated cost rather than probable cost in making the selection decision for a cost-reimbursement contract. (The evaluators had performed a cost realism analysis.)

While it is not relevant to the mistakes made by this SSA, the decision contains a fascinating discussion of the impact of a low proposed target cost when the award will be made on a cost-plus-incentive-fee basis. The GAO stated:

> Finally, the agency appears to have ignored the fact that the contract is largely a CPIF-type contract. The central feature of a CPIF contract is a financial risk and reward mechanism to spur cost effective performance on the part of the contractor; the contractor will be rewarded for reducing costs, and penalized for cost overruns. *See*FAR § 16.405-1. The incentive aspect of a CPIF contract works only within a range defined by the minimum and maximum fee, and the FAR provides that the "fee adjustment formula should provide an incentive that will be effective over the full range of reasonably foreseeable variations from target cost." FAR § 16.405-1(b)(3). Most significantly, once an overrun (that is, a variation between an offeror's proposed target cost and the actual cost of performance) is so great that the fee has dropped to the minimum, the CPIF mechanism no longer functions to give the contractor an incentive to control costs. An unrealistically low proposed target cost risks putting the contractor (and the agency) in precisely this situation. While with other cost reimbursement vehicles, calculating a proposal's most probable cost may be all that is needed to address cost realism, in the CPIF context, a lack of realism in an offeror's proposed target cost can defeat the purpose of the incentive fee structure and independently cause performance risk. *Bechtel Hanford, Inc.*, B-292288, et al., Aug. 13, 2003, 2003 CPD ¶ 199*passim; see also, Hayes Int'l Corp.*, B-162387, 47 Comp. Gen 336*passim* (1967) (protest sustained where record showed that agency awarded contract despite the fact that it had determined that all proposals offered costs so unrealistically low that incentive fee mechanism would not function). Nothing in the record here shows that the agency gave any thought to these considerations.

Another decision finding a flawed source selection decision is *Navarro Research & Engineering, Inc.*, Comp. Gen. Dec. B-408248.6, 2014 CPD ¶ 164, 2014 WL 2582803. There the problem seems to have been insufficient communication between the SSA and the evaluators. In one instance, the SSA relied on a finding of the evaluators that there was a difference in part of the technical proposals, but the GAO found that they contained essentially the same language. (The SSA never read the language in the proposals.) In another instance, the SSA's testimony at the

GAO hearing conflicted with the testimony of the SEB Chair. In a third instance the SSA's testimony at the hearing conflicted with the source selection decision document. In all, this appears to be another case where the SSA did not do sufficient work during the selection process and was made to look rather incompetent at the GAO hearing.

Our Plea

There are several lessons to be learned from these decisions. First, while an SSA is free to disagree with the evaluators, the basis for the disagreement will be scrutinized in detail. This means that the conclusion of the SSA has to be justified fully to ensure that it is reasonable. Second, when these disagreements occur, the GAO is likely to hold a hearing to find out exactly what happened, and the reasoning of the SSA will be probed by challenging questions. If the SSA has not done a thorough job in analyzing the situation, she or he can be made to look incompetent—and the agency will lose the protest.

This leads to the third and most important lesson. On procurements of significant size, the SSA will probably be a person who is not a specialist in the niceties of the procurement process. Hence, the SSA may regard the source selection decision as a typical management decision where the manager uses common sense to arrive at the correct result. *This is not the way the procurement process works.* Source selection is subject to esoteric rules that are not always in accord with common sense. That means that the Contracting Officer or an agency lawyer must thoroughly brief these source selection officials to make sure that (1) they understand the rules, (2) they are willing to commit sufficient time to the process to make the decision their own, and (3) they understand that they may have to explain their decision under the stressful atmosphere of a hearing. Making source selection decisions is not a casual job—it demands time and effort to ensure that the decision will withstand scrutiny in the heat of the protest process. The job should be given only to people who are willing to devote that time and effort. *RCN*

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Contractor Claims

¶ 49. POSTSCRIPT: THE COURT OF FEDERAL CLAIMS FORFEITURE STATUTE

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In *The Court of Federal Claims Forfeiture Statute: Broad or Narrow?*, 28 NCRNL ¶ 20, we discussed the cases interpreting 28 USCA § 2514, calling for the forfeiture of fraudulent claims. We noted that there seem to be two lines of authority, one applying the statute only when the claim itself was tainted with fraud and another forfeiting all claims if the contract was tainted with fraud (even if the claims were bona fide claims for work performed). A recent decision of the Federal Circuit, *Veridyne Corp. v. U.S.*, No. 2013-5011, 2014 WL 3408567 (Fed. Cir. July 15, 2014), 56 GC ¶ 242, deals with this issue in a very obtuse way but seems to arrive at the latter position. We discussed the final