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**United States Government Accountability Office  
Washington, DC 20548**

## **SELECTED RECENT GAO BID PROTEST DECISIONS**

Updated August 2007

## Evaluation and Source Selection

- Source selection decisions are required to be documented

YORK Bldg. Servs., Inc., B-296948.2 et al., Nov. 3, 2005, 2005 CPD ¶ 202 (protest sustained where source selection official failed to document rationale for source selection consistent with differential weighting of technical evaluation factors and emphasis on technical superiority as required by solicitation).

Intercon Assocs., Inc., B-298282; B-298282.2, Aug. 10, 2006, 2006 CPD ¶ 121 (protest of agency's evaluation of proposals is sustained where the evaluation record is brief and the evaluation judgments were either factually incorrect, internally contradictory, or so cryptic that it is impossible to discern the evaluator's concerns, and the record shows that the agency, in evaluating protester's proposal and making its source selection decision, relied upon numerous unreasonable or unsupported evaluated weaknesses regarding the protester's proposal).

Magellan Health Servs., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81 (protest challenging adequacy of agency's "best value" source selection decision was sustained where there was insufficient information and analysis in the record, which included both a contemporaneous source selection document and a post-protest statement, to determine that the selection official's key conclusion of technical equality, notwithstanding the higher technical rating assigned to the protester's proposal, was reasonable).

Panacea Consulting, Inc., B-299307.4; B-299308.4, July 27, 2007, 2007 CPD ¶ 133 (protest that agency's evaluation and source selection decisions are unreasonable was sustained where the record provided to our Office in response to the protest did not contain sufficient information to support the evaluations or source selection decisions).

- Agency's evaluation must be reasonable and consistent with the stated evaluation criteria

Advanced Sys. Dev., Inc., B-298411, B-298411.2, Sept. 19, 2006, 2006 CPD ¶ 137 (protester's contention that the agency failed to evaluate price proposals for completeness is sustained where the record shows that: (1) the solicitation expressly advised that price proposals would be assessed for completeness, including an assessment of the traceability of price estimates, and required that offerors submit detailed pricing data showing the traceability of those estimates in a work breakdown structure; (2) the agency never performed the completeness review; and (3) it is reasonable to conclude that, had it not been compelled to structure its proposal to comply with this solicitation requirement, the protester could have employed a different approach to structuring its proposal which could have resulted in a lower price).

Sikorsky Aircraft Co.; Lockheed Martin Sys. Integration-Owego, B-299145 *et al.*, Feb. 26, 2007, 2007 CPD ¶ 45 (protest was sustained where (1) solicitation for combat search and rescue aircraft provided that cost/price would be calculated on the basis of Most Probable Life Cycle Cost, including both contract and operation and support (O&S) costs, (2) solicitation requested detailed information quantifying required maintenance for proposed aircraft, and (3) agency nevertheless normalized cost of maintenance when it calculated O&S costs, and thereby ignored potentially lower cost of asserted low maintenance helicopters; once offerors are informed of criteria against which proposals will be evaluated and award made, agency must adhere to those criteria).

L-3 Commc'ns Titan Corp., B-299317 *et al.*, Mar. 29, 2007, 2007 CPD ¶ 66 (where solicitation established specific evaluation benchmarks for evaluation of offerors' experience, and provided for comparative assessments against those benchmarks, an agency may not substitute a previously unidentified "threshold of sufficiency" as an evaluation benchmark against which proposals were evaluated on a pass/fail basis).

Carson Helicopter Servs., Inc., B-299720; B-299720.2, July 30, 2007, 2007 CPD ¶ 142 (in determining the technical acceptability of a proposal, an agency may not accept at face value a proposal's promise to meet a material requirement, where there is significant countervailing evidence that was, or should have been, reasonably known to the agency evaluators that should have created doubt whether the offeror would or could comply with that requirement).

- Source selection must be consistent with the solicitation's award criteria

Wiltex Inc., B-297234.2; B-297234.3, Dec. 27, 2005, 2006 CPD ¶ 13 (protest sustained where awardee's proposal failed to address material solicitation requirements and the agency failed to treat offerors equally by making award to the awardee despite the deficiencies in its proposal, while finding the protester's proposal unacceptable for similar deficiencies).

BAE Tech. Servs., Inc., B-296699, Oct. 5, 2005, 2006 CPD ¶ 91 (protest sustained where, under solicitation requiring that offerors substantiate proposed initiatives to reduce staffing, agency applied a more exacting standard in evaluating adequacy of substantiation for protester's proposed initiatives than it did in evaluating awardee's substantiation).

- Source selection official's decision to reject recommendation of proposal evaluators must have a reasonable basis

TruLogic, Inc., B-297252.3, Jan. 30, 2006, 2006 CPD ¶ 29 (source selection authority's (SSA) disagreement with the majority of the evaluators and acceptance of the minority's recommendation that the awardee be selected for award is unobjectionable and does not evidence a lack of "impartiality," where the SSA reached a reasoned conclusion, supported by the record, that the awardee's lower-

priced, lower-rated proposal deserved a higher technical rating than was assigned by the majority and represented the best value to the government).

- Bias

Lockheed Martin Corp., B-295402, Feb. 18, 2005, 2005 CPD ¶ 24 (where the record established that a procurement official who had significant involvement in activities that culminated in decision forming the basis of the protest was biased in favor of one offeror, protest sustained where the agency did not provide compelling evidence that the protester was not prejudiced).

Lockheed Martin Aeronautics Co.; L-3 Commc'ns. Integrated Sys. L.P.; BAE Sys. Integrated Def. Solutions, Inc., B-295401 et al., Feb. 24, 2005, 2005 CPD ¶ 41 (protest sustained where source selection authority, who was materially involved in the evaluation of proposals, admitted bias in favor of the awardee, and the agency did not demonstrate that the protesters were not prejudiced).

- Selection of higher-priced offer based upon awardee's technical superiority is not reasonable where the source selection official did not consider the protester's similar technical approach

Spherix, Inc., B-294572, B-294572.2, Dec. 1, 2004, 2005 CPD ¶ 3 (protest sustained where agency's evaluation and source selection decision found awardee's staffing and proposed marketing approach to be significantly superior and agency did not fairly consider the protester's similar proposed staffing and marketing approach).

- Price must be meaningfully considered in the source selection decision

Computers Universal, Inc., B-297552, Feb. 14, 2006, 2006 CPD ¶ 42 (agency unreasonably evaluated protester's price by adding to protester's price the protester's proposed increase in telecommunications charges under another contract for maintaining the system, without first verifying with the protester whether costs for necessary telecommunications to accomplish the work were already included in its quoted price).

- Cost evaluation that did not account for awardee's low contingency cost allowance was unreasonable

EPW Closure Servs., LLC; FFTF Restoration Co. LLC, B-294910 et al., Jan. 12, 2005, 2006 CPD ¶ 3 (protest sustained where the record showed that proposed allowances for contingency costs--which the solicitation required to be included in proposed target costs--did not reflect the likely costs of the risks associated with offerors' proposed approaches).

- Cost realism analysis

Kellogg Brown & Root Servs., Inc., B-298694 *et al.*, Nov. 16, 2006, 2006 CPD ¶ 160 (agency did not perform a reasonable cost realism evaluation when it deleted a certain element from awardee's proposed indirect costs because other offerors accounted for this element as a direct cost; this evaluation did not result in a reasonable assessment of the probable cost of performing the contract associated with the awardee's proposal, given that the adjustment was inconsistent with Cost Accounting Standards 401 and 402 and the firm's cost accounting practices, to which the firm was obligated to adhere in performing the contract).

Magellan Health Serv., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81 (agency's cost realism evaluation of awardee's proposal was improper where, although knowing that awardee had proposed to recruit the incumbent workforce and match all existing salaries but had also failed to propose direct labor rates consistent with existing salaries, agency failed to adjust awardee's proposed labor rates as part of its cost realism evaluation).

- Price evaluation that does not provide a meaningful basis to consider cost to the government is unreasonable

R&G Food Serv., Inc., B-296435.4, B-296435.9, Sept. 15, 2005, 2005 CPD ¶ 194 (agency unreasonably determined that protester's prices were not fair and reasonable where agency's price evaluation considered only offerors' unit prices for some of contract line items and, in so doing, failed to provide a reasonable basis for comparing the relative overall costs to the government of offerors' competing proposals).

- Competitive range determination

Global, A 1st Flagship Co., B-297235; B-297235.2, Dec. 27, 2005, 2006 CPD ¶ 14 (in procurement that placed greater importance on technical factors, agency's establishment of a competitive range of one, which consisted of the awardee's technically unacceptable initial proposal and which excluded protester's "highly acceptable" technical proposal, on the basis that protester's evaluated cost/price was 15 percent higher than the awardee's, was not reasonable where the agency's cost/price evaluation reflected various flaws and erroneous assumptions).

- Agency must reasonably accommodate a firm's request for a site visit

Dellew Corp., B-299408, May 1, 2007, 2007 CPD ¶ 77 (the agency unreasonably exercised the broad discretion that it had regarding the scheduling of site visits where the protester was unable to attend a timely requested site visit because the agency first informed the protester only 1 day before the date and time of the site visit that the site visit had been scheduled, and unreasonably declined the protester's reasonable request for a later site visit to allow that firm a meaningful opportunity to compete).

## Discussions

- Improper/misleading discussions

Frontline Apparel Group, B-295989, June 1, 2005, 2005 CPD ¶ 116 (discussions were improper where agency afforded awardees a second round of discussions in two areas of their proposals where concerns remained after first round, but did not provide protester a second round of discussions, even though its proposal had been downgraded in the same two areas).

Advanced Sys. Dev., Inc., B-298411; B-298411.2, Sept. 19, 2006, 2006 CPD ¶ 137 (protester's contention that the agency conducted flawed discussions regarding price is sustained where the flawed discussions led the awardee to significantly lower its price, and the selection decision turned on the price differential between awardee and the protester).

Sytronics, Inc., B-297346, Dec. 29, 2005, 2006 CPD ¶ 15 (protest sustained where the agency conducted price discussions that improperly favored the selected vendor over the protester (whose higher-priced quotation received a higher technical score).

Multimax, Inc.; NCI Info. Sys., Inc., Tech. LLC; Northrop Grumman Info. Tech., Inc.; Pragmatics, Inc., B-298249.6 et al., Oct. 24, 2006, 2006 CPD ¶ 165 (discussions were misleading where the agency identified certain proposed hourly rates as significantly higher than independent government cost estimate labor rates, and offerors reasonably deduced- -incorrectly, as the record shows- -that rates not identified were not significantly higher than IGCE rates, which led offerors to leave those rates unchanged in the final proposed revisions).

Creative Info. Tech., Inc., B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110 (agency failed to conduct meaningful discussions with the protester, where the agency did not convey in any meaningful way the disparity in the protester's prices and level of effort, when compared to the agency's and awardee's staffing, such that the protester could not have understood the agency's concern with the protester's proposal or that fundamental changes were required in the protester's proposal to have any reasonable chance of being selected for award).

- What constitutes discussions

CIGNA Gov't. Servs., LLC, B-297915.2, May 4, 2006, 2006 CPD ¶ 74 (agency's communications with awardee following submission of final revised proposals, during which awardee made various changes to its final proposal submission, including changes to the total level of effort awardee represented it would provide under the contract, constituted discussions and required that the agency similarly conduct discussions with the protester).

Al Long Ford, B-297807, Apr. 12, 2006, 2006 CPD ¶ 68 (protest sustained and discussions should have been reopened where after discussions had concluded, agency identified concerns pertaining to the achievability of protester's proposed delivery schedule that should have been apparent to the agency prior to discussions, since proposed delivery schedule was an area that had to be addressed in order for the protester to be in line for award. The key fact is that the concerns (while identified after discussions had been closed) relate to the proposal as it was prior to discussions).

Overlook Sys. Tech., Inc., B-298099.4; B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185 (information exchanges concerning the adequacy of the awardee's plan to mitigate the risk of an organizational conflict of interest is analogous to a responsibility determination, and the exchanges here- -like a request for information that relates to an offeror's responsibility, rather than proposal evaluation- -do not constitute discussions).

Global Analytic Info. Tech. Servs., Inc., B-298840.2, Feb. 6, 2007, 2007 CPD ¶ 57 (agency improperly engaged in discussions solely with awardee where awardee was permitted to submit required price escalation rate after conclusion of its oral presentation, notwithstanding agency's specific instructions that such pricing information be furnished at outset of oral presentation).

### **Past Performance Evaluations**

- Consideration of information collected by other evaluation boards in other procurements

Cooperativa Muratori Riuniti, B-294980, B-294980.2, Jan. 21, 2005, 2005 CPD ¶ 21 (agency could reasonably base a past performance evaluation on information compiled in connection with a different recent solicitation).

- Lack of relevant past performance

MIL Corp., B-294836, Dec. 30, 2004, 2005 CPD ¶ 29 (protest sustained, where agency downgraded protester's proposal under the past performance evaluation factor based upon the agency's determination that the proposal lacked relevant past performance information).

Greater Pac. Aquatics, B-297654, Feb. 2, 2006, 2006 CPD ¶ 37 (under solicitation for lifeguard services, agency reasonably rated protester's past performance as neutral where protester's proposal showed that protester had managed swim team, but had not performed lifeguard services).

- Unequal effort, on the agency's part, in contacting references

Family Entm't Servs., Inc., B-298047.3, Sept. 20, 2006, 2006 CPD ¶ 59 (protest that the agency's evaluation of the protester's past performance was unreasonable was

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, and the record does not provide a reasonable explanation for the agency's conclusions regarding the protester's past performance, including what if any impact the agency's receipt of contract performance assessment reports had on its evaluation).

### **Experience Evaluations**

- Relevant experience

Cooperativa Muratori Riuniti, B-294980, B-294980.2, Jan. 21, 2005, 2005 CPD ¶ 21 (protest sustained where, in assessing the relevance of the protester's experience, the agency unreasonably differentiated between experience in performing multiple projects at multiple sites under a single contract and experience in concurrently performing multiple projects at multiple sites under multiple contracts, given that concurrent performance at multiple sites was what the RFP required).

- Evaluation of subcontractor experience

KIC Dev., LLC, B-297425.2, Jan. 26, 2006, 2006 CPD ¶ 27 (protest sustained where the agency's determination that the protester's proposal was unacceptable because it did not show that the protester itself met the solicitation's experience requirement--while its subcontractor clearly did--was inconsistent with the solicitation's evaluation scheme, which allowed offerors to meet experience requirements using the experience of properly committed key employees or subcontractors).

### **Simplified Acquisitions and Federal Supply Schedule Purchases**

- Electronic notice of solicitation must be accessible in a form that allows convenient and universal user access

Jess Bruner Fire Suppression, B-296533, Aug. 19, 2005, 2005 CPD ¶ 163 (posting of pre-solicitation notice and solicitation conducted under simplified acquisition procedures on the Federal Business Opportunities Internet site did not deprive the protester of an opportunity to compete for a contract for fire engine services to be provided in a particular national forest where the pre-solicitation notice and solicitation were accessible on the Internet site by searching by geographic location).

- Simplified acquisition-may not exceed dollar threshold

Global Commc'ns. Solutions, Inc., B-299044; B-299044.2, Jan. 29, 2007, 2007 CPD ¶ 30 (protest is sustained where agency had no authority to use small purchase procedures to acquire a commercial item because the anticipated contract value was in excess of \$5 million, contrary to applicable regulation limiting use of these procedures to purchases at or below \$5 million).



- Simplified acquisition-when the relative weight of the listed subfactors must be disclosed

Bio-Rad Laboratories, Inc., B-297553, Feb. 15, 2006, 2006 CPD ¶ 58 (where a solicitation failed to disclose the relative weight of the listed subfactors of the primary technical factor, the subfactors should have been considered approximately equal in weight, even though the procurement was intended to be conducted using Federal Acquisition Regulation (FAR) Part 13 simplified acquisition procedures and FAR § 13.10601(a)(2) states that the relative importance of evaluation factors and subfactors need not be disclosed in a solicitation, because the solicitation did not indicate that the acquisition was being conducted under FAR Part 13 and the acquisition was conducted in a manner that was not distinguishable from a negotiated acquisition conducted under FAR Part 15, which required that the relative weights of the evaluation factors and subfactors be stated in the solicitation).

- FSS procedures cannot be used to purchase items or services not on schedule

KEI Pearson, Inc., B-294226.3, B-294226.4, Jan. 10, 2005, 2005 CPD ¶ 12 (issuance of a task order to an FSS vendor was improper where the vendor's quotation was based on purchasing software products outside the framework of the FSS).

Tarheel Specialties, Inc., B-298197; B-298197.2, July 17, 2006, 2006 CPD ¶ 140 (issuance of a task order to an FSS vendor was improper where the vendor's quotation was based on providing services that were outside the scope of the vendor's FSS contract).

- When using FSS procedures a responsibility determination is not required

Advanced Tech. Sys., Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 (an ordering agency is not required to perform a responsibility determination when placing a task or delivery order under a FSS contract, since the General Services Administration performed a responsibility determination at the time of award of the underlying contract).

- Order issued on the basis of a quotation that deviates from requirements of request for quotations is improper

Haworth, Inc., B-297077; B-297077.2, Nov. 23, 2005, 2005 CPD ¶ 215 (protest sustained where agency issued blanket purchase agreement for office furniture to vendor whose quotation did not comply with requirements of request for quotations).

- Cost issues

CW Gov't Travel, Inc.–Reconsideration; CW Gov't Travel, Inc.; CI Travel; Alamo Travel Group; National Travel Serv.; Bay Area Travel; Knowledge Connections, B-295530.2 et al., July 25, 2005, 2005 CPD ¶ 139 (protest challenging solicitation's

price evaluation scheme was sustained where scheme did not require offerors to propose binding transaction and management fees for the services being procured, thereby precluding the agency from meaningfully evaluating proposals' cost to the government, and where the agency has not explained why it cannot request and evaluate this pricing information).

- Federal Acquisition Regulation § 8.405-2(d)

Advanced Tech. Sys., Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 (when ordering services priced at hourly rates from vendors holding FSS contracts, and when a statement of work is required, an agency is required under FAR § 8.405-2(d) to consider a vendor's proposed level of effort and labor mix in its selection decision).

### **Reverse Auctions**

MTB Group, Inc., B-295463, Feb. 23, 2005, 2005 CPD ¶ 40 (reverse auction is permissible under simplified acquisition procedures of FAR Part 13, where these procedures encourage the use of innovative procedures and do not expressly prohibit the disclosure of vendors' prices and where the disclosure of vendors' prices is not prohibited under the procurement integrity provisions of the Office of Federal Procurement Policy Act).

### **Organizational Conflicts of Interest**

Lucent Tech. World Servs. Inc., B-295462, Mar. 2, 2005, 2005 CPD ¶ 55 (protest challenging protester's exclusion from participation in a procurement denied, where the contracting officer reasonably determined that the protester had an organizational conflict of interest arising from its preparation of technical specification used by the agency in the solicitation).

TPL, Inc., B-297136.10; B-279136.11, June 29, 2006, 2006 CPD ¶ 104 (a conflict of interest does not exist merely because the same contracting agency or contracting agency employees both prepare an offeror's past performance reference and perform the evaluation of offerors' proposals).

Alion Science & Tech. Corp., B-297342, Jan. 9, 2006, 2006 CPD ¶ 1 (protest sustained where record does not support the agency's conclusion that awardee's conflicts of interest would be minimal, with limited impact on quality of contract performance, where awardee, a manufacturer of spectrum-dependent products, will perform analysis and evaluation and exercise subjective judgment regarding formulation of policies and regulations that may affect the sale or use of spectrum-dependent products manufactured by the awardee or the awardee's competitors, and those deployed by the awardee's customers).

Alion Science & Tech. Corp., B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2 (protest sustained where record did not support the agency's assessment regarding the "maximum

potential” for organizational conflicts of interest to occur during awardee’s contract performance where awardee, a manufacturer of spectrum-dependent products, will perform various activities requiring subjective judgments that may affect the sales or use of spectrum-dependent products of the awardee, the awardee’s competitors, and the awardee’s customers).

Alion Science & Tech. Corp., B-297022.4; B-297022.5, Sept. 26, 2006, 2006 CPD ¶ 146 (where agency previously failed to meaningfully consider potential conflicts of interest created by awardee’s contract performance of electromagnetic spectrum engineering services that could affect awardee’s other spectrum-related interests, agency’s corrective actions adequately remedied the prior procurement flaws, where the agency performed and documented its review of the spectrum-related products and services produced or provided by the awardee and the awardee’s competitors, identified the awardee’s customers of spectrum-related products and services, considered the impact that performance of the contract requirements may have on awardee’s spectrum-related interests, and reasonably concluded that awardee’s plan to perform conflicted portions of the contract requirements through use of “firewalled” subcontractors will adequately avoid, neutralize, or mitigate the potential conflicts of interest with minimal impact on performance quality).

Overlook Sys. Tech., Inc., B-298099.4; B-298099.5, Nov. 28 2006, 2006 CPD ¶ 185 (protester’s contention that the agency failed to adequately mitigate the risk of organizational conflicts of interest (OCI) associated with the selection of the awardee is denied where the record shows that: the contracting officer reasonably concluded that the risk of a conflict of interest in this procurement was not great; the agency requested a detailed OCI mitigation plan from the awardee and sought additional information about, and modifications to, the plan; and the contracting officer reasonably concluded, after performing a detailed analysis, that the modified plan- -together with certain steps designed to increase agency oversight of the contractor- -was sufficient to protect the government’s interest).

Celadon Labs., Inc., B-298533, Nov. 1, 2006, 2006-1 CPD ¶ 158 (agency failed to determine whether the peer review evaluators of the protester’s proposal under an Small Business Innovation Research program solicitation had a conflict of interest, where the evaluators were employed by firms that promote a type of technology that assertedly was directly challenged by the type of technology offered in the protester’s proposal).

### **OMB Circular A-76 Competitions**

Johnson Controls World Servs., Inc., B-295529.2; B-295529.3, June 27, 2005, 2005 CPD ¶ 124 (a decision by the agency’s Independent Review Official to withdraw its certification that the agency’s plan for performing the services in-house includes all required costs renders academic a protest alleging that the agency’s in-house cost estimate failed to include all required costs).

Lawrence C. Drake, B-298143, Apr. 7, 2006, 2006 CPD ¶ 60 (President of the affected local chapter of the American Federation of Government Employees is not an “interested party” for the purposes of filing and pursuing a protest regarding certain actions taken by the Department of Labor with regard to a cost comparison study to be conducted pursuant to Office Management Budget Circular A-76).

## **Bundling**

Sigmattech, Inc., B-296401, Aug. 10, 2005, 2005 CPD ¶ 156 (protest challenging bundling of system engineering and support services with other requirements under a single-award BPA issued under the awardee’s Federal Supply Schedule contract is sustained where the agency failed to perform a bundling analysis or satisfy the requirements of FAR §§ 7.107(a), (b); 10.001(c)(2); and 19.202-1).

B.H. Aircraft Co., B-295399.2, July 25, 2005, 2005 CPD ¶ 138 (consolidating minor engine parts contract into logistics supply chain management contract covering more than 2,000 parts is unobjectionable where the record establishes that the consolidation will provide a measurably substantial benefit to the government).

## **Cost Claims**

Johnson Controls World Servs., Inc.--Costs, B-295529.4, Aug. 19, 2005, 2005 CPD ¶ 162 (request that GAO recommend reimbursement of protest costs in challenge to A-76 cost comparison decision is granted where: (1) the issues raised in the initial protest filing clearly identified deficiencies in the agency’s determination that in-house performance would be more economical than contracting out, (2) the agency admitted that it did not investigate the protest allegations, and (3) the agency withheld relevant protest documents until more than 70 days after the initial protest filing; agency’s actions constituted an undue delay in taking corrective action in the face of a clearly meritorious protest).

Department of State--Costs, B-295352.5, Aug. 18, 2005, 2005 CPD ¶ 145 (request that Comptroller General recommend reimbursement of attorneys’ fees at a rate higher than the statutory cap of \$150 per hour based on increase in cost of living is granted where protester’s claim filed with agency presented a reasonable basis for the adjustment).

Honeywell Tech. Solutions, Inc.--Costs, B-296860.3, Dec. 27, 2005, 2005 CPD ¶ 226 (where GAO attorney, in conducting outcome prediction alternative dispute resolution (ADR), advised parties that protest issue related to organizational conflict of interest would likely be sustained (which led agency to take corrective action that rendered entire protest academic), GAO did not recommend reimbursement of costs associated with other, separate unresolved issues raised by protest, which were severable from the organizational conflict of interest issue addressed during ADR and were not clearly meritorious).

Department of the Army; ITT Fed. Services International Corp.—Costs, B-296783.4; B-296783.5, Apr. 26, 2006, 2006 CPD ¶72 (Consistent the Federal Acquisition Regulation, reimbursement of protest costs associated with the use of a consultant is limited to the highest rate of pay for a federal employee (general schedule grade 15, step 10), even where the consultant billed at a higher rate).

## **Protests**

- Timeliness

MadahCom, Inc.—Recon., B-297261.2, Nov. 21, 2005, 2005 CPD ¶ 209 (protest that a solicitation improperly restricts competition to multiple-award task-order contract holders, and that the task orders will exceed the scope of the underlying contracts, was timely where filed before the closing date for receipt of task-order proposals; dismissal of protest as untimely because it was not filed within 10 days of when the protester knew that the procurement would be restricted to task-order contract holders therefore is reversed).

WareOnEarth Commc'ns., Inc., B-298408, July 11, 2006, 2006 CPD ¶ 107 (protest challenging agency issuance of amendments changing basis of price evaluation is dismissed as untimely where protest was not filed before the time set for receipt of revised proposals. Here protester argued that he did not have a reasonable opportunity to file his protest before the due date of the revised proposals. The protester cites the steps involved in filing a protest, *e.g.*, research, and the complexity of the protest issues. The decision noted that the protester received the amendments 4 days before revised proposals were due, and declined to take the factors listed above into account because to do so would undermine the bright-line nature of our timeliness rules).

WorldWide Language Res., Inc.; SOS Int'l Ltd., B-296984 *et al.*, Nov. 14, 2005, 2005 CPD ¶ 206 (announcement of contract award on the Department of Defense's official website, [www.DefenseLink.mil](http://www.DefenseLink.mil), did not place protesters on constructive notice of the award and thus require protesters to file their protests within 10 days of the announcement since DefenseLink has not been designated by statute or regulation as the public medium for announcement of procurement actions).

CBMC, Inc., B-295586, Jan. 6, 2005, 2005 CPD ¶ 2 (posting of award notice on the FedBizOpps internet site is constructive notice of the protested contract award, and protest filed more than 10 days after the award posting is untimely).

MIL Corp., B-297508; B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 (protest issue raised subsequent to a post-award debriefing provided to a vendor in a Federal Supply Schedule procurement is untimely where it was filed more than 10 days after the basis of protest was known; since the procurement was not conducted on the basis of competitive proposals, the timeliness rules based on protests which challenge a procurement conducted on the basis of competitive proposals under which a debriefing is requested and required are not applicable).

Celadon Labs., Inc., B-298533, Nov. 1, 2006, 2006-1 CPD ¶ 158 (the significant issue exception to our timeliness rules was invoked in this matter where the issue- -the application of conflict of interest regulations to peer review evaluators in Small Business Innovation Research (SBIR) procurements- -was not one that we had previously decided and was one that could be expected to arise in future SBIR procurements).

- Jurisdiction

Knowledge Connections, Inc., B-298172, Apr. 12, 2006, 2006 CPD ¶ 67 (GAO has no jurisdiction to consider a protest of a solicitation for services issued by the Transportation Security Administration (TSA) since that agency is subject to the Federal Aviation Administration's Acquisition Management System (AMS), and Congress has now provided that TSA acquisitions for services are covered by the AMS).

PPG-CMS-PSI JV, B-298239; B-298239.2, July 19, 2006, 2006 CPD ¶ 111 (protests will not be considered that ultimately involve the question of the status of the awardees as eligible small business and service-disabled veteran-owned small business concerns, matters within the exclusive statutory authority of the Small Business Administration).

Veolia Water N. Am. Operating Servs., LLC, B-291307.5; B-298017, May 19, 2006, 2006 CPD ¶ 86 (protester's promissory estoppel arguments, not founded upon an asserted statutory or regulatory violation, will not be considered because the Competition in Contracting Act of 1984 only authorizes GAO to decide bid protests concerning alleged violations of a procurement statute or regulation).

Doug Boyd Enters., LLC, B-298237.2, Aug. 6, 2007, 2007 CPD ¶ 147 (protest challenging the issuance of a task order under a multiple-award indefinite-delivery, indefinite-quantity contract was dismissed as the award of such task orders are not subject to GAO's bid protest jurisdiction, and the order here cannot be termed a "downselection").

- Corrective action

Cooperativa Muratori Riuniti, B-294980.5, July 27, 2005, 2005 CPD ¶ 144 (where agency amends request for proposals after closing and permits offerors to submit revised proposals, it should permit offerors to revise aspects of their proposals that were not the subject of the amendment absent evidence that the amendment could not reasonably have any effect on other aspects of proposals, or that allowing such revisions would have a detrimental impact on the competitive process).

Lockheed Martin Sys. Integration-Owego: Sikorsky Aircraft Co., B-299145.5; B-299145.6, Aug. 30, 2007, 2007 CPD ¶ (where an agency revised the criteria against which offers are to be evaluated, or otherwise materially changes the solicitation's evaluation scheme, offerors must be given a reasonable opportunity to respond to the revised criteria or evaluation scheme).

Saltwater, Inc.--Recon. & Costs, B-294121.3, B-294121.4, Feb. 8, 2005, 2005 CPD ¶ 33 (where an agency's implementation of promised corrective action, which caused GAO to dismiss a protest as academic, is such that the issue in controversy in fact has not been rendered academic, GAO will consider the protest's merits in response to a reconsideration request).

### **Miscellaneous Issues**

- Improper sole source award

WorldWide Language Res., Inc.; SOS Int'l Ltd., B-296984 et al., Nov. 14, 2005, 2005 CPD ¶ 206 (protest challenging award of sole-source contract for bilingual-bicultural advisors for Iraq utilizing other than competitive procedures, based on unusual and compelling urgency, was sustained where agency initially attempted to place the requirement under an environmental services contract, which, on its face, did not include within its scope the bilingual-bicultural advisor requirement; this obvious error constituted a lack of advance planning, which compromised the agency's ability to obtain any meaningful competition).

eFedBudget Corp., B-298627, Nov. 15, 2006, 2006 CPD ¶ 159 ( protest of proposed sole-source award is sustained where the record shows that the agency did not satisfy its obligation to engage in reasonable advance planning and to promote competition).

Bausch & Lomb, Inc., B-298444, Sept. 21, 2006, 2006 CPD ¶ 135 ( agency's sole-source order of ophthalmology equipment based on unusual and compelling urgency was improper where the awardee was determined to be the only responsible source, yet the capabilities of the equipment of other interested firms were not considered).

M.D. Thompson Consulting, LLC; PMTech, Inc., B-297616; B-297616.2, Feb. 14, 2006, 2006 CPD ¶ 41 (protests sustained where agency notice of intent to modify contract to extend performance on a sole-source basis did not comply with requirement for an accurate description of the services to be furnished and thus did not provide enough information to allow all prospective sources a meaningful opportunity to demonstrate the ability to meet the agency's requirements).

- Modification changing the scope of a contract

Poly-Pacific Techs., Inc., B-296029, June 1, 2005, 2005 CPD ¶ 105 (protest challenging agency's modification of a contract was sustained where the modification improperly changed the scope of the work anticipated by the underlying solicitation).

DOR Biodefense, Inc.; Emergent BioSolutions, B-296358.3; B-296358.4, Jan. 31, 2006, 2006 CPD ¶ 35 (protest that modification of contract for research and development of botulinum vaccine was outside scope of the original contract denied because changes did not substantially alter the type of work, costs or period of performance beyond that which could have been reasonably anticipated by offerors).

- Option Exercise

Antmarin Inc.; Georgios P. Tzanakos; Domar S.r.l., B-296317, July 26, 2005, 2005 CPD ¶ 149 (protest that agency improperly exercised option was denied where the agency reasonably determined that exercising option was the most advantageous means of satisfying the agency's needs).

- Use of traditional responsibility factors as technical evaluation criteria

Capitol CREAG LLC, B-294958.4, Jan. 31, 2005, 2005 CPD ¶ 31 (where traditional responsibility factors are used as technical evaluation criteria and where the proposal of a small business concern, which would otherwise be in line for award, is found ineligible for award based on the agency's evaluation of those criteria, whether or not the agency's decision was tantamount to a nonresponsibility determination depends upon whether the agency was evaluating the offeror's capability to perform under those factors—which would be a responsibility determination—or technical approach to performing the work).

- Changing of requirements after issuance of solicitation

Northrop Grumman Info. Tech., Inc.; Broadwing Commc'ns LLC; Level 3 Commc'ns, Inc.; Qwest Gov't Servs., Inc.; MCI WORLDCOM Commc'ns, Inc., B-295526 *et al.*, Mar. 16, 2005, 2005 CPD ¶ 45 (protest sustained where, during the procurement, the agency changed the approach stated in the solicitation for exercising options, making it significantly less likely that options would be exercised, without informing offerors of the changed requirements or affording them an opportunity to respond).

- Timely challenge to awardee's size status

ALATEC Inc., B-298730, Dec. 4, 2006, 2006 CPD ¶ 191 (where the Small Business Administration (SBA) determined, in response to a timely size protest, that the awardee under a procurement set aside for small businesses was other than small after the 10-day period during which the SBA was required to issue the size determination and the agency, therefore, proceeded with award, and there was a stay



of contract performance because of a protest to GAO, during which the SBA Office of Hearings and Appeals affirmed that the awardee was other than small, the agency, in the absence of any legitimate countervailing reasons for not taking such action, should have terminated the large business's contract).

Alliance Detective & Sec. Serv., Inc., B-299342, Apr. 13, 2007, 2007 CPD ¶ 56 (in the absence of any countervailing reasons, agency should not exercise options under contracts set aside for small business concerns, where award was improperly made before referring pre-award size protests to the Small Business Administration (SBA) and to a firm that has been determined to be other than a small business by the SBA, and where the agency lifted a stay on contract performance, even though performance was not to commence for 3 months, it had been apprised of the SBA size protest, and all evidence indicated that the award was a large business).

- Cancellation

Rand & Jones Enters. Co., B-296483, Aug. 4, 2005, 2005 CPD ¶ 142 (cancellation of RFP after receipt of proposals was unreasonable where agency justified cancellation on basis that it wanted to reissue solicitation as an IFB and make award based solely on price, but the RFP had omitted evaluation factors, so that the competition already had been conducted based solely on price).

- Material misrepresentation

Greenleaf Constr. Co., B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19 (evaluation of awardee's proposal for contract to provide single-family home management and marketing services was unreasonable where it was based on awardee's proposal of key personnel and an electronic monitoring system that awardee should have known-- more than 2 months prior to final evaluation and award--would not be available, and awardee never advised agency of the material change in circumstances).

- Affirmative determination of responsibility

FN Mfg., Inc., B-297172, B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212 (protest challenging affirmative determination of awardee's responsibility on the ground that contracting officer (CO) unreasonably failed to consider available relevant information suggesting that the awardee does not have a satisfactory record of integrity and business ethics was denied where the record showed that: (1) while the awardee was investigated for possible fraud, it was neither indicted nor proposed for debarment; (2) the CO was aware of the information that led to the questions about the awardee's activities under certain previous contracts and did not ignore the matter; and (3) the CO's more recent dealings with the company provided a rational basis for her conclusion that the awardee is a responsible contractor).

Fabritech, Inc., B-298247; B-298247.2, July 27, 2006, 2006 CPD ¶ 112 (protest challenging rejection of small business protester's offer on the ground that the

agency's decision constituted a nonresponsibility determination that should have been referred to the Small Business Administration is sustained where the basis of the agency's determination—that protester would be unable to obtain the required parts—relates directly to the firm's capability to perform the contract).

- Agency cannot overlook vendor's failure to certify compliance with Buy American Act/Trade Agreements Act

Wyse Tech., Inc., B-297454, Jan. 24, 2006, 2006 CPD ¶ 23 (agency improperly awarded contract where the offeror expressly declined to certify that the product to be provided would comply with the Trade Agreements Act as was required by the terms of the solicitation).

- Implementation of preference for local firms in debris removal services under Robert T. Stafford Disaster Relief and Emergency Assistance Act

AshBritt Inc., B-297889, B-297889.2, Mar. 20, 2006, 2006 CPD ¶ 48 (protest that agency improperly set aside procurement for firms residing, or primarily doing business, in Mississippi, under solicitation for cleanup efforts in Mississippi associated with damage resulting from Hurricane Katrina, is denied because the Stafford Act requires the agency to provide a preference in debris removal contracts to firms residing, or primarily doing business, in the area affected by a major disaster).

- Anti-Pinkerton Act

Brian X. Scott, B-298370; B-298490, Aug. 18, 2006, 2006 CPD ¶125 (solicitations for cargo transportation and security services and for base security services in Iraq will not result in an award that violates the Anti-Pinkerton Act or Department of Defense policies regarding contractor personnel because the services required under the resultant contract are guard and protective services, and not “quasi-military armed forces” activities).

