Material to Accompany OGC Presentation

MEMORANDUM FOR << Insert Name of Contracting Officer>>
<< Insert Name of Agency>>

FROM: << Insert Name of Attorney>>
<< Insert Title>>
General Law Division

SUBJECT: Filing of General Acccountability Office ("GAO") Protest, <<insert name and B#>> and Request for Documents

<<Insert protester name>> filed a GAO protest on <<insert date>> against <<the pre-award action protested OR the award>> of <<insert solicitation OR contract number>>. <<A copy of the protest is attached.>> The <<soliciation OR contract>> is for the purchase/acquisition/procurement of <<describe the purpose of the contract.>> I am the attorney assigned to represent the agency in this protest and may be reached at <<insert phone number and email address.>> This office will be responsible for filing the agency report with GAO, the protester, and any intervenors. However, once a determination is made as to the contents of the final agency report, this office may request your further assistance in procuring printing of the agency report or in compiling the agency report.

If this protest was filed prior to award, award is prohibited absent a written determination to proceed as required by law. If a protest was filed within 10 days after award, or within 3 days of a debriefing date offered by the protester upon its request for a debriefing (whether pre- or post-award), the award must be suspended unless overridden by the agency in accordance with law. Please advise immediately if this protest appears to trigger a suspension, and if there is an urgent need for the award to go forward, so that timely legal advice can be rendered as to whether a suspension has indeed been triggered and as to whether an override of the suspension is viable or necessary.

The due date for filing the agency report with GAO is <<insert date>>. <<Additionally, the protester has requested specific documents and therefore we are required to submit a list ot documents to be submitted or withheld on <<insert date 5 days prior to protest due date>> >>. GAO regulations require that the agency report include a statement of relevant facts by the contracting officer, including a best estimate of the contract value (a model statement is attached), a memorandum of law, and copies of all relevant documents.

In order to ensure that this office can provide full legal advice as to the merits of the protest, full defense of the protest, and timely preparation of the agency report, please provide the documents checked below by **<< insert date>>** to me at General Law Division, Rm 3311-S, 1400 Independence Avenue SW, Washington, D.C. 20250-1415.

_____ Any information regarding a prior agency protest or any other communications or information relevant to establishing the timeliness of the protest.

_____ Copy of the solicitation/RFP (if negotiated procurement) or invitation for

bids/IFB (if sealed bidding procedure used), including all amendments.

_____ Copies of detailed specifications or plans included as separate attachment to the solicitation/RFP or invitation for bids/IFB.

_____ Copy of any communications to all offerors generally.

_____ Copy of the protester's offer/bid.

_____ Copy of the awardee's offer/bid.

_____ Copy of all offers or bids, or those specifically listed as follows: <<insert>>

_____ Copy of abstract of offers/bids.

_____ Copy of the source selection decision or contracting officer's award decision.

_____ Copy of any evaluation documents, including individual evaluators' sheets, evaluation panels' consensus evaluation ratings and documentation, and any other evaluation documents.

_____ Copy of competitive range determination(s).

_____ Copy of any written discussions.

_____ Copy of any documents, videos, slides, powerpoint demonstrations, etc., submitted as part of oral presentations by offerors.

_____ Copy of any recordings, transcripts, or notes made of oral presentations by offerors.

_____ Copy of any slides, briefing books, documents, powerpoint presentations, provided by government employees to the source selection authority, source selection panel, or any person or group involved in the source selection/award decision.

_____ Copy of any past performance evaluations submitted by or on behalf of the awardee/prospective awardee, protester, and specific offerors specified above, and any past performance information of awardee/prospective awardee, protester, and specific offerors specified above.

_____ Copy of any contracting officer's negotiation memorandum.

_____ Copy of any cost-technical tradeoff or best value analysis, including charts and graphs.

____ Copy of any price analysis, price realism analysis, cost analysis, cost realism analysis, or should-cost analysis, or the like, done by the agency.

____ Copy of any debriefing materials for the awardee/prospective awardee, protester, and specific offerors specified above.

____ Copy of the government estimate for this procurement.

____ Copy of any documentation submitted by an awardee or prospective awardee to verify its proposed price.

____ Copy of any information submitted by an awardee or proposed awardee in support of a mistake in bid price adjustment.

____ Copy of any and all communications between the agency and the awardee/prospective awardee, protester, and specific offerors specified above, including electronic communications and documentation of phone calls.

____ Copy of the following specific documents requested by the protester: << insert>>

Thank you for your timely assistance in this matter.

Sincerely,

Enclosure

cc: <<insert as necessary>>

DEVELOPING TRENDS

"Impaired Objectivity" Conflicts of Interest

FAR 9.5 provides guidance on the identification and mitigation of organizational conflicts of interest (OCIs). Most procurement personnel understand that an OCI exists when a contractor assists in drafting a statement of work or specifications, and then wishes to bid on the resulting contract, or when a contractor is asked to evaluate products that include one it manufactures.

But another OCI not clearly addressed by FAR 9.5 exists when a contractor provides advisory & assistance services to an agency in development of policies or regulations that may affect other divisions or affiliates of a contractor, facilities owned by a contractor, or even other clients/customers of that contractor. GAO has described this type of OCI as "impaired objectivity" OCI. In *Science Applications International Corporation*, B-293601, et. al., May 3, 2004 (attached), GAO sustained a protest of an EPA contract awarded to Lockheed Martin for, among other things, "scientific application and computational science support" because EPA failed to consider the potential Lockheed Martin's potential OCI because of its various facilities subject to EPA regulations.

With increasing reliance placed on contractors by agencies in the areas of regulatory analysis, rulemaking, and scientific analysis,procurement personnel must be alert to the potential for impaired objectivity OCIs and mitigate them accordingly. Contractors are not bound by the same ethical standards and ethics laws that seek to prevent impaired objectivity on the part of Federal employees. Thus, the contract vehicle itself may be the only place to ensure that conflicts of interest are avoided.

Negligent Estimates

It has long been black letter procurement law that the government may be liable for negligent estimates provided for goods and services ordered under a requirements contract, but would not be liable for negligent estimates given in IDIQ contracts because the government's only obligation in an IDIQ contract is to order the minimum quantity. However, in the past year, the Interior Board of Contract Appeals rendered a decision calling into question whether the assumption of no liability for IDIQ contracts should be continued.

In *Sanford Cohen & Assocs., Inc.*, IBCA No. 4239/00, 2004 IBCA LEXIS 5 (attached), the EPA had awarded a level of effort, cost-reimbursement term contract, specifying the agency's best estimate of the level of effort required in terms of direct labor hours for the base and option periods. Each year EPA exercised the option without modifying the estimate, even though in fact EPA's ordered requirements were far below the estimates and EPA knew that its requirements had been substantially reduced. EPA OGC actually

had advised the agency to negotiate bilateral modifications to reduce the estimates before exercising options. Only at the end of the contract did EPA seek to reduce the estimates retroactively to reflect the actual hours in order to reduce the fee, but the contractor refused to agree to the modification and appealed EPA's rejection of its proposed equitable adjustment.

As the IBCA noted, the effect of over estimating requirements "is to entice prospective contractors into offering lower prices than they otherwise would, since greater quantities generally mean lower costs per unit." The Board broke from the standard rule that the government should not be liable for negligent estimates outside of requirements contracts. Even though this was a cost-reimbursement contract, the Board's analysis relied heavily on similar criticisms of the no liability rule applied to IDIQ contracts and indicated it would apply its analysis to IDIQ contracts as well.

Thus one Board having ruled this way, contractors can be expected to seek damages for negligent estimates in reliance on this case. The teaching of this case is, when making estimates for quantities to be ordered under a contract, try to be as accurate as possible and if your predicted quantities significantly decline, seek a modification of the contract – don't rely simply on the fact that you have met your minimum quantity.

Past Performance Evaluations are Appealable under the Contracts Disputes Act (CDA) to the Court of Federal Claims (COFC)

Several Boards of Contract Appeals have ruled that they have no jurisdiction under the CDA to consider appeals of contractor past performance evaluations completed by the CO at the close of a contract. In *Record Steel and Construction, Inc., v. United States,* 62 Fed. Cl. 508 (2004), the contractor requested that the agency revise its past performance evaluation on several grounds. The agency by letter rejected the request. The Contractor thereafter appealed to the COFC. The COFC held for the first time that it does have jurisdiction under the CDA and its jurisdictional statute, the Tucker Act, to consider an appeal based on a past performance evaluation. The contractors request to revise its evaluation constituted a "claim" under the CDA, the agency's rejection letter constituted a "final decision" under the CDA, and the COFC had jurisdiction under the Tucker Act to award nonmonetary relief, so the COFC denied the government's motion to dismiss.

As systems for making and centrally filing past performance evaluations at the end of a contract become more formal, undoubtedly further challenges of this nature will arise. The key for procurement officials writing such evaluations to ensure that they are accurate and rationale, and not arbitrary and capricious, and they should withstand judicial review.

1 of 3 DOCUMENTS

Matter of: Science Applications International Corporation

B-293601, B-293601.2, B-293601.3

Comptroller General of the United States

2004 U.S. Comp. Gen. LEXIS 98; 2004 Comp. Gen. Proc. Dec. P96

May 3, 2004

CONTRACT: [*1] (RFP) No. PR-HQ-02-11750

HEADNOTES:

Where agency acknowledges that awardee's substantial involvement in activities that are subject to environmental regulations could create a conflict of interest in performing certain tasks contemplated by the solicitation's scope of work, and agency gave no consideration to the impact of such potential conflicts in selecting awardee's proposal for contract award, agency failed to comply with Federal Acquisition Regulation requirement that it "identify and evaluate potential organizational conflicts of interest."

COUNSEL:
James J. McCullough, Esq., Deneen J. Melander, Esq., Steven A. Alerding, Esq., and Abram J. Pafford, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.

Thomas L. McGovern, III, Esq., Michael J. Vernick, Esq., and Todd R. Overman, Esq., Hogan & Hartson, for Lockheed Martin Services, Inc., an intervenor.

Jonathan S. Baker, Esq., Environmental Protection Agency, for the agency.

Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

OPINIONBY: GAMBOA

OPINION:

DECISION

Science Applications International Corporation (SAIC) protests the U.S. Environmental Protection [*2] Agency's (EPA) award of a contract to Lockheed Martin Services, Inc. under request for proposals (RFP) No. PR-HQ-02-11750 to perform various tasks, including those related to systems development, data management, training, statistical services, and scientific applications. SAIC protests that the agency failed to properly consider Lockheed Martin's potential organizational conflicts of interest.

We sustain the protest.

BACKGROUND

The solicitation at issue here was published on May 21, 2003 and contemplated award of an indefinite-delivery/indefinite-quantity contract, under which cost-reimbursement and fixed-price task orders will be issued. n1 The solicitation stated that task orders will be issued for "a wide variety" of systems engineering services, to be performed at various locations, "to assist [EPA] in meeting its strategic objectives and responsibilities under Federal legislation and executive orders."

RFP at C-2, C-3. More specifically, section C of the RFP listed various "task areas," including "systems development, maintenance, and operation," "application security support," "IT architectural support," "data management support," "training," "statistical services," "geographic [*3] information systems (GIS) support," "high performance computing (HPC) and visualization support," and "scientific application and computational science support." RFP at C-7 through C-10.

n1 Offerors were told to assume that approximately 90 percent of the task orders would be issued on a cost-reimburseable basis. RFP at L-19.

For each task area identified, the solicitation provided a more expansive description of the particular activities contemplated. For example, with regard to "statistical services," the solicitation stated that the contractor will: "Develop surveys, samples, and questionnaires and related documentation." RFP at C-9. Similarly, with regard to the task area entitled "scientific application, visualization and computational science support," the RFP provided that the contractor will: "Provide environmental modeling and application development; molecular modeling and computational modeling; numerical algorithms and verification; code optimizing, porting, tuning, and vectorizing; trouble shooting; parallel computing; cluster porting; statistical analysis; data mining and large scale statistical analysis; information engineering; and other scientific application [*4] support." RFP at C-10.

Section C of the RFP identified the agency's overall objectives related to performance of this contract. Among other things, this portion of the solicitation stated that the agency intends to "develop a full partnership relationship with the Offeror," which will, among other things, result in "significant business growth." RFP at C-3. Consistent with the objective to achieve "significant business growth," the solicitation stated that the agency intends for this contract to become the "vehicle of choice" for the agency's "clients" and "partners," which include "other Federal and state agencies," as well as "local governments, contractors, and researchers." RFP at C-2, C-4.

The solicitation provided that the agency would select the proposal that is "most advantageous" to the government, based on consideration of cost and various non-cost factors, advising offerors that the non-cost factors combined were "significantly more important" than cost. RFP at M-1. The solicitation established the following non-cost factors that would be subjectively point-scored: management approach, key personnel, oral presentations, task performance, software development center [*5] facilities and organization, corporate experience and past performance, transition approach, and small business utilization. RFP at M-2 through M-3. The solicitation also provided that the agency would evaluate, on a "pass/fail" basis, each offeror's compliance with the solicitation's statement of objectives and the offeror's conflict of interest (COI) plan. n2 RFP at M-3.

n2 The solicitation required offerors to submit a "corporate COI plan," that would describe the procedures a company uses to identify and report future conflicts; however, the solicitation specifically provided that such plans need not be "contract or program specific." RFP at M-4. Separate and apart from the requirement to submit a corporate plan describing the procedures for identifying and reporting future conflicts, the solicitation required each offeror to certify that it was "not aware of any information bearing on the existence of any potential organizational conflict of interest." RFP at K-11, L-7.

Five proposals, including those of Lockheed Martin and SAIC, n3 were submitted by the June 23 closing date; thereafter, each offeror made an oral presentation to the agency. The agency subsequently conducted [*6] discussions with all five offerors and, thereafter, requested, received and evaluated the offerors' final revised proposals. n4 Lockheed Martin's and SAIC's proposal both received ratings of "pass" with regard to their conflict of interest plans and compliance with the solicitation's stated objectives. With regard to the point-scored non-cost factors, SAIC's proposal received a score of [deleted]; Lockheed Martin's proposal received a score of [deleted]. SAIC's proposal had an evaluated cost of approximately [deleted] million; Lockheed Martin's proposal had an evaluated cost of approximately $706 million. n5 Agency Report, Tab 11, Source Selection Document, at 1. On the basis of this evaluation, the agency determined that Lockheed Martin's proposal represented the best value to the government; a contract was awarded on January 8. This protest followed.

n3 SAIC is the incumbent contractor under the predecessor contract for these requirements.

n4 The proposals submitted by the three offerors other than Lockheed Martin and SAIC are not relevant to resolution of this protest; accordingly, they are not further discussed.

n5 In evaluating Lockheed Martin's proposal, the agency noted Lockheed Martin had stated its intent to "grow the annual revenue under the contract by [deleted] *a year*" and to "add [deleted]." Agency Report, Tab 4, Lockheed Martin Proposal at III.2-1 (italics in original). The agency commented favorably on these portions of Lockheed Martin's proposal, characterizing the proposal as reflecting "an extremely clear commitment to growth" and "an excellent analysis of business opportunities in other agencies." Agency Report, Tab 11, Source Selection Decision, at 3.

[*7]

DISCUSSION

SAIC first protests that Lockheed Martin failed to properly disclose, and the agency failed to properly consider, Lockeed Martin's potential organizational conflicts of interest (OCI) associated with its performance of the particular requirements of this contract. More specifically, SAIC protests that Lockheed Martin may suffer impaired objectivity in performing some of the tasks contemplated under this solicitation, due to Lockheed Martin's multiple ongoing activities that are subject to, and potentially in violation of, EPA regulations. n6

n6 The record contains a document printed from EPA's website, titled "Enforcement & Compliance History Online," which identifies numerous Lockheed Martin facilities across the country that are subject to EPA inspection and, potentially, enforcement actions. Protester's Post-Hearing Comments, attach. B, exh. 1.

Contracting officers are required to identify and evaluate potential conflicts of interest as early in the acquisition process as possible. FAR § 9.504. Situations that create potential conflicts of interest are identified and discussed in FAR subpart 9.5, and they include situations in which a contractor's performance [*8] of contract requirements may affect the contractor's other activities and interests. See FAR §§ 9.505, 9.508. That is, a contractor's judgment and objectivity in performing the contract requirements may be impaired if the substance of its performance has the potential to affect other activities and interests of the contractor. Id.

SAIC maintains that, in light of Lockheed Martin's significant involvement in activities that are subject to environmental regulations, including its ownership and/or operation of various manufacturing and production facilities dealing with hazardous materials, n7 Lockheed Martin failed to properly disclose its ongoing involvement in such activities, n8 and the agency failed to reasonably consider the extent to which such involvement might impair Lockheed Martin's judgment and objectivity in performing certain tasks contemplated by the solicitation's statement of work.

n7 Neither Lockheed Martin nor the agency disputes the fact that Lockheed Martin has substantial interests in multiple activities and facilities that are subject to EPA regulations. For example, in its post-hearing comments, the agency refers to "Lockheed's status as a potentially responsible party (PRP) at Superfund sites," as well as "the fact that it [Lockheed Martin] still performs manufacturing activities which are subject to EPA regulations." Agency's Post-Hearing Comments at 2. In this regard, the 2003 annual report filed by Lockheed Martin Corporation with the Securities and Exchange Commission, states:

> We have property that is subject to environmental matters. . . . We are responding to three administrative orders issued by the California Regional Water Quality Control Board in connection with our former facilities in Redlands, California. We are also coordinating with the U.S. Air Force, which is working with the aerospace and defense industry to conduct preliminary studies of the potential health effects of perchlorate exposure associated with several sites across the country, including the Redlands site.

Protester's First Amended Protest, attach. A, at 69.

[*9]

n8 There is no dispute that Lockheed Martin submitted a certification with its proposal, as required by sections K and L of the RFP, representing that it was "not aware of any information bearing on the existence of any potential organizational conflict of interest."

Specifically, SAIC identifies various tasks contemplated by the solicitation, including tasks associated with statistical services and environmental modeling, maintaining that the agency failed to properly consider the impact that the existence

of Lockheed Martin's other environmentally-regulated activities-that is, Lockheed Martin's ownership or operation of various production or manufacturing facilities that produce or handle various hazardous materials subject to federal, state and local environmental regulations--may have on Lockheed Martin's judgment and objectivity in performing these tasks.

The agency responds that it had no obligation to—and that it did not—consider the impact that Lockheed Martin's past and ongoing environmentally-regulated activities may have on Lockheed Martin's performance of this contract because "this procurement is for computer support/systems engineering services, not enforcement [*10] or regulatory advice." n9 Agency's Post-Hearing Brief at 2. At the hearing conducted by GAO in connection with this protest, n10 the technical evaluator offered by the agency to speak on behalf of the technical evaluation panel (TEP), testified that the panel did not consider conflict of interest issues. Specifically, this evaluator testified as follows:

> n9 The agency maintains that approximately 70-75 percent of the work to be performed under this contract will deal with "administrative" systems, such as payroll, personnel, and grants management. Agency's Post-Hearing Brief at 3.
> n10 In resolving this protest, GAO conducted a hearing on the record, during which testimony was provided by various government and SAIC witnesses, including: the agency's contracting officer, a technical evaluator, contract transition manager, and internal cost auditor; and two SAIC managers under the predecessor contract.

> Q. Can [you] provide us [with] what your understanding was with regard to OCI and what the TEP did prior to source selection with regard to OCI.
>
> A. Sure. My focus was on the—on evaluating the capability of the bidders. And so[,] so far as the OCI itself, that was [*11] something that was addressed by the contracting officer, and it wasn't something that we weighed in on or needed to weigh in on. It was something that was outside our particular focus.
>
> Q. So prior to the source selection decision, the issue—was the issue of conflict of interest discussed by the TEP at all?
>
> A. No, it was not.

Hearing Transcript (Tr.) at 87-88.

Similarly, the contracting officer testified that, other than the corporate OCI plan submitted by Lockheed Martin—which discussed the general procedures Lockheed Martin will employ to identify future conflicts, but did not address either its ongoing environmentally-regulated activities or the particular requirements of this contract—the agency gave no consideration to any potential conflicts of interest created by Lockheed Martin's prior or current activities. n11 Tr. at 10, 15-18.

> n11 The contracting officer noted that, because a significant portion of this contract calls for information technology (IT) support, there were three other contracts involving IT support—a "software development contract," an "architectural support contract," and an "advisory and assistance" contract—that the agency reviewed for purposes of identifying potential conflicts caused by offeror involvement in those contracts. Tr. at 8-9.

[*12]

For the reasons discussed below, we are unpersuaded that the agency could reasonably conclude that it need not give any consideration to the potential that Lockheed Martin may suffer impaired objectivity in performing a portion of the contract requirements contemplated by this solicitation due to its considerable involvement with activities and facilities that are subject to environmental regulations.

First, as SAIC points out, there are various portions of the statement of work that directly conflict with the agency's assertion that the contract is unrelated to the agency's environmental regulatory responsibilities. For example, with regard to the tasks to be performed in the area of "statistical surveys," the solicitation states that the contractor will: "Develop surveys, samples, and questionnaires and related documentation." RFP at C-9. At the GAO hearing, one of SAIC's contract managers testified that, under the predecessor contract, n12 SAIC had been tasked with developing a series of

questionnaires designed to elicit information concerning the testing and sampling practices used by certain public drinking water systems. Tr. at 178-79. The surveys had been designed to assess [*13] how often water was being sampled for various bacteria or other pathogens and what kind of water treatment was being applied. n13 Tr. at 179.

> n12 In responding to SAIC's initial protest, the contracting officer specifically referenced the manner in which work had been performed under the predecessor contract as indicative of the manner in which this contract will be performed. Contracting Officer's Statement, Feb. 19, 2004, at 4. Accordingly, we view prior task orders issued under the predecessor as relevant to the type of task orders that may be issued under this follow-on contract.
> n13 The portion of the GAO hearing during which testimony was elicited regarding the type of work performed under the preceding contract, was conducted in a somewhat unusual manner. In essence, GAO moderated a "panel discussion" consisting of two SAIC participants and three agency participants, all of whom had been involved with performance of the preceding contract. Each of the participants was given an opportunity to hear and react to other participants' testimony. Although the agency participants questioned the significance of the above-referenced survey, there was no dispute that SAIC was, in fact, tasked to perform the work described.

[*14]

Further, Lockheed Martin's own proposal provides additional support for SAIC's assertions that the scope of work under this contract encompasses various activities associated with EPA's assessment of environmental conditions. Specifically, in responding to the "statistical surveys" portion of the solicitation, Lockheed Martin's proposal states:

> We have designed and implemented questionnaires and surveys to meet EPA requirements that are clear and concise. For example, we evaluated information collected from [deleted] along a potentially contaminated river to determine long-term contaminant ingestion and corresponding health effects.

Agency Report, Tab 4, Lockheed Martin Proposal, at III.2-32.

At the GAO hearing, agency personnel acknowledged that the scope of work of this contract could reasonably include designing and implementing surveys similar to the type described in Lockheed Martin's proposal, specifically testifying as follows:

> Q. Is it your position that under the [protested] contract, Lockheed can be tasked with designing and implementing surveys to gather information on things such as contaminant ingestions and health effects?
>
> A. I don't see a reason why [*15] they couldn't.

Tr. at 169.

Upon further questioning, this government witness then testified that it would be inappropriate for Lockheed Martin to be tasked with conducting this type of survey if there were a Lockheed Martin production facility located in the area being surveyed, concluding "this [the presence of a Lockheed Martin facility] would clearly be a conflict of interest." Tr. at 171-72.

In defending against this protest, the agency argues that it intends to engage in ongoing monitoring and supervision of Lockheed Martin's contract performance in a manner that will effectively neutralize potential conflicts. However, such post-award assertions do not negate the agency's pre-award obligation to "identify and evaluate potential organizational conflicts of interest." See FAR § 9.504. As discussed above, the record unambiguously establishes that the agency gave no consideration to Lockheed's past and ongoing performance of environmentally-regulated activities and, similarly, gave no consideration to the impact those activities could have on Lockheed Martin's judgment and objectivity in performing certain tasks that are reasonably within the scope of the contract. [*16] Our concern with the agency's failure to consider the potential conflicts of interest is heightened by the fact that both the agency and Lockheed Martin are intent on experiencing substantial "growth" in the contract—increasing both the volume of tasks to be performed and the customer base that relies on this contract, specifically expressing the intent to expand the base to EPA's "clients" and "partners," including "other Federal and state agencies" and "local governments, contractors, and researchers." RFP at C-2, C-4; Agency Report, Tab 4, Lockheed Martin Proposal, at III.2-1.

On this record, we conclude that the agency could not reasonably determine that it need not give any consideration to the potential conflicts of interest created by Lockheed Martin's substantial involvement in environmentally-regulated activities while simultaneously performing certain tasks under this contract, which the agency now concedes, at least in certain circumstances, would clearly be a conflict of interest. n14 Tr. at 171-72.

n14 SAIC has identified various additional areas in the solicitation's statement of work that may similarly create conflicts of interest, including, for example, tasks associated with environmental modeling, and systems development, maintenance, and operation. Further, as noted above the volume of work and customer base are likely to expand substantially. Accordingly, our concerns regarding potential conflicts of interest are not limited to those specifically discussed above. Consistent with our recommendation below, we expect the agency to perform a thorough, documented, review regarding all potential conflicts, not limited to those discussed here.

[*17]

The protest is sustained. n15

n15 In its initial protest and first supplemental protest (filed on January 23 and 30, 2004, respectively) SAIC argued that the procurement was flawed for various additional reasons, including that the agency improperly evaluated SAIC's oral presentation, failed to conduct meaningful discussions, and failed to properly evaluate Lockheed Martin's proposed direct labor rates. SAIC subsequently expressly withdrew some of these allegations. To the extent the allegations were not withdrawn, we have considered them and conclude that they do not provide additional bases for sustaining the protest. In contrast, on March 4, SAIC submitted a second supplemental protest, challenging the agency's evaluation of Lockheed Martin's proposal with regard to certain proposed indirect rates which were [deleted]. Based on the record provided, including the testimony of the EPA's cost evaluator, we have concerns regarding the agency's evaluation of Lockheed Martin's proposed indirect rates. For example, although the solicitation expressly provided that [deleted] information must be provided, Lockheed Martin's proposal did not include that information for some of its proposed rates. Further, although the record indicates that the contracting officer believed that the Defense Contract Audit Agency had verified all of Lockheed Martin's proposed rates, this was not the case. Tr. at 48-49; 288-89, 313-14, 320-21. Finally, the agency's cost auditor repeatedly testified that, rather than focusing on whether there was a basis to accept Lockheed Martin's proposed rates, she focused on whether there was a basis to "question" the rates. Tr. at 289, 295, 296-99, 301, 303, 305, 310-12. In light of our recommendation, below, regarding the potential conflict of interest, we suggest that the agency revisit the basis for determining that Lockheed Martin's proposed indirect rates—that will be applied to performance of this contract, valued in excess of $700 million, where the agency projects that 90 of the tasks orders will be issued on a cost-reimbursable basis—were reasonable and realistic.

[*18]

RECOMMENDATION

We recommend that the agency perform a thorough assessment of Lockheed Martin's environmentally-regulated activities in the context of the entire scope of work to be performed under this contract, and perform a reasonable, documented assessment that identifies and evaluates the potential conflicts that may arise due to Lockheed Martin's environmentally-regulated activities and interests. n16 With regard to areas of contract performance creating significant conflicts, the agency should establish and document a course of action that will effectively avoid, neutralize or mitigate the conflict. See FAR §§ 9.504, 9.506. In the event the agency determines that a potential conflict exists which cannot be avoided, neutralized or mitigated, it should either terminate the contract with Lockheed Martin and award a contract to the offeror whose proposal represents the best value to the government, consistent with the terms of the solicitation and applicable law and regulation or, alternatively, amend the solicitation and seek revised proposals from all offerors. We further recommend that the agency reimburse SAIC for the costs of filing and pursuing its protest, including [*19] reasonable attorney's fees. SAIC's certified claim for costs, detailing the time spent and cost incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1) (2004). n17

n16 It is not clear whether the agency will need to request additional information from Lockheed Martin in making this assessment. As SAIC has demonstrated in pursuing this protest, there appears to be a substantial amount of publicly available information regarding the scope of Lockheed Martin's activities. Nonetheless, we leave this

matter to the agency's reasonable discretion.

n17 We note that the agency determined to proceed with contract performance, notwithstanding the protest, on the basis that performance is in the best interests of the government, citing to FAR § 33.104(c)(2)(i). Letter from EPA to GAO (Jan. 29, 2004). We also note that, pursuant to the Competition in Contracting Act of 1984, when our Office sustains a protest following an agency's determination to proceed with contract performance on the basis of the "best interests of the United States," we are statutorily required to make our recommendation "without regard to any cost or disruption from terminating, recompeting, or reawarding the contract." *31 U.S.C. § 3554*(b)(2) (2000).

[*20]

1 of 1 DOCUMENT

APPEAL OF SANFORD COHEN & ASSOCIATES, INC.

IBCA No. 4239/00

Interior Board of Contract Appeals

2004 IBCA LEXIS 5

September 8, 2004

CONTRACT: [*1]

Environment Protection Agency, Contract No. 68D20185 (FY's 1993-1997)

JUDGES:

Candida S. Steel, Chief Administrative Judge. Bernard V. Parrette, Administrative Judge, concur.

COUNSEL:
APPEARANCE FOR APPELLANT: Claude P. Goddard, Jr., Esq., Wickwire Gavin, P.C., Vienna, Virginia.

APPEARANCE FOR GOVERNMENT: Anthony G. Beyer, Esq., Agency Counsel, Research Triangle Park, North Carolina.

OPINIONBY: STEEL

OPINION:

Sustained: Remanded for Quantum Determination

OPINION BY CHIEF ADMINISTRATIVE JUDGE STEEL

Summary

This is an appeal from the Environment Protection Agency's (EPA's) Contracting Officer's (CO's) denial of Sanford Cohen & Associates' (SCA's) claim for breach of contract damages arising out of EPA's alleged failure (1) to order a contractually specified number of work hours for the base year, and for subsequent years, as set forth in the Contract; and (2) to renegotiate the fixed fee based on a realistic estimate of the level of effort. Appellant alleges that EPA knew or should have known that its estimates of direct labor hours for each performance period were grossly inflated and impossible to achieve, and that for the base period and four renewal option periods, the level of effort actually ordered never [*2] exceeded 40% of EPA's estimates.

The parties are in agreement that the Contract was a level of effort, cost-reimbursement, term contract with five renewal options, the fifth option having been added by Contract Modification 0052 on September 23, 1997. The Contract was neither a Requirements contract nor an Indefinite Delivery/Indefinite Quantity (ID/IQ) contract. It provided that:

> The Contractor shall perform all work and provide all required reports within the level of effort specified below. The Government **will order 119,000 direct labor hours [dlh] for the base period** which represents the Government's best estimate of the level of effort required to fulfill these requirements.

(Emphasis added)

By Modification 0008, dated May 26, 1993, EPA exercised Option Period I but deleted the above clause and substituted the following:

> (a) The Contractor shall perform all work and provide all required reports within the level of effort specified below. **The Government's best estimate of the level of effort** required to fulfill these requirements is as follows:

PERIOD	DIRECT LABOR HOURS
Base Period	119,000
Option Period I	119,000

Although Appellant describes the foregoing [*3] as "non-standard language," EPA included it in each option exercised except for Option V, which was added by Modification 0052 and established an estimated level of only 7,000 hours for that option period. This modification also lowered the estimate of direct labor hours for Option Period IV from 119,000 dlh to 112,000 dlh. Along with these unilateral reductions in level of effort, EPA reduced the Contractor's fees by the same percentage as its level-of-effort cost reductions, an action it said was permitted under paragraph (1) of FAR's Limitation of Funds (LOF) clause, 52-232-22. This paragraph, incorporated by reference into the Contract, provided:

> (1) If the Government does not allot sufficient funds to allow completion of the work, the Contractor is entitled to a percentage of the fee specified in the Schedule equaling the percentage of completion of the work contemplated by this contract.

Appellant contends, however, first, that the LOF clause does not apply because sufficient funds were allotted to the Contract, and, second, as shown by the fact that in every year except Option Periods III and V EPA either shifted funds from the current year to the next Option Period or [*4] deleted funds already obligated, that funds were always readily available in excess of the amounts required for the actual level of effort. We agree and find that Appellant is entitled to a renegotiation of the fees it received on the basis of what it would have earned had EPA's estimates more accurately reflected the true level of effort that it required on the basis of known conditions.

Facts

The Appellant is a corporation incorporated as "SC&A, Inc." and doing business as S. Cohen & Associates, Inc. (Hereinafter "SCA"). Respondent is the Environmental Protection Agency ("EPA").

1. The Board has jurisdiction over this appeal pursuant to the Contract Disputes Act of 1978, *41 U.S.C. § 601* et seq. SCA filed a properly certified claim which was denied by EPA's Contracting Officer; and SCA timely appealed the denial of its claim. EPA awarded SCA Contract No. 68D20185, effective September 30, 1992, to provide technical support to EPA relating to the assessment and evaluation of radon contamination, gaseous and other airborne radioactive materials, and electromagnetic field radiation.

2. The Contract was a level of effort, cost-reimbursement, [*5] term contract, with a base period of performance, and an option to extend the term for four additional periods of fifteen months each.

3. The Solicitation and resulting Contract incorporated standard cost reimbursement provisions by reference in Section I of the solicitation. These cost reimbursement provisions included the "Allowable Cost and Payment (JUL 1991)" clause (FAR § 52.216-7), the "Limitation of Cost (APR 1984)" clause (FAR § 52.232-20), and the "Limitation of Funds (APR 1984) clause (FAR § 52.232-22).

4. Clause B-1 of the contract, entitled "Level of Effort - Cost-Reimbursement Term Contract," EPAAR 1552.212-70 (APR 1984), provided in part that,

> (a) The Contractor shall perform all work and provide all required reports within the level of effort specified below. The Government will order 119,000 direct labor hours for the base period which represents the Government's best estimate of the level of effort required to fulfill these requirements.

***

(d) If the Contractor provides less than 90 percent of the level of effort specified for the base period or any optional period ordered, an equitable downward adjustment of the fixed fee, if any, for that period will [*6] be made.

5. Thus, the Contract established a Level of Effort of 119,000 direct labor hours for each option period. Costs and fixed fees were also established for the base and options periods as follows:

Period	Estimated Cost	Fixed Fee
Base Period	$ 6,565,091	$ 426,731
Option Period I	$ 6,709,566	$ 436,122
Option Period II	$ 6,896,855	$ 448,296
Option Period III	$ 7,089,668	$ 460,828
Option Period IV	$ 7,276,576	$ 472,977
Option Period V	$ 428,034	$ 27,822

6. By unilateral Modification 0008, dated May 26, 1993, the government exercised Option Period I. The Modification also deleted the original clause at B. 1 set out in paragraph 4, above, and substituted a new clause **with the same estimate** as follows:

(a) The Contractor shall perform all work and provide all required reports within the level of effort specified below. The Government's best estimate of the level of effort required to fulfill these requirements is as follows:

PERIOD	DIRECT LABOR HOURS
Base Period	119,000
Option Period I	119,000

7. EPA used identical language for each subsequent option exercise. Except for Option Period V and amended Option Period IV, the estimated direct labor [*7] hours for each performance period continued to be 119,000 hours. Modification 0052 established the level of effort for Option Period V at 7,000 direct labor hours and lowered the estimated direct labor hours for Option Period IV from 119,000 to 112,000 dlh.

8. The EPA's estimated hours and actual orders per option period were as follows:

Contract Period	DLH Estimated	DLH Ordered
Base Period	119,000	35,608
Option Period I	119,000	50,583
Option Period II	119,000	69,306
Option Period III	119,000	32,963
Option Period IV	112,000	28,124
Option Period V	7,000	4,717

9. The EPA incrementally funded the Contract throughout its duration, allotting funds to the Contract at levels consistent with the actual levels ordered. At the end of each performance period, EPA had allotted the following amounts:

Performance Year	Total Allocated	Allotted to Cost	Allotted to Fee
Base Period	$ 2,058,022	$ 1,932,415	$ 125,607
Option Period I	3,021,774	2,837,346	184,428
Option Period II	3,952,051	3,654,732	296,319 n1
Option Period III	1,623,040	2,523,981	99,059
Option Period IV	1,635,000	1,535,211	99,789
Option Period V	299,000	280,751	18,249

n1 Per Modification 0050 of September 9, 1997.

[*8]

The estimated costs and fixed fees, however, remained at their original levels for each performance period. During these performance periods, the amounts allotted were driven by the level of effort, not by the absence of funding availability.

10. SCA's incurred costs and fees received were as follows:

Base Period	$ 1,925,275.46	124,970.60
Option Period I	$ 2,745,804.12	177,839.97
Option Period II	$ 2,654,445.75	163,816.88
Option Period III	$ 1,503,019.03	102,729.45
Option Period IV	$ 1,438,143.41	108,060.97
Option Period V	$ 271,487.04	19,030.20
Total		$ 696,448.07

The difference between the total of $ 2,244,945 in fixed fees set forth in the Contract and the total fees paid is $ 1,548,505.93.

11. By letter dated December 3, 1996, EPA sent SCA a proposed bilateral Modification 0044 that would have retroactively changed clause B-1 of the Contract to reflect the Government's "best estimate" of the level of effort as follows:

PERIOD	DIRECT LABOR HOURS
Base Period	32,516.86 (actual)
Option Period I	46,877.14 (actual)
Option Period II	43,459.86 (actual)
Option Period IV	119,0000 (later reduced to 112,000 by Modification 0052

12. SCA refused to sign [*9] Mod 0044 because it thought basing the fee on a lesser number of hours was inequitable. It proposed an equitable adjustment of the fee based on the midpoint between the original fixed fee and EPA's fee, which was based solely on dollars per hour delivered. EPA rejected the proposal.

Discussion

In their well-written and well-received "bible", Formation of Government Contracts (3rd ed., George Washington University, 1998), Mssrs. Nash and Cibinic devote more than 200 pages to Types of Contracts. But their recent newsletters suggest that they have a particular interest in requirements and ID/IQ contracts. The Contract before us is of neither type, but its legal construction depends upon case law in these areas because any level-of-effort, cost reimbursement, option contract must specify in some manner the quantities the parties have agreed to, since pricing depends on the quantities ordered.

EPA, the agency involved here, apparently originally made use of ID/IQ contracts (*Dot Systems v. United States, 231 Ct. Cl. 707 (1982))* but more recently has used Level-of-Effort contracts instead (*Sociotechnical Research Applications, Inc., IBCA 3969, 01-1 BCA 31,235* [*10] and *03-1 BCA 32,214)* (hereafter STRA). In both cases, EPA grossly over-estimated its needs, as it has in this Appeal. The effect, whether intended or not, is to entice prospective contractors into offering lower prices than they otherwise would, since greater quantities generally mean lower costs per unit. It is therefore necessary to analyze the nature and extent of EPA's legal obligations in this matter.

The earlier cases pretty well agree that the Government's only obligation in an ID/IQ contract is to purchase the minimum quantity specified in the contract, regardless of the Government's needs. EPA's contract form in Dot Systems, above, expressly reserved the Government's right to award contracts and orders to other companies for like services during the same period. The Government's estimate of its contractual needs was not guaranteed. The Court of Claims affirmed this approach, stating that "in light of this provision, plaintiff could not reasonably have believed that it had any right to expect that the estimated quantities would in fact be ordered." *231 Ct. Cl. at 769.*

Although Nash and Cibinic observe that there is [*11] no requirement in the FAR for an agency to include

estimated quantities in an ID/IQ contract--and that all that is required is a statement of minimum and maximum quantities--they note with approval that many agencies now use estimated quantities to establish a basis for evaluation of offers, and that the Comptroller General also has "no difficulty in recognizing that offerors rely on estimated quantities in ID/IQ contracts."

These authors would propose a rule making the Government liable for negligently prepared estimates in both ID/IQ and requirements contracts whenever the contractor has reasonably relied on those estimates in arriving at its offered prices. They also suggest that "while reasonable reliance on the estimate in a requirements contract is presumed, the contractor would have to show that it reasonably relied on the estimate in an IDIQ contract." (Nash & Cibinic Report, Vol 13, No. 12, December 1999, par. 63) They go on to say:

> Our proposed rule would probably not lead to a great amount of contractor recovery on IDIQ contracts because the burden of proof on the contractor would be substantial. However, it would have one significant benefit. It would stop the [*12] appeals boards from continuing to state or imply that contractors should not rely on estimated quantities in IDIQ contracts. The boards' approach is damaging to the procurement process for two reasons. First, as recognized by the Comptroller General, it is probably not correct as a matter of fact in most instances. Second, it permits Government agencies to be careless in preparing estimates on IDIQ contracts when they are well aware that such estimates may induce offerors to submit reduced prices based on the estimates. This is not a healthy state of affairs.

We agree. Even our decision in STRA, which discussed these issues at great length and ultimately granted EPA's motion for summary judgment, found it reasonable that STRA would have relied on EPA's estimates. *(01-1 BCA at 154,178).* The same finding is appropriate here with respect to SCA, and we hereby make it. We find it particularly egregious that as early as its first option exercise in May 1993, EPA felt the need to change the statement that it would order 119,000 direct labor hours to less-definite "best estimate" language, while still retaining the same number of hours as the required level-of-effort--apparently [*13] in an attempt to relieve itself of any legal responsibility for lesser orders--but at the same time requiring Appellant to maintain sufficient staffing to accommodate an order for the original 119,000 hours if EPA later changed its mind on the number of hours it needed.

The essential unfairness of this EPA practice did not escape the agency's notice. EPA's Regional Operations Division on April 3, 1998, issued a memorandum entitled, "Monitoring the Level of Effort (LOE) in Cost-Reimbursement Term Form Contracts," which stated the following:

> Purpose: This Contract Guidance Document (CGD) provides information to contracting officers (CO' s) administering cost-reimbursement -Level of Effort (LOE) term form contracts.
>
> Background: The current Environmental Protection Agency Acquisition Regulation (EPAAR) clause 1552.211-73, entitled "Level of Effort-Cost-Reimbursement Term Contract" states that EPA "will order" a specified number of direct labor hours for the base period, which number of hours "represents the Government's best estimate of the level of effort" required. The clause provides that if the direct labor hours actually provided falls below 90% of the specified LOE, [*14] an equitable downward adjustment will be made to the fixed fee. The clause states that no adjustment will be made to the fee if the Government orders up to 110% of the specified LOE.
>
> In recent years, the direct labor hours ordered under many superfundl/RCRA contracts have been substantially less that 90% of the specified LOE. Sometimes, the specified LOE is not achieved because a significant portion of the effort is ordered shortly before the current contract period is about to expire.
>
> Analysis: The Office of General Counsel (OGC) has advised that if 90% of the specified LOE will not be ordered, the contract should be modified to reduce the LOE before the current base or option period expires. CO's should attempt to negotiate a bilateral modification which reduces both the LOE and the fixed fee if an acceptable modification cannot be negotiated in a timely manner, CO's should issue a partial termination for convenience of the LOE to remove any excess labor hours from the current and all remaining contract periods of performance if the LOE is not reduced (either by means of a bilateral modification or a partial termination for convenience) before the current period of performance [*15] expires, the Government may have breached the contract. The contractor could pursue a claim to recover

the entirety of the fixed fee and other damages associated with the breach of contract.

Conclusion: CO's should monitor cost-reimbursement, LOE term form contracts closely to ensure that the total number of direct labor hours ordered and completed during a given period of performance falls within the 90-110% range specified in the contract LOE clause. If such monitoring indicates that the original LOB estimate will not be achieved, timely action should be taken to negotiate a reduction in the labor hours and the corresponding fixed or base fee. Alternatively, the CO may issue a partial termination for convenience which (1) removes the excess labor hours from the current and each remaining contract period of performance, and (2) reduces the fixed fee. A partial termination for convenience may result in a contractor claim for termination costs.

By contrast, as in STRA, Government counsel argues here that the number of hours ordered is essentially a funding issue; that is, that EPA is liable to the contractor only to the extent that funds have been allotted to a particular contract. [*16] The Board in STRA accepted that argument on the basis of the agency's assurance that sufficient appropriations were not available to fully fund the contract's LOE estimates. Here, there is no representation that sufficient funds were not available, as partially indicated by the fact that unused contract funds in prior years were allotted to the contract in subsequent years. Counsel does not discuss his General Counsel's concerns or satisfactorily refute Appellant's contention that the limitation of funding clause is not involved in this Appeal because adequate funds were available for the full performance of the Contact. We find that sufficient funds were in fact available to meet the agency's LOE estimates.

The only remaining issue is the matter of damages. Appellant argues that it is entitled to compensation midway between the fee it would have earned if all of the estimated hours had been ordered and the lesser fee based on the hours that were actually ordered. Such a result might have been appropriate for a settlement outside the scope of this litigation, but it is not an appropriate basis for an award by this Board, particularly in light of the Federal Circuit's opinion in *Rumsfeld v. Allied Companies, 318 F.3d 1317 (2002),* [*17] which found that the contractor was not entitled to anticipatory profit damages and that the proper methodology for determining damages was by equitable adjustment in the price of units delivered. Thus, a remand of the case to the parties for a determination of damages in accordance with Rumsfeld is necessary.

Decision

Appellant's motion for summary judgment is granted, and the Government's motion is denied. The matter is hereby remanded to the parties for a determination of damages based on an equitable adjustment in the price of hours delivered. If the parties cannot agree on damages, the Board should be notified within 60 days so that it can determine damages. It is so ordered.

Candida S. Steel
Chief Administrative Judge

I concur:

Bernard V. Parrette
Administrative Judge

GAO
Accountability * Integrity * Reliability
United States General Accounting Office
Washington, DC 20548

SELECTED RECENT GAO BID PROTEST DECISIONS[1]

Evaluation and source selection

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

Tiger Enterprises, Inc., B-293951, July 26, 2004, 2004 CPD ¶ 141 (protest sustained where solicitation called for comparative evaluation of various criteria, but source selection appeared to be based on the low-priced, technically acceptable submission).

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

University Research Company, LLC, B-294358 et al., Oct. 28, 2004, 2004 CPD ¶ 217 (protest sustained where source selection official rejected award recommendation of project officers, whose participation in proposal evaluation is anticipated by agency regulation, without documentation explaining the basis of our decision).

- 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 is 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.

The MIL Corp., B-294836, Dec. 30, 2004, 2005 CPD ¶ ___ (protest is sustained where agency in selecting contracts for award failing to consider the differences among the offerors' proposed pricing).

[1]Bid protest decisions, as well as an online version of GAO's protest docket, can be accessed at GAO's website: **http://www.gao.gov**.

Discussions

Lockheed Martin Simulation, Training and Support, B-292836.8 et al., Nov. 24, 2004, 2005 CPD ¶ ___ (protest is sustained where agency engaged in post-final proposal revision discussions only with awardee).

Past performance evaluations

- Assessment of relevant past performance must be reasonable, even in competitive FSS procurements.

KMR, LLC, B-292860, Dec. 22, 2003, 2003 CPD ¶ 233 (agency unreasonably rated two vendors' quotations equal under past performance evaluation factor, where record does not support agency's finding that awardee's experience was relevant to the requirements of the solicitation).

- Similarity of past performance

Kaman Dayron, Inc., B-292997, Jan. 15, 2004, 2004 CPD ¶ 101 (protest is sustained where, under a solicitation that indicated that when rating proposals under the technical evaluation factor particular importance would be placed on the similarity of the items previously produced to the grenade fuze being procured, the record does not support the agency's ultimate determination that the awardee's experience producing part of a different fuze was nearly identical to the experience of the protester in producing the fuze being procured here such that both offerors were entitled to the same "excellent" rating).

- Joint venture treatment.

JACO & MCC Joint Venture, LLP, B-293354.2, May 18, 2004, 2004 CPD ¶ 122 (agency may consider the experience and past performance history of individual joint venture partners in evaluating the joint venture's proposal where solicitation does not preclude doing so, and both joint venture partners will be performing work under the contract).

- Lack of relevant past performance.

The MIL Corp., B-294836, Dec. 30, 2004, 2005 CPD ¶ ___ (protest is 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).

Task/delivery orders and modifications

- GAO may consider certain issues despite the jurisdictional bar on protests relating to task or delivery orders.

Anteon Corp., B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51 (protest that task order request for electronic passport covers is outside the scope of General Services Administration's (GSA) indefinite delivery/indefinite quantity, multiple-award contract for "Smart Identification Cards" (Smart Card) is sustained, where GSA's Smart Card contract contemplates the purchase of credit card-sized plastic cards, while the task order contemplates the purchase of cloth cover sheets for electronic passports with embedded integrated circuit chip inlays that are significantly larger in size than a Smart Card and are manufactured using different materials).

Simplified acquisitions and Federal Supply Schedule purchases

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

American Sys. Consulting, Inc., B-294644, Dec. 13, 2004, 2004 CPD ¶ 247 (award of a delivery order that included user support manager services was unreasonable where the services were not identified in the firm's FSS contract).

Armed Forces Merchandise Outlet, Inc., B-294281, Oct. 12, 2004, 2004 CPD ¶ 218 (delivery order improperly issued for item not on FSS vendor's schedule).

- Even simplified acquisitions require rational price/technical tradeoffs.

e-LYNXX Corp., B-292761, Dec. 3, 2003, 2003 CPD ¶ 219 (under a request for quotations, issued under simplified acquisition procedures, under which oral presentations constituted the vendors' technical submissions and which provided for award based upon a price/technical tradeoff, protest challenging source selection decision is sustained, where the contracting officer's selection of the higher-priced, higher-rated quotation reflected a failure to meaningfully consider price, given that the price/technical tradeoff was based primarily upon a technical consideration which the contracting officer testified he did not understand and for which he obtained no advice).

- The way oral presentations in competitive FSS procurements are conducted can result in finding that discussions were held.

TDS, Inc., B-292674, Nov. 12, 2003, 2003 CPD ¶ 204 (where agency personnel comment on, or raise substantive questions or concerns about, vendors' quotations or proposals in the course of an oral presentation, and either simultaneously or subsequently afford the vendors an opportunity to make revisions in light of the agency personnel's comments, questions, and

concerns, discussions have occurred; once discussions have occurred with one offeror, they must be held with all offerors within the competitive range, and they must be meaningful).

- Discretion to cancel a competitive FSS procurement is not unfettered.

SMF Sys. Tech. Corp., B-292419.3, Nov. 26, 2003, 2003 CPD ¶ 203 (agency determination, in the face of protester's challenge to selection decision to cancel request for quotations for services under the FSS and to issue an order for services on a noncompetitive basis because the initial competition allegedly was contrary to regulations governing FSS acquisitions and inconsistent with an urgent need to conduct the procurement with minimum delay was not reasonable where the competition conducted was not contrary to applicable regulations and the urgency was primarily the result of the agency's missteps in the acquisition process).

- Cost issues.

Alion Science & Tech. Corp., B-294159, B-294159.2, Sept. 10, 2004, 2004 CPD ¶ 189 (under anticipated time-and-materials task order to be placed under successful vendor's Federal Supply Schedule contract, protest sustained where record indicated that solicitation may not accurately reflect agency's needs and its lack of clarity resulted in uncertainty about the total cost of each vendor's approach).

Cross Match Techs., Inc., B-293024.3; B-293024.4, June 25, 2004, 2004 CPD ¶ 193 (solicitation provision that provides for incorporating into a BPA additional, unevaluated items, in quantities for which no estimates are provided in the solicitation, and at prices that are subsequently to be negotiated, appears neither to ensure that competitors are evaluated on an equal basis nor to comply with the requirement that the total cost to the government for the required goods or services be taken into account in the evaluation, but protest is nevertheless denied because error did not prejudice protester).

- Non-binding nature of quotations.

Computer Assocs. Int'l, Inc., B-292077.3 et al., Jan. 22, 2004, 2004 CPD ¶ 163, recon. denied, B-292077.6, May 5, 2004, 2004 CPD ¶ 110 (agency lawfully issued purchase order to vendor at price quoted in response to request for quotations, notwithstanding language in quotation indicating that it was valid only through a specified date and order was issued after that date; quotations are not offers, and vendors are not bound to honor them, so that the concept of an acceptance period has no application to quotations).

- Adequate time and information to respond under simplified acquisition.

Information Ventures, Inc., B-293541, Apr. 9, 2004, 2004 CPD ¶ 81 (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 given that 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, Inc., B-293518, B-293518.2, Mar. 29, 2004, 2004 CPD ¶ 76 (protest that published synopsis expressing an agency's intent to award a sole-source contract under simplified acquisition procedures was improper because it lacked necessary information, is sustained where the synopsis did not accurately describe the agency's requirements).

- Commercial buys.

Firearms Training Sys. Inc., B-292819.2 et al., Apr. 26, 2004, 2004 CPD ¶ 107 (when using commercial items procedures, agency is not required to formally evaluate and document whether proposed items are in fact commercial items unless either a solicitation provision requires such an evaluation, or the agency has some indication that proposed items are not commercial).

Jurisdiction

Ashe Facility Servs., Inc., B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 (protest that awardee's proposal contained material misrepresentations regarding its status as a qualified Historically Underutilized Business Zone (HUBZone) small business concern is dismissed, since protest ultimately involves issue of whether awardee was a qualified HUBZone concern, a matter within the exclusive statutory authority of the Small Business Administration).

Conflicts of interest

Science Applications Int'l Corp., B-293601 et al., May 3, 2004, 2004 CPD ¶ 96 (where agency acknowledges that awardee's substantial involvement in activities subject to environmental regulations could create a conflict of interest in performing certain tasks contemplated by the solicitation's scope of work, and agency gave no consideration to the impact of such potential conflicts in making award, agency failed to comply with Federal Acquisition Regulation requirement that it "identify and evaluate potential organizational conflicts of interest").

PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 (protest sustained where agency failed to reasonably consider or evaluate potential conflicts of interest that would be created by awardee's involvement in evaluating the performance of undersea warfare systems that had been manufactured by the awardee or by the awardee's competitors, even if such evaluations were not "part of the procurement process").

OMB Circular A-76 competitions

- Jurisdiction.

Vallie Bray, B-293840, B-293840.2, Mar. 30, 2004, 2004 CPD ¶ 52 (protest filed by federal employee on behalf of other federal employees who assert that they are directly affected by agency's decision--pursuant to a streamlined competition conducted under OMB Circular A-76, as revised on May 29, 2003--to contract for the work rather than continue to perform the work in-house, is dismissed because, as permitted under the Circular's streamlined procedures, the decision to contract out was based on the agency's internal analysis, rather than pursuant to a solicitation; under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000), and GAO's Bid Protest Regulations, 4 C.F.R. part 21 (2004), GAO's jurisdiction is limited to considering protests involving solicitations and awards made or proposed to be made under those solicitations).

- Interested party status.

Dan Duefrene; Kelley Dull; Brenda Neuerburg; Gabrielle Martin, B-293590.2 et al., Apr. 19, 2004, 2004 CPD ¶ 82 (notwithstanding May 29, 2003 revisions to Office of Management and Budget Circular A-76, the in-house competitors in public/private competitions conducted under the Circular are not offerors and, therefore, under the current language of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000), no representative of an in-house competitor is an "interested party" eligible to maintain a protest before the General Accounting Office).

- Other significant A-76 decisions.

Career Quest, Division of Syllan Careers, Inc., B-293435.2; B-293435.3, Aug. 2, 2004, 2004 CPD ¶ 152 (protest is sustained where, under OMB Circular A-76 cost comparison, record shows that Most Efficient Organization (MEO) was misevaluated regarding key aspects of intended in-house staffing levels--principally a failure to cost all positions proposed in the MEO technical performance plan, and uncertainty whether other staffing levels were adequate to perform in accordance with the quality control aspects of the performance work statement--and the misevaluation could have affected the outcome of the cost comparison).

BAE Sys. Technical Servs., Inc., B-293070, Jan. 28, 2004, 2004 CPD ¶ 24 (in competition conducted pursuant to OMB Circular A-76, where in-house cost estimate (IHCE) for performance by the government's most efficient organization (MEO) fails to include costs for various performance work statement (PWS) requirements, and the additional costs required for the MEO to meet all PWS requirements are greater than the marginal difference between the protester's evaluated cost and the IHCE, GAO recommends that agency award a contract to the protester based on its lower-cost proposal).

Electronic commerce

Allied Materials & Equip. Co. Inc., B-293231, Feb. 5, 2004, 2004 CPD ¶ 27 (protest of agency's failure to post solicitation on FedBizOpps Internet website, as required by

regulation, is denied where protester did not avail itself of every reasonable opportunity to obtain the solicitation; although presolicitation notice indicated an anticipated closing time, as that time approached and passed, protester did not contact agency to determine status of solicitation, and finally inquired as to status approximately 7 weeks after closing time).

Cost claims

Department of the Army--Modification of Remedy, B-292768.5, Mar. 25, 2004, 2004 CPD ¶ 74 (where GAO sustained protest on one issue, but additional issues not addressed or denied in decision were related to the same core allegation so that they were not distinct and severable from the sustained issue, GAO's recommendation that protest costs be reimbursed extends to all issues raised).

First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 (where agency took corrective action--amendment of solicitation and resolicitation--in response to protest challenging agency's relaxation of solicitation's geographical location requirement, GAO nevertheless will not recommend reimbursement of protest costs, since relaxation did not result in competitive prejudice to protester, and corrective action therefore was not in response to clearly meritorious protest).

Miscellaneous issues

- Multiple award vs. single award

One Source Mechanical Services, Inc.; Kane Construction, B-293692, B-293802, June 1, 2004, 2004 CPD ¶ 112 (protest of solicitation terms sustained, where agency lacked a reasonable basis for not structuring the procurements to provide for multiple contract award).

- Affirmative determination of responsibility.

Consortium HSG Technischer Serv. GmbH & GeBe Gebäude- und Betriebstechnik GmbH Südwest Co., Mgt. KG, B-292699.6, June 24, 2004, 2004 CPD ¶ 134 (in order to challenge affirmative responsibility determination on basis that contracting officer failed to consider relevant information, protester must show that information was "available" by showing that protester provided the information to contracting officer, that contracting officer was aware of information, or that contracting officer should have been aware of information).

Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 (contracting officer's affirmative determination of the awardee's responsibility was not reasonably based where, despite having general awareness of misconduct by some of awardee's principals and parent company, the contracting officer did not obtain sufficient information about or consider the awardee's record of integrity and business ethics in making his responsibility determination).

- Timeliness.

American Multi Media, Inc.--Recons., B-293782.2, Aug. 25, 2004, 2004 CPD ¶ 158 (when a firm has been notified that the agency is considering taking an action adverse to the firm's interests, but has not made a final determination, the firm need not file a "defensive protest," since it may presume that the agency will act favorably to the firm).

- Cancellation.

Greenlee Construction, Inc., B-294338, Oct. 26, 2004, 2004 CPD ¶ 216 (cancellation of solicitation for offers was improper where agency's basis for cancellation was that solicitation was ambiguous regarding which of two methodologies would be used for evaluating price, but the agency was unable to identify a methodology, consistent with the balance of the solicitation, under which the protester's price would not be low).

- Corrective action.

SYMVIONICS, Inc., B-293824.2, Oct. 8, 2004, 2004 CPD ¶ 204 (protest is sustained where agency provided material information concerning solicitation requirements to a single competitor in a post-award debriefing and the agency subsequently reopened the competition without providing the other competitors with the same information).

Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2004 CPD ¶ ___ (protest sustained where agency in taking corrective action in response to a protest conducted discussions only with the awardee, rather than with all offerors whose proposals were in the competitive range).

Ridoc Enters., Inc./Myers Investigative & Sec. Servs., Inc., B-293045.2, July 26, 2004, 2004 CPD ¶ 153 (protest sustained where, after restoring offerors--including protester--to the competitive range in order to resolve an earlier protest, and having already conducted discussions with offeror that had continued to be in the competitive range, the agency failed to conduct any discussions with the reinstated offerors).

Security Consultants Group, Inc., B-293344.2, Mar. 19, 2004, 2004 CPD ¶ 53 (agency's decision to reopen competition, after making award to protester, in order to correct solicitation defect (failure to accurately disclose intended weights of evaluation factors), was unreasonable where record does not establish a reasonable possibility that any offeror was prejudiced by the defect; reopening of competition thus did not provide any benefit to the procurement system that would justify competitive harm to protester from resoliciting after exposure of protester's price).

- Randolph-Sheppard Act.

Washington State Dep't of Servs. for the Blind, B-293698.2, Apr. 27, 2004, 2004 CPD ¶ 84 (protest by a state licensing agency (SLA) for the blind challenging the elimination of its

proposal from consideration under request for proposals issued pursuant to the Randolph-Sheppard Act is dismissed; GAO will not consider protests from SLAs because arbitration procedures are provided for under the Act, and decisions of the arbitration panel are binding on the parties involved).

- Small business set-asides.

Information Ventures, Inc., B-294267, Oct. 8, 2004, 2004 CPD ¶ 205 (protest that agency improperly did not set aside procurement for small business concerns is sustained where the contracting officer did not consider the responses of several small businesses to the presolicitation notice and otherwise did not make a reasonable effort to survey the market to ascertain whether two or more responsible small business concerns would submit bids at fair market prices).

SWR, Inc., B-294266, Oct. 6, 2004, 2004 CPD ¶ 219 (protest challenging agency decision not to set aside procurement for Historically Underutilized Business Zone (HUBZone) small business concerns is sustained where the decision was unreasonable, particularly since two HUBZone firms had competed under a similar procurement).

- Unbalanced bidding.

Burney & Burney Constr. Co., B-292458.2, Mar. 19, 2004, 2004 CPD ¶ 49 (protest that agency improperly rejected protester's bid as unbalanced is denied where bid included overstated prices for some line items, and agency determined that, due to uncertainty in estimated quantities for those items, bid posed risk that government would pay an unreasonable price for contract performance).

- Material misrepresentation.

ACS Gov't Servs., Inc., B-293014, Jan. 20, 2004, 2004 CPD ¶ 18 (protest that awardee misrepresented that three proposed key personnel had agreed to work for the firm is sustained where the record shows that the three individuals had not so agreed, and the misrepresentation materially affected the evaluation of the awardee's proposal).

- Defective solicitation

Oregon Potato Co., B-294839, Dec. 27, 2004, 2004 CPD ¶ 254 (protest is sustained where an invitation for bids failed to provide sufficient information to allow bidders to prepare their bids intelligently and to compete on an equal basis).

OGC PRACTICAL POINTERS

Don't Be Mr. Nice Person

Time and again the situation arises where an offeror submits an offer that does not quite make the grade for the requirement, or does nott really meet the technical requirements. But instead of creating a competitive range and excluding that offeror, the contracting officer decides it is not worth the trouble and leaves that deficient offer in the mix. Later, when the contract is awarded, that offeror is now the protester, with some very good claims, and then we hear from the contracting officer, well, they really should not have been considered in the first case because they do not meet the minimum technical requirements, etc.

So, in the future, DON'T DO IT. If an offer is not qualified, create a competitive range and exclude it. It is easier to defend the protest against kicking that offer out initially than the one for improperly evaluating it when you leave it in the competition.

Additionally, if an offeror is not technically qualified to receive award even after discussions and evaluation of revised proposals, explain that fact at the beginning of the written cost/technical trade-off. If you cannot make award to that offeror, that takes care of the trade-off analysis for that offeror. This situation arises, for example, when a solicitation provides that certain equipment requirements will be evaluated on a pass/fail basis, and an offeror fails. To make award to the offeror would require waiver of a solicitation requirement. Once you have documented that fact, no further best value analysis is required regarding that offeror.

SIMILARLY, take the situation where you have a contractor whose performance is dismal. You have the proof performance is bad, but you are a nice person and really do not want to default the contractor. You want to give them a chance. But the program types are pushing you to issue a cure notice and terminate for default. So you issue the cure notice and give them 10 days to fix.

The contractor comes back with promises to perform, the contractor has called its congressman, the Under Secretary, etc., but performance has not been cured and the contractor has offered no plan to show how it will be cured. But you want to be fair, they have made this political, you boot it to the Office of the General Counsel (OGC) for an opinion, and one, two, three weeks or more go by and you have not terminated for default.

DON'T HESITATE. If the time specified by the cure notice has expired, you have to move expeditiously to terminate for default or else your right to terminate for default created by the cure notice will have been waived. The termination for default will be converted into a termination for convenience. Just read the recent opinion of the Agriculture Board of Contract Appeals in *Trinity Installers, Inc.*, AGBCA No. 2004-139-1 (attached) to see how bad the results can be from the failure to enforce a cure notice.

Document, Document, Document. . . . BUT Remember It All Gets Seen in a Protest

One of the problems we often find in protests is a lack of documentation. This especially is true when proof of events is important for determining the timeliness of a protest. For example:

- If you tell an offeror over the phone that award has not yet been made but they do not really have a chance, DOCUMENT the phone conversation.
- If you fax notice of award to someone, make sure you document the time and date of the outgoing fax, preferably with a header from the fax machine.
- If you call and speak with or leave messages for past performance references, document it.
- Initial and date all notes of conversations.

Also remember that all this documentation (INCLUDING EMAILS) must be produced in a protest if relevant or requested. So be careful of making random comments that may be misunderstood later when someone else reads the document. And remember to have a system for easily retrieving this information in a timely manner.

Tell Me Whyyyyyyyyyy?

Another documentation issue: lack of any documentation that clearly states the contracting officer's rationale for award to the awardee over other offerors. Just ask yourself the question: "why am I doing this?" and write down all the answers. This is critical in best value procurements with a cost-technical tradeoff. MECHANICAL APPLICATION OF POINT SCORES OR COLOR SCHEMES IS NOT ENOUGH. There needs to be a written explanation of why you think a Cadillac offers more value than a Lexus to meet this particular procurement requirement.

And make sure all the numbers you cite in different places in the document all add up.

Just Because It Is Legally Within Your Rights Does Not Mean It Makes Good Business Sense

A favorite type of call: "OGC, the contractor is holding our government property because we haven't paid them [we have a dispute/they want more money, etc.] and we want you to get the U.S. Marshalls in there to retrieve this property t right away because we have to have this project done by next week for the Under Secretary."

First of all, does the contract clearly state that this is your property? Has the contractor actually breached a contract clause? If so, the legal process does not necessarily work that fast to be able for us to go to the Department of Justice, ask for assistance, and get the courts to grant a hearing and issue an order that quickly. It might be more efficient

and better business sense to pay a minor amount in dispute, issue a final decision later, or take some other action to achieve the program objective rather than stand on your legal rights.

Another example. Yeah, there are problems with the construction of the new building. Items will have to be redone, and the contractor has a plan to fix them. The problems are the fault of the A-E design company. But the program types want to terminate the construction contractor for default because the building has to be done by x date. Do you really have a basis for default? Is kicking out the construction contractor, who has a plan, and awarding a new contract to a new contractor, going to get you any closer to completion? Always remember the end goal and we can work out the claims later.

Upon Receipt of a Protest, Remember Your Obligations to Notify the Awardee and Others and Suspend Contract Performance When Applicable.

Contracting officers are required to notify the awardee upon receipt of a protest so that the awardee has the necessary information to evaluate its options, including intervening in the protest. In a pre-award protest of a competitive range determination, you need to notify all offerors.

If it is a pre-award protest, YOU MUST SUSPEND ALL FURTHER WORK ON THE PROCUREMENT. FAR 33.104(b). If a post-award protest is filed within the legal time periods, you MUST suspend the contract. There are no ifs, ands, or buts about these rules unless the automatic suspension is overridden. AND, if the program needs require that the agency execute an override of a suspension, please advise OGC about that IMMEDIATELY and start preparing the suspension override. It is difficult for us to grapple with a suspension override request that comes in at the last minute before a protest report is due to the Government Accountability Office (GAO), and the likelihood that the Court of Federal Claims (COFC) will uphold any override as necessary obviously will be affected by the seriousness and expediency with which the agency pursued getting the suspension overridden.

This is basic stuff but this has been a serious problem that we have encountered in the past few years.

Briefing Materials

They are a good and a bad thing. They help present information to the Source Selection Authority (SSA) or other final decision maker, or other program or policy officials. But then, they also form a paper record to suggest that something the evaluators considered important was not considered by the SSA because it wasn't in the Powerpoint slides. The chain of rationality of the decision from the evaluation to the SSA is now broken, and a protest subject to being sustained. If you must use briefing materials, they must cover everything accurately – at least give the SSA a copy of the whole evaluation record to review even if your presentation is in Powerpoint form.

When using BULLETS, make sure that the text fully and accurately reflects the evaluation assessment which it is meant to summarize.

Past Performance Evaluation

If you ask for past performance information in the solicitation, and they give you past performance contact information in their proposal, CONTACT THE PAST PERFORMANCE REFERENCES. Just because people in the agency "know" this contractor by reputation, does not mean you won't get dinged for not bothering to follow up with the references you asked for.

Simplified and Commercial Item Acquisitions

For the acquisition of commercial items, FAR part 12 provides that contracting officers may use the procedures for solicitation, evaluation, and award from part 13 (simplified acquisitions), part 14 (sealed bidding), and part 15 (negotiation), as appropriate. Similarly, in conducting a simplified acquisition under FAR part 13, contracting officers may use the procedures in FAR part 14 and part 15 as appropriate.

THIS DOES NOT MEAN that you can conduct a simplified acquisition for commercial items and ignore the provisions of FAR part 12. For example, if a comparative evaluation based on price and other factors is done, past performance is not a required evaluation factor for a simplified acquisition. However, the clause for evaluation of commercial items offers does require consideration of past performance. FAR 52.212-2.

Similarly, there is no clause requiring completion of on-line certs and reps for simplified acquisitions. The FAR authorizes the conduct of simplified acquisitions using any appropriate combination of procedures under parts 13, 14, 15, 35, or 36. In publishing the final rule for the on-line certs and reps, the FAR Council concluded that this by default required the use of on-line certs and reps for simplified acquisitions, and thus a cross-reference in part 13 to the requirement for on-line certs and reps established under FAR part 4 for all solicitations was not required.

Also, be careful what Agriculture Acquisition Regulation (AGAR) clauses you put into a commercial item or simplified acquisition procurement. For example, the commercial item instructions to offerors clause does not require offerors to submit financial information – AGAR 452.215-171 does. If you include the AGAR clause, you create a situation where an offeror may have to be rejected if it does not include that financial information.

The bottom line here is that in using the menu choices available for commercial item and simplified acquisition procurements, you have to be careful in terms of what specific

requirements will or should apply depending on how you structure the solicitation.

*2005-1 B.C.A. (CCH) P32,868; 2005 AGBCA LEXIS 6, **

TRINITY INSTALLERS, INC., Appellant

AGBCA No. 2004-139-1

Department of Agriculture Board of Contract Appeals

2005-1 B.C.A. (CCH) P32,868; 2005 **AGBCA** LEXIS 6

February 8, 2005

CORE TERMS: contractor, valley, notice, termination, roof, flashing, cure, water damage, default, trim, diary, contracting, completion, right to proceed, terminated, inspection, unacceptable, eave, chimney, engineer, metal, non-compliance, specification, estimated, installed, dormer, failure to complete, jack, bottom, carpet

JUDGES:
[*1] ANNE W. WESTBROOK, Administrative Judge. HOWARD A. POLLACK, Administrative Judge, Concurring. JOSEPH A. VERGILIO, Administrative Judge, dissenting.

COUNSEL:
Representing the Appellant: David R. Talbot, President, Trinity Installers, Inc., 7388 Mt. Angel Hwy., NE, Silverton, Oregon.

Representing the Government: John Bennett Munson, Esquire, Office of General Counsel, U. S. Department of Agriculture, 1220 S. W. Third Avenue, Room 1734, Portland, Oregon.

OPINIONBY: WESTBROOK

OPINION:
DECISION OF THE BOARD OF CONTRACT APPEALS

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK. Separate opinion by Administrative Judge VERGILIO, dissenting.

This timely appeal arises out of Contract No. 50-05K3-3-018, between the U. S. Department of Agriculture, U.S. Forest Service, Gifford Pinchot National Forest (FS or the Government), and Trinity Installers, Inc., of Silverton, Oregon (Appellant or Trinity). The contract, awarded July 28, 2003, required Appellant to remove an existing roof and furnish and install a replacement metal roof on the Mt. Adams Machine Shop. In a decision dated November 7, 2003, the Contracting Officer (CO) terminated **[*2]** Appellant's right to proceed with contract work for cause, and this appeal ensued. The parties elected to present the appeal on the record, pursuant to Board Rule 11. The record consists of the Appeal File (AF), Supplemental Appeal File (SAF), pleadings and briefs. Neither party presented affidavit testimony or additional evidence of any kind with their briefs.

The Board's jurisdiction to decide the appeal derives from the Contract Disputes Act of 1978,

41 U.S.C. §§ 601-613, as amended.

FINDINGS OF FACT

1. On June 17, 2003, the FS issued solicitation No. R6-GIP-3-027 for the removal of existing metal roofing and associated appurtenances and the furnishing and installation of new pre-formed metal roofing to include panels, ridge cap and flashing/trim. The solicitation incorporated by reference FAR 52.212-1, "Instructions to Offerors - Commercial Items"; FAR 52.212-4, "Contract Terms and Conditions - Commercial Items"; FAR 52.212-3, "Offeror Representations and Certifications - Commercial Items"; and FAR 52.212-5, "Contract Terms and Conditions Required to Implement Statute or Executive Orders - Commercial Items" (AF 125). Appellant bid **[*3]** a lump sum of $ 49,779 and was awarded the project (SAF 2).

2. FAR 52.212-5(m), Termination for Cause, incorporated by reference, provides:

> The Government may terminate this contract, or any part hereof, for cause in the event of any **default** by the Contractor, or if the Contractor fails to comply with any contract terms or conditions, or fails to provide the Government upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for **default,** such termination shall be deemed a termination for convenience.

3. The solicitation contained 11 drawing sheets, and specification sections 01150, Measurement & Payment; 01300, Submittals; 01630, Product Options & Substitutions; 06100, Rough Carpentry; 07110, Waterproofing; 07412, Preformed Metal Roof Panels; and, 07900, Sealants. (SAF 5-44). Appellant alleges that at award the FS added specifications which had **[*4]** not been included in the solicitation. The Government states that upon award the FS provided Appellant with additional guidelines to facilitate the work. Neither party specifically identified the documents or pages alleged to be additional.

4. Drawing sheet 10 of 11 provides a photographic detail of desired dormer valleys, of which there were four (4). Descriptive text reads: "Example valley located on adjacent Fire Office. 26 Gauge Min. Thickness. Baked-on, paint finish to match roofing panels. Minimize the number of pieces used to make valley; one-piece valley is desired." Specification section 3.02 Installation, C., Flashing & Trim, reads as follows:

> 1. Provide Flashing for:
>
> a. Main Ridge
> b. Dormer Ridge Caps
> c. Valleys
> d. Gable & Eave Edge Trim
> e. Vent Pipes
> f. Chimney Crickets & Jacks
>
> 2. Shop fabricate items where possible
> 3. Accurately reproduce profiles
> 4. Valley flashing to be custom fabricated from 4 foot by 10 foot metal sheets, and installed so exit at bottom of valley is wider than. [sic] See example on other

building at site.
5. Cut groove into chimney and embed new custom counter flashings into sealant as approved by manufacturer.

5. The contract provided **[*5]** for a performance period of thirty (30) days from receipt of Notice to Proceed (NTP) (AF 183). The record contains no copy of the NTP. An internal FS e-mail dated September 10, 2003, states that the NTP had been issued effective September 15, 2003 (AF 286). The earliest contract daily diary in the record is dated September 16, 2003, and recites a contract completion date of October 15, 2003 (AF 224).

6. During contract performance, the FS sent several notices of non-compliance to Appellant. On October 4, 2003, Appellant was advised that valley flashing, as constructed, did not conform to plan sheet # 10 (AF 222). Notice of non-compliance No. 3, dated October 9, 2003, advised that flashing on both east dormers did not extend to the edge eave trim in both directions; a new panel cut line was "wavey"; workers had walked through the east dormer valley; building contents were not being satisfactorily protected from rain; and security fencing was not maintained on a few occasions. More attention to these items was needed. (AF 220.) By notice dated October 15, 2003, the FS advised that heavy rains had entered the lunch room through the north chimney's unfinished chimney jack and soaked **[*6]** the carpet and several boxes of copy machine paper. Ceilings were stained. The combined bathroom vent, installed October 11, had not been sealed. (AF 219.) The next day, October 16, 2003, the FS directed that unspecified action be taken in regard to water damage in several listed areas. The order stated that although the contractor covered exposed roof with plastic, water was still running into several areas. (AF 218.) On October 17, 2003, the FS issued a notice of non-compliance advising that work on the east dormer - west valley and the west dormer - east valley did not conform to contract requirements and might result in rejection (AF 216).

7. Two notices of non-compliance were issued on October 21, 2003. Notice No. 7 (dated October 21, 2003) again advised that work was not in conformity with contract requirements and might result in rejection. The notice stated that "given recent work efforts, this work order reflects current valley construction issues." It went on to list specific deficiencies with both east and west valleys on the east dormer and both east and west valleys on the west dormer. The East Dormer - East Valley was noted as being deficient as follows: (1) roof panel **[*7]** cut lines are not straight; (2) bottom valley flashing does not extend to the edge of the eave trim; and, (3) gable trim shall not protrude into valley, where it will prevent snow slide. Noted deficiencies on the East Dormer - West Valley were (1) roof panels are not cut off evenly at the hi-lok seams; (2) the lower flashing does not extend to the edge of the eave trim on both sides; (3) the lower flashing, on both sides, was returned downward beyond the eave trim and screwed to an added piece of custom fabricated trim. We believe the flashing should have either terminated at the edge of the eave trim or if returned, done so back to the building's wood facia, without the addition of the added tube-shaped structural member; (4) gable trim shall not protrude into valley where it will prevent snow slide. The West Dormer - East Valley was shown with the following deficiencies: (1) roof panel lines are not cut straight; (2) bottom valley flashing does not extend to the ridges of the eave trim; (3) gable trim protrudes into valley, which will prevent snow slide. (AF 215.) Listed deficiencies for the West Dormer - West Valley were: (1) roof panel lines not cut straight; (2) bottom valley **[*8]** flashing does not extend to the edge of the eave trim; (3) gable trim protrudes into valley, which will prevent snow slide. (AF 215.)

8. The final notice, No. 8 (dated October 21), also advised of non-conforming work which could be rejected and outlined on-going issues with "existing/potential water damage and work schedule." The first set of three items indicated that measures had not been taken to prevent water running in around the chimney jacks and ridge cap. A lunch room carpet stain was getting larger and while the upstairs smoking room carpet had been wet vacuumed, no

other measures had been taken to dry underlayment. Regarding the work schedule, the notice pointed out that although Appellant had advised it would be complete by October 22, no official daily schedule had been received. The FS estimated the work to be 80% complete, exclusive of valley and water damage repair work. While Appellant had assured the FS that they would be on site as of October 16, no one was on site when the FS inspected at 1:00 p.m. on October 16; the contractor worked on Friday and Saturday, October 17 and 18; and no work was performed on Sunday and Monday, October 19 and 20. (AF 214.)

9. Meanwhile, **[*9]** throughout performance, the FS was preparing contract daily diaries. The record contains such diaries for the period from September 16 through November 3, 2003. These were prepared by FS project engineer, Greg Neely. Block 20 of each diary provides an indication of whether or not the work was deemed acceptable. In each case, the preparer indicated that the work was acceptable. The diary for October 14, 2003, showed the completion date to be the next day, October 15. Nonetheless, it also indicated that 102% of the contract time had been used and that the work was 70% complete. (AF 262.) On October 20, the work was shown as 80% complete and the time used as 120% (AF 268).

10. The following day, October 21, 2003, the CO issued a cure notice. The CO informed Appellant that the Government considered its failure to complete the contract within contract time or to make necessary arrangements to protect Government property from rain damage as a result of uncompleted work to be a condition endangering performance of the contract. Unless the condition was cured within 10 days of receipt of the notice, the Government might terminate for cause and Appellant would be liable for any excess reprocurement **[*10]** costs and damages to the Government caused to the Government by Appellant's failure to complete the work in a timely manner. The copy in the AF does not indicate how the cure notice was transmitted to Appellant or when it was received by Appellant. The cure notice did not establish a new completion date. (AF 1.) In an e-mail dated October 28, 2003, the project engineer estimated that all work could be completed within the 3 days between that date and October 31. He estimated that come October 31, the amount of remaining work would be such a small amount that it would probably be in the interest of the Government to "stay the course." (AF 308.)

11. The October 30, 2003 daily diary, showing work completed at 90%, also contains a notation indicating that if an invoice were received that day, the project engineer would recommend retaining $ 9,500 for contract work and $ 3,800 for estimated water damage. The $ 9,500 estimated recommended retainage for contract work was for work associated with three valleys; 2 crickets; 2 chimney jacks and trim; cleanup and disposal. The $ 3,800 for water damage was for carpet damage ($ 800) and content damage ($ 3,000). The block indicating work was **[*11]** acceptable was checked. (AF 276-77.)

12. The contractor continued to work and on November 3, 2004, the work was shown as 92% complete and acceptable although the narrative report stated that only one of the valleys was acceptable and that the chimney crickets and jacks which had been installed the previous Friday had poor workmanship and color mismatch. The diary for that date contains a notation that if an invoice were received that day the project engineer would recommend holding back $ 7,100 for contract work (including $ 500 for clean-up) and an estimated $ 1,300 to $ 4,300 for water damage. The range was explained by an estimate of $ 3,000 for replacement of lunch room carpet, if needed. (AF 278.) There is no evidence the contractor was provided a description of necessary corrective work. The Contractor was not informed of the date and time of, or asked to attend, the final inspection.

13. By a decision dated November 7, 2003, the CO terminated Appellant's right to proceed with work under the contract for cause. She referenced the October 21, 2003 cure notice, stating it had outlined the reasons the Government was then considering terminating the contractor's right to proceed **[*12]** under the contract for cause. She reported that Appellant had called on November 3 to say the work was complete. Appellant had also provided a plan

to correct the water damage (AF 210-11). n1 She reported that she had toured the project for the purpose of final inspection on November 6, 2003. Her decision reported that she found unprofessional work, a work site in disarray and water damage. She concluded that the work failed to pass contract inspection, did not meet specifications and did "not meet the intent to have a professionally installed weather tight metal roof on the building." No further details were enumerated. She terminated Appellant's right to proceed with work under the contract for cause and expressed the Government's intent to reprocure "the remaining contract work" including correcting water damage and general cleanup from another contractor. (AF 2, 3.)

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Appellant's plan to correct water damage included professional carpet cleaning scheduled for November 7, 2003. The record does not indicate whether this had taken place prior to the decision to terminate dated the same day. (AF 210-11.)

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*13]**

14. Appellant submitted a request for payment in the amount of $ 27,378 on September 19, 2003. This invoice was approved for payment September 26, 2003. (AF 316.) The record does not contain a copy of a second pay request. As of October 20, 2003, the project engineer said that he had not seen a pay request (AF 300). However, a November 4, 2003 e-mail message from the project engineer to the CO made reference to holding "Trinity's payment request until after the final inspection." The message also estimated the costs of completion of the work as $ 7,100 for contract work and $ 1,300 to $ 4,300 for water damage. The range for the water damage work was explained by the assertion that $ 3,000 would not be incurred if Appellant were successful in removing a stain from the lunch room carpet. (AF 310.) At that time the unpaid contract balance was $ 22,401.

15. The record contains no evidence that the Government has reprocured contract work. In a letter to the Board dated June 29, 2004, Government counsel stated that "the budget process has hindered the reconstruction of the roof." The Government's brief originally stated that the building "has not been and cannot be occupied until the **[*14]** job is redone, probably by removing the roof constructed by Appellant and installing a new one." The record, however, contains no evidence of any evaluation of work completed; the extent to which it was or was not acceptable; work necessary to correct the defective work nor an estimate of the cost of corrective work. A subsequent letter to the Board dated November 9, 2004, states that the building is in use as a machine shop and storage facility.

DISCUSSION

Termination for **default** is a drastic sanction that should be imposed upon a contractor for good cause in the presence of solid evidence. **Lisbon Contractors, Inc. v. United States**, 828 F.2d 759, 765 (Fed. Cir. 1987), quoting **J. D. Hedrin Construction Co. v. United States**, 408 F.2d 424, 431 (Ct. Cl. 1969). The Government has the burden to prove the termination for **default** was justified. **Id.** The CO also has the responsibility to take steps to ensure the propriety of a proposed termination action. FAR 49-402-3. It is not necessary that the CO mechanically record consideration of every factor. The CO must, however, demonstrate an active and reasoned consideration **[*15]** of available and sometimes contradictory information. Various factors must be evaluated and the totality of circumstances must be weighed by the CO in arriving at a decision which has serious consequences for a contractor. **Jamco Constructors, Inc.**, VABCA Nos. 3271, 3516T, 94-1 BCA P 26,405.

In soliciting this work, the CO employed a contract for commercial items. The scope of work, however, included work of a construction nature, and a construction wage decision was made

a part of the contract. Despite the terms of the contract drafted by the Government, the contract was administered as a construction contract. Throughout performance of the contract, the FS recorded the progress of the project on contract daily diary forms.

Without exception, the daily reports indicate that the work performed was acceptable. In addition, the same documents provide a record of the project engineer's assessment of the percent of work under the contract deemed to be complete. At the time of termination, the work was shown as being 92% complete. (Finding of Fact (FF) 12.) We recognize that during the same period, the FS issued notices of non-compliance (FF 6-8). Of particular **[*16]** note were those detailing deficient work on dormer valleys and water damage. A notice of non-compliance issued October 21, 2003, enumerated defects on all four dormer valleys (FF 7). By November 3, the project engineer considered one valley compliant (FF 12.) The contract requirements for construction of valleys do not, however, provide a great deal of detail (FF 4). They are to some extent open-ended using such terms as "are desired"; "if possible" and "see other building." It is also difficult to determine whether and how many of the defects on the report of non-compliance No. 7 are aesthetic ("wavy" and "not straight"), as opposed to functional ("will prevent snow slide"). (FF 7.)

The cure notice, dated October 21, 2003, warned the contractor that it was in danger of termination because of its failure to complete the contract on time and failure to protect the project from water damage (FF 10). The termination decision referenced the cure notice and stated that the CO's inspection of the project had revealed unprofessional work; a work site in disarray; water damage; and the work that failed to pass inspection did not meet specifications and did not meet the intent of a professionally **[*17]** installed weather tight metal roof (FF 13). While the cure notice cited failure to complete in a timely manner as a condition which might cause termination of the contractor's right to proceed, the CO did not cite that as a reason for the termination. The CO also did not specifically enumerate the particulars in which the work performed failed to meet specifications. The record indicates that Appellant's work was mediocre at best, but it does not sufficiently provide a comparison of the work performed to contract requirements, for us to conclude that the contractor failed to comply with any particular terms or conditions, as set out in the Termination for Cause clause of the contract. Moreover, the claim of defective work relied upon by the Government was the result of an inspection to which the contractor was not invited. In an internal e-mail, dated October 28, 7 days after the cure notice was issued, the project engineer described the work as able to be corrected within 3 days. (FF 10.) According to the daily diaries, an additional 2% of project work was completed between the e-mail and the date of termination bringing the project from 90% to 92% complete (FF 12). While the record **[*18]** clearly identifies work that would need correction, the record raises questions concerning the materiality of defects outstanding at the date of termination and to what extent they were cosmetic and not clearly covered by the contract (FF 4, 7). Finally, the Government submitted no affidavit or other evidence clearly explaining the basis for the CO's decision to employ the drastic sanction of termination for cause.

Appellant argues that because the daily diary for November 3, 2003, called the work 92% complete and acceptable, it should be paid 92% of the total contract price and at best should forfeit the remaining 8%. The pro se Appellant does not use the term "substantial completion" but his argument raises the issue whether the project was substantially complete at the time of termination. We choose not to ignore the issue. The substantial completion doctrine has at times been successfully invoked to avoid the consequences of termination by contractors who have undertaken considerable efforts but have failed to complete all of the specified work by the due date. It does not, however, eliminate the Government's right to terminate a contractor's right to proceed when a contractor **[*19]** has not performed its contact. The better rationale for invoking the "substantial completion" in construction contracts is to avoid a forfeiture where a contractor has made permanent improvement to Government property. **See generally** John Cibinic, Jr. and Ralph C. Nash, Jr., **Administration of Government Contracts**, at 919-20 (3rd Ed. 1995). The test of whether the doctrine of substantial

completion should be invoked to invalidate a termination for cause is whether the deficiencies in a contractor's performance constitute only minor departures from what had been contractually promised. **See Franklin E. Penny Co. v. United States**, 207 Ct.Cl. 842, 524 F.2d 668 (1975).

Here, the work performed required some correction. Notwithstanding the deficiencies, however, the new roof had been installed; it was functional and could be, and is being, used for its intended purposes (FF 15). The Government continues to hold almost 45% of the contract price while (1) having assessed the work at 92% complete during performance; (2) having indicated that defects could have been corrected in a short period of time; (3) having presented no detailed estimate **[*20]** of the value of work in place or of necessary corrective work; (4) having made no attempts to reprocure the terminated work; and (5) using the building as a machine shop and storage facility. The sparse record and the failure of the Government to reprocure the defaulted work leave open the likelihood of forfeiture. The fact that the Government is using the building as modified under the project for its intended purpose leads to the conclusion that it is substantially complete and that the termination for **default** has likely caused a forfeiture of the value of work performed by Appellant.

The dissent finds Appellant's performance untimely and inadequate and the termination for **default,** therefore, justified. That conclusion is at odds with our view of the law, including the burden of proof, and with the factual record. In its cure notice, the FS cited Appellant's failure to complete performance within the contractual period, stating that if the condition were not cured within 10 days, Appellant might be terminated for cause, making Appellant liable for any excess reprocurement costs. The cure notice did not set a new completion date and when the 10-day cure period had elapsed, the **[*21]** FS did not immediately terminate Appellant's right to proceed, but allowed Appellant to continue to work.

When the Government elects to permit a delinquent contractor to continue performance past a due date, it surrenders its alternative and inconsistent right under the **default** clause to terminate, assuming the contractor has not abandoned performance and a reasonable time has expired for a termination notice. A fact situation of this type has been popularly, if inaccurately, described as a "**waiver**" of the Government's right to terminate a contract for **default. DeVito v. United States**, 413 F.2d 1147 (1969). The purpose of the "**waiver** doctrine" is to protect contractors who are led to believe that time is no longer of the essence and undertake substantial efforts after the performance date specified in the contract has passed. **State of Fla., Dept. of Ins. v. United States**, 81 F.3d 1093 (2004); **Olson Plumbing & Heating Co. v. United States**, 221 Ct.Cl. 197, 602 F.2d 950 (1979). Here, notwithstanding the fact that the cure notice cited untimely performance, the FS did not base **[*22]** its decision to terminate on failure to complete within the contract period, perhaps recognizing that it had not established a new completion date nor terminated promptly after the 10-day cure period had elapsed. Instead, the FS terminated the contractor's right to proceed because it concluded that the work was unprofessional and the work site untidy.

We acknowledge the well settled principle that a termination for **default** may be sustained on grounds other than those cited by the CO in the termination notice even it they were not known to the CO at the time of termination. **Empire Energy Management Systems, Inc. v. Roche**, 362 F.3d 1356, (Fed. Cir. 2004), and cases cited therein. Here, however, we find the "timely completion" ground relied on by the dissent invalid because of the "**waiver**" and forfeiture situation discussed above. We must therefore return to the reasons cited by the CO - unprofessional work and an untidy work site. Clearly, the work performed under this contract was far less than ideal. However, the FS's own records are contradictory on the question of whether the work crossed the line between minimally acceptable and unacceptable. We **[*23]** cannot ignore the facts that the only estimates of the value of the work remaining are far less than the funds withheld and that the FS has found the facility usable as constructed by Appellant and without reprocuring to correct deficiencies or to complete the work. We also cannot ignore the fact that the FS chose not to provide written or oral testimony to

supplement the record. This is a close case. It is close on the "**waiver**" question because of the relatively short amount of time the contractor was allowed to work after the end of the cure period. It is close on the question whether work was non-conforming, or merely mediocre. Were the facility not capable of being used or had the FS found it necessary to correct Appellant's work, we may well have decided this appeal differently. The Government had the burden to tip the balance of the evidentiary scales. It failed to do so.

DECISION

The Government has the burden to prove the propriety of the termination. The Government has failed to meet that burden. The termination for cause is overturned and converted to a termination for the convenience of the Government. The CO is to contact Appellant to request a termination for **[*24]** convenience settlement proposal. n2

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 The parties are encouraged to effect a settlement by negotiation. **See** FAR 49-103. The general burden of proof on a termination for convenience settlement is the contractor's. For guidance regarding treatment of defective work, **see Lisbon Contractors, Inc. v. United States**, 828 F.2d 759 (Fed. Cir. 1987); **The Swanson Group, Inc.**, ASBCA No. 52109, 02-1 BCA P 31,836; **D.E.W., Inc.**, ASBCA Nos. 50796, 51190, 00-2 BCA P 31,104 at 153634, modified on recon., 01-1 BCA P 31,150; **Goetz Demolition Co.**, ASBCA No. 39129, 90-3 BCA P 23,241, motion for recon. denied, 91-1 BCA P 23,937; **Ayden Corp.**, EBCA No. 355-5-86, 89-3 BCA P 22,044; **Air Cool, Inc.**, ASBCA No. 32838, 88-1 BCA P 20,399; **New York Shipbuilding Co.**, ASBCA No. 15443, 73-1 BCA P 9852. These decisions differ on whether the Government is allowed to recover for defective work under a termination for convenience settlement but make clear that if it may so recover, the Government has the burden to prove the value of defective work.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[*25]**

ANNE W. WESTBROOK
Administrative Judge

Concurring:

HOWARD A. POLLACK
Administrative Judge

DISSENTBY: VERGILIO

DISSENT:

Administrative Judge VERGILIO, dissenting.

I write in dissent because I conclude that the termination for **default** is well-supported by the existing record. The contractor did not complete performance within the contract or cure period; the actually accomplished work was flawed in various respects, inconsistent with the commercial products and services purchased. The record does not support a conclusion that a basis exists to excuse the performance. Whether one considers that the Government contends that it would be required to expend approximately $ 8,000 to $ 11,000 to obtain a completed project (approximately 15% of the contract price would be needed to complete contract work, and $ 1,300 to $ 4,300 to repair damage caused by the contractor's performance), or the