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**Acquisition Learning Seminar: Surviving the Bid Protest**  
**August 6, 2014**

**Best Value and LPTA**

There were a number of questions and comments regarding the difference between Best Value and LPTA. We addressed these questions initially in the answers we provided during the session; however, I thought I would elaborate a little given the apparent confusion. The confusion is understandable given the language in the FAR, which seems to indicate that Best Value is a broad category that encompasses both “trade-offs” and LPTA. Thus, it appears the FAR language contemplates an agency saying that it is achieving “Best Value” by engaging in an LPTA acquisition. However, in the context of a bid protest this does not really work. Just since giving the presentation I’ve seen GAO issue a decision that involved a challenge to the agency’s award decision in which GAO stated: “In a best value procurement, it is the function of the selection official to perform a price/technical tradeoff, that is, to determine whether one proposal’s technical superiority is worth the higher price, and the extent to which one is sacrificed for the other is governed only by the test of rationality and consistency with the stated evaluation criteria.” *Lynxnet, LLC*, B-409791, B-409791.2 (Aug. 4, 2014). In short, GAO considers “Best Value” and “tradeoff” to be the same thing, a method in which an agency must determine whether or not a higher rated proposal is worth a higher cost. By contrast, of course, LPTA does not require an agency to consider this question. Thus, despite the language in the FAR, you should be careful using the term “Best Value” in conjunction with LPTA as this may cause problems before GAO.

**Clarifications v. Discussions**

There were also a number of questions and comments regarding clarifications and discussions. This section will expand on the information already presented by addressing the more specific application of these points. Clarifications and discussions occur after proposals are submitted. The primary objective of discussions is to maximize the Government’s ability to obtain the best overall proposal based on the requirement and the evaluation factors set forth in the solicitation. Discussions are tailored to each offeror’s proposal and must be conducted by the contracting officer with each offeror in the competitive range. During discussions, the contracting officer must discuss with each offeror being considered for award, its deficiencies, significant weaknesses, and adverse past performance to which the offeror has not yet had an opportunity to respond, but the contracting officer is not required to discuss every area where the proposal could be improved. If the government opens discussions with one offeror, it must open discussions with all offerors – and give all offerors the opportunity to submit a revised proposal. Even if an offeror does not have deficiencies, significant weaknesses, or adverse past performance, if you open discussions, you must also let that offeror know that it does not have any deficiencies, significant weaknesses or adverse past performance, and give that offeror the opportunity to revise its proposal. On the other hand, clarifications are limited exchanges with offerors and may occur when an award without discussions is contemplated. The government must specify in the solicitation whether it intends to evaluate proposals and make an award without discussions. If you are having clarifications with an offeror, you need to make it explicitly clear that you are only seeking clarifications on certain points and that revised proposals will not be accepted, nor will additional information that was not provided in the original proposal. The case law examples in this presentation showed that GAO will

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look to the substance of the communication to determine whether the communication truly is clarifications or discussions and will not simply rely on the label of the document. We highly recommend that you consult with your assigned legal counsel when engaging in any type of communication with vendors during a source selection.

**What do you do when your contracting activity does not have adequate legal staff?**

In our presentation, we emphasized that agency contracting staff should consult with their assigned legal counsel for specific legal advice and for assistance with responding to a protest. We received a question asking what should be done in the absence of assigned legal counsel. While I can understand that because of budget cuts and staff reductions it may seem like you do not have an assigned legal counsel, every contracting activity within the federal government must have some legal support. If a procurement on which you are working is subject to a GAO protest, then you will for sure find out who your legal counsel is because after GAO receives a protest they will inform a point of contact within your agency of the protest and it will be the responsibility of that contact person to direct the protest to the correct counsel to represent the agency in the protest. If you believe you need legal advice for a procurement I strongly urge you to consult your supervisor or colleagues as to the identity of your assigned counsel. There has to be someone.

**Would the State Department have violated the requirement for completion if it limited required experience to experience solely with the State Department?**

During the presentation I discussed a GAO decision involving a State Department procurement in which GAO sustained the protest because the agency evaluated offerors positively or negatively based on whether the offerors possessed experience specifically with the State Department and not just experience in hostile, austere or remote locations, as stated in the solicitation. I stated that if the State Department wanted a contractor with specific experience with the State Department then they should have just said so in the solicitation. A couple of questions asked whether the State Department would be improperly restricting competition by stating such a requirement and this is, in fact, a good point. It probably would be unduly restrictive of competition if an agency limited a requirement for experience to solely experience with that agency. However, the point I was trying to make is that if there was something specific about experience with the State Department that the agency wanted to be able to consider it could have put that in the solicitation in a manner that would have been acceptable.

**In taking corrective action which may result in a change in selection, must it be clearly indicated as taking corrective action?**

If taking corrective action after a protest is filed, the agency should notify GAO of its intent to take corrective action and request that GAO dismiss the protest. If the agency discovers a problem with the way it conducted a procurement before an award and before a protest is filed, then the agency may take corrective action on its own initiative – by correcting whatever issues arose (e.g., having

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meaningful discussions, resoliciting the RFP, etc.). While we can't say what GAO will do in the future, GAO has looked favorably upon an agency taking corrective action on its own when discovering a problem with the way it conducted a procurement. See *Onsite Health Inc.*, B-408032 (May 30, 2013).

**If GAO recommends a reevaluation to address specific items and the Government makes a new award determination or sustains the earlier award, does GAO automatically review those results or must the Offeror protest the reevaluation?**

If GAO recommends reevaluation and the agency conducts that reevaluation and makes a new award, the unsuccessful offerors at that point would need to protest for GAO to review the new award.

**Can an offeror protest the agency's decision to exclude them from the competitive range?**

Yes.

**Can a protester appeal a decision of GAO?**

There is no specific right to appeal a decision of GAO on a bid protest. GAO is a branch of Congress, not a part of either the Executive or Judicial branches. However, a protestor who is dissatisfied with a GAO decision on a protest may choose to bring a new protest action before the U.S. Court of Federal Claims. A protester may do this even after going through the entire protest process at GAO. At the Court of Federal Claims it will essentially be a new protest review that may or may not, depending on what the judge decides, consider the decision of GAO. We did not discuss protests at the Court of Federal Claims in our presentation because the vast majority of protests are brought before GAO, therefore if you have any specific questions about these types of protests you should consult your assigned counsel.

**Is it possible to have a competitive range of one company?**

It is possible to have a competitive range with just one company, however I would not recommend it if at all possible. The point of having a competitive procurement is to have competition that allows an agency to select the best proposal based on value or price, but if you have only one company in the competitive range then you are not going to have any competition. You should definitely consult legal counsel before deciding to pursue this approach.

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**Are there differences between FAR Part 15 and Far Part 8.4 with respect to discussion questions, debriefs, etc.?**

Most of our discussion during the presentation focused on competitive procurements conducted pursuant to FAR Part 15 standards. There are differences between the requirements for conducting a competition under Part 15 and the requirements for procurements conducted under other sections of the FAR, such as under the Multiple Award Schedules program described in FAR 8.4. I won't go over those differences specifically because you can review the FAR itself, however an important point to keep in mind is that even if you are not conducting a FAR Part 15 procurement but you do adopt competitive procedures similar to Part 15 then GAO will hold you to the competitive standards that you describe in the solicitation. So if your solicitation includes a statement of work and describes how you will evaluate proposals for meeting the requirements of the statement of work then GAO will review your evaluation to ensure it reasonably complies with what you said you were going to do, and it will be no defense to say that you were not operating under Part 15.

**Can we find more samples as you provided from GAO actual cases that could be reviewed to learn more?**

Yes, we recommend that you talk to your assigned counsel. Even if you think your situation is unique, there are likely many GAO decisions that are analogous to any decision you are facing. You may also go to GAO's website and search bid protest decisions:

<http://www.gao.gov/legal/index.html>.