



APR 24 2012

MEMORANDUM FOR: T. MICHAEL KERR
Assistant Secretary
for Administration and Management

A handwritten signature in black ink that reads "Elliot P. Lewis".

FROM: ELLIOT P. LEWIS
Assistant Inspector General
for Audit

Subject: OIG Review of Complaint Filed by
Waterfront Technologies, Inc.
Report No. 17-12-003-07-711

This memorandum transmits the results of the OIG's work related to a request received from Senator Barbara A. Mikulski, on behalf of one of her constituents, Ms. Janice Kaufmann, President of Waterfront Technologies, Inc. (Waterfront).

Ms. Kaufmann alleged the Office of the Assistant Secretary for Administration and Management (OASAM) award of a Small Business Administration (SBA) Section 8(a) set-aside (Section 8(a)) contract was flawed based on errors in the Department's evaluation of Waterfront's proposal. Ms Kaufmann alleged procurement officials were not fair and unbiased in their review of the proposals — that the Department illegally manipulated Waterfront's proposal submissions — which resulted in a contract award to 21st Century Technologies, Inc. (21st Century).

In a letter dated September 28, 2010, we notified Senator Mikulski that the OIG was undertaking a broad review of DOL's procurement process in Fiscal Year 2011 that would review matters such as those raised in Ms. Kaufmann's complaint.

Audit report number 17-12-002-07-711, *Department Oversight Needs to Be Strengthened to Minimize Procurement Risk*, was issued on March 30, 2012. The audit found that the Department did not always maintain adequate documentation to demonstrate price reasonableness determinations, conflict of interest certifications, or Contracting Officer reviews were completed prior to awards. Documentation was also lacking to demonstrate procurement officials had ensured contract modifications were within the scope of the original contract, or had checked the Excluded Parties List System for suspended or debarred contractors prior to award. Although we were able to determine that the Department did not award any of the sampled contracts to suspended or debarred contractors, because of the lack of documentation by the

Department, we were unable to determine if all of the contracts reviewed were properly awarded for reasons cited above. In order to ensure that all actions are properly documented, we recommended that the Assistant Secretary for Administration and Management update DOL's procurement regulations and guidance, and develop detailed and standardized procurement procedures.

We reviewed the contract awarded to 21st Century within the context of our audit noted above. We also tested the 21st Century contract using the Data Collection Instrument we developed to test all Section 8(a) contracts for our audit. Our testing included but was not limited to the following areas: documentation of source selection decisions, price reasonableness determinations, and Excluded Parties List System verifications. We determined the Department was able to demonstrate that the 21st Century contract was awarded based on best value to the Government.

We also analyzed the specific allegations contained in Ms. Kaufmann's November 6, 2009, and December 8, 2010, letters to the OIG (Hotline Complaint # 61106). In addition, we reviewed the U.S. Government Accountability Office's (GAO) bid protest decisions¹ related to the solicitation in question, and met with officials from the Department's Office of the Solicitor (SOL) to discuss the solicitation and Waterfront's related bid protests to GAO. GAO's role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. In this regard, we note that GAO dismissed Waterfront's "protest challenging the evaluation of offerors' past performance, technical proposals, and price realism...where the record demonstrates that the [Department's] evaluations were reasonable."

Based on our analysis and testing described above, the OIG concluded that we also have no basis to dispute the Department's evaluation of proposals for the questioned Section 8(a) set-aside or the contract it awarded to 21st Century. Furthermore, there is no indication that DOL officials engaged in fraud or misconduct with respect to these procurement matters. OIG considers the allegations raised by Ms. Kaufmann closed and will inform Senator Mikulski of our findings with respect to those allegations.

Below we summarize our analysis of the allegations contained in Ms. Kaufmann's letters to the OIG.

Background

On June 29, 2009, the Department issued a Request for Proposal (RFP) to provide support for and expand the Employment and Training Administration (ETA), Office of Foreign Labor Certification's (OFLC) enterprise-level labor certification program (formerly titled the iCERT Visa Portal System). The procurement was set aside for participants in the SBA, Section 8(a) program.

¹ At the time of fieldwork, protesters had filed 18 separate bid protests with GAO. Five GAO bid protests decisions, B-401948.5, B-401948.9, B-401948.13, B-401948.16, and B-401948.18, covered the issues raised by Ms. Kaufmann.

On September 18, 2009, DOL awarded the contract to Zolon Technologies, Inc. Waterfront, and another offeror, Insero Corporation (Insero), filed bid protests (B-401948.2 and B-401948.3) with GAO challenging the award to Zolon. Prior to providing its report to GAO regarding the protest, the Department advised GAO that it would take corrective action by reevaluating the offerors' proposals. Based on this notice, GAO dismissed the protests on November 16, 2009.

The Department subsequently reevaluated the offerors' proposals, and made a new award, this time to Insero. On November 23, 2009, Waterfront and Zolon filed bid protests (B-401948.5 and B-401948.6) with GAO to protest the award to Insero. Prior to providing its report to GAO regarding the protest, the Department again advised GAO that it would take corrective action by amending the solicitation, obtaining revised proposals and making a new award. Based on this notice, GAO dismissed the protests on December 23, 2009.

The Department issued RFP amendment 6 on January 20, 2010, and received new proposals from offerors. Based on the Department's evaluation of the offerors' revised proposals, the Contracting Officer found that 21st Century's proposal merited award because it was one of two offerors who received the highest overall technical score of outstanding, received a past performance score equal to all other offerors, and proposed the lowest overall price. On September 9, 2010, DOL selected 21st Century's proposal for award. On September 20, 2010, Waterfront filed a bid protest with GAO (B-401948.13) challenging the award to 21st Century. Waterfront challenged the Department's evaluation of its past performance and technical proposal, and 21st Century's price.

On November 18, 2010, as part of its alternative dispute resolution process, GAO advised the Department that Waterfront's challenges to the evaluation of its past performance and technical proposal would not likely be sustained, but GAO would likely sustain Waterfront's protest regarding the agency's evaluation of 21st Century's price. Specifically, the GAO attorney advised that the record showed the agency did not conduct a Price Realism Analysis, as required by the solicitation. The Department advised GAO that it would take corrective action by conducting a Price Realism Analysis. Based on this notice, GAO dismissed Waterfront's protest on November 24, 2010.

On January 24, 2011 the Department advised Waterfront that it had affirmed the award to 21st Century. On February 9, 2011 Waterfront filed a bid protest (B-401948.17) with GAO, again challenging the agency's evaluation of past performance, technical proposals, and price. Prior to filing its report to GAO regarding this protest, the Department advised GAO that it would again take corrective action to further address concerns regarding the agency's Price Realism Analysis. Based on this notice, GAO dismissed the protest on March 14, 2011.

On March 18, 2011, DOL advised Waterfront that it had affirmed the award to 21st Century. Three days later, Waterfront filed another bid protest with GAO (B-401948.18). Waterfront contended that the award to 21st Century was flawed based on errors in the Department's evaluation of the offerors' past performance, technical proposals, and proposed prices. GAO issued its decision on June 24, 2011, stating that the record demonstrated the Department's evaluations were reasonable and it found no basis to sustain Waterfront's protest of the contract award to 21st Century.

Waterfront's Allegations

- **Allegation 1 — The Department mischaracterized the questioned Section 8(a) set-aside as a new solicitation rather than a re-competition and incorrectly identified the incumbent contractor as Inserso.**

Waterfront contended it performed application development and maintenance activities to support the ETA, OFLC visa program operations and worked on the iCERT Visa Portal System prior to the award of a separate contract to Inserso (#DOLJ089A27771). In addition, Waterfront contended that OASAM changed Inserso's contract to include work substantially different from the work specified in Inserso's contract and that OASAM changed Inserso's contract after it denied bridge funding to Waterfront, effectively stopping work without a "Stop Work Order."

Our review of the solicitation found that in Amendment #2 the Department acknowledged an incumbent contractor, Inserso, was performing general operations and maintenance activities on legacy systems. The Department stated this contractor was also supporting the implementation of a new system but maintained that to the best of its knowledge the questioned Section 8(a) set-aside solicitation was not a re-competition, as it included new work not performed by this contractor. We also interviewed an SOL official regarding these allegations and this official told us the Department characterized the questioned Section 8(a) set-aside solicitation as new because it involved development aspects that were not part of any prior OFLC contract. Nonetheless, whether it was a new solicitation or a re-competition, all interested parties had to compete for the award and an incumbent would not be treated differently from any other bidder.

The United States Court of Federal Claims is the proper venue for Waterfront to claim the Cardinal Change violations noted above. To our knowledge, Waterfront has not filed a claim with the Court of Federal Claims. The OIG has no basis to dispute the Department's determination with respect to identifying Inserso as the incumbent contractor or the characterization of the questioned Section 8(a) set-aside as a new solicitation.

- **Allegation 2 — The questioned Section 8(a) set-aside solicitation contained an unnecessary and unreasonable requirement that the bidder**

obtain a facility security clearance prior to submitting its bid, which unduly restricted the range of Section 8(a) contractors that could compete for the contract. In addition, the Department did not take effective corrective action with regard to an SBA Certificate of Competency determination.

Waterfront contended that the questioned Section 8(a) set-aside solicitation contained an unnecessary and unreasonable requirement that the bidder obtain a facility security clearance prior to submitting its proposal, which unduly restricted the range of Section 8(a) contractors that could compete for the contract.

Waterfront did not have a facility security clearance when it submitted its proposal in response to the solicitation. As a result, the Department determined that Waterfront was not eligible for award, and Waterfront filed a bid protest with GAO. GAO took the position that (1) the ability to obtain a security clearance is generally a matter of responsibility, and (2) under the Small Business Act, the SBA has conclusive authority to determine the responsibility of small business concerns. The Department agreed to refer the matter of Waterfront's responsibility to the SBA for a Certificate of Competency (COC) determination, which was noted by GAO in its bid protest decision.² The SBA declined to consider Waterfront for a COC determination because the Department had subsequently accepted Waterfront's proposal. The Department indicated it accepted Waterfront's proposal since the company had obtained an interim secret facility clearance. SBA stated in its January 4, 2010, letter to GAO regarding Waterfront protest B-401948.5 that since the Department no longer viewed Waterfront as technically unacceptable for failing to meet the interim security clearance requirement, the SBA concluded it did not need to evaluate Waterfront for a COC.

Since the Department referred Waterfront to SBA for a COC determination, subsequently did not find Waterfront to be unacceptable or non-responsible for failure to have an interim secret facility clearance, considered Waterfront's proposal as technically acceptable, and included Waterfront's proposal in its technical review of proposals, the OIG concludes that the Department took effective corrective action with regard to an SBA COC determination.

² Per the Federal Acquisition Regulation (FAR), Part 19, Subsection 19.601(a), a COC is the certificate issued by the SBA stating that the holder is responsible (with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting) for the purpose of receiving and performing a specific Government contract.

- **Allegation 3 — The Department misled Waterfront by not disclosing the deficiencies in Waterfront’s staffing plan when Waterfront’s disqualification was rescinded, but used this same weakness later in Waterfront’s debriefing letter as part of the basis to lower Waterfront’s score within the competition of the questioned SBA Section 8(a) set-aside.**

Waterfront contended that OASAM was obligated to provide an explanation of any deficiencies and allow Waterfront an opportunity to correct them, particularly after Waterfront repeatedly sought clarification about the status of its staffing plan.

The staffing plan is one of the elements that the Department considered as part of its technical evaluation of proposals. In bid protest decisions B-401948.16 and B-401948.18, GAO denied Waterfront’s protest, stating that the record demonstrated the Department’s evaluation of technical proposals was reasonable. Based on our review of GAO’s bid protest decision, we could not determine whether issues regarding Waterfront’s staffing plan were raised. Regardless, GAO would be the appropriate venue in which to raise these issues.

- **Allegation 4 — The Department awarded a 100 percent SBA Section 8(a) set-aside contract to Zolon Technologies, Inc., who misrepresented itself and the size of its business.**

Waterfront contended that the Department awarded a 100 percent SBA Section 8(a) set-aside contract to Zolon Technologies, Inc., who misrepresented itself and the size of its business. The SBA has sole jurisdiction over small business size verification and the FAR requires Contracting Officers to accept SBA’s small business determinations.³ In addition, as noted in SBA’s January 4, 2010, letter to GAO regarding Waterfront protest B-401948.5, the Department terminated Zolon Technologies, Inc.’s contract. As a result, there was no reason for the OIG to further review this allegation.

- **Allegation 5 — The Department tampered with Waterfront’s past performance evaluations in order to ensure that Waterfront would not be the successful bidder on the questioned SBA Section 8(a) set-aside.**

Waterfront contended that the Department tampered with Waterfront’s past performance evaluations by pressuring a DOL official and dismissing his past performance evaluation in order to ensure that Waterfront would not be the successful bidder on the questioned SBA Section 8(a) set-aside. In addition, Waterfront contended that that DOL made post hoc alterations to the evaluation

³ Small Business Act, Title 15, United States Code, 637 (b)(6); FAR, Part 19, Subpart 19.301-1(b); and FAR, Part 19, Subpart 19.301-1(c).

record in its preparation of redacted versions of the agency report in response to GAO protest B-401948.13.

GAO, in its bid protest decisions B-401948.16 and B-401948.18, rejected any claims by Waterfront that the Department did not properly evaluate Waterfront's past performance. GAO stated that the evaluation of past performance, including the agency's determination of the relevance and scope of an offeror's performance history, is a matter of agency discretion, which GAO will not find improper unless unreasonable or inconsistent with the solicitation's evaluation criteria. The Department assigned Waterfront an overall evaluation of "significant confidence" for past performance. GAO found no basis to question the Department's evaluation.

Our review of the past performance evaluation noted that "significant confidence" was the second highest possible rating that could be earned on the past performance evaluation and was the same rating that the successful bidder received. Furthermore, GAO noted that while Waterfront had the second highest possible rating under the past performance factor, DOL could not have selected its proposal for award over either 21st Century's or Offeror 3's proposals, as those proposals received higher ratings under the technical evaluation factor and contained prices that were \$9.6 million and \$4.4 million lower, respectively, than Waterfront's proposal.

In addition, GAO also rejected Waterfront's collateral argument that DOL made post hoc alterations to the evaluation record in its preparation of redacted versions of the agency report in response to GAO protest B-401948.13. GAO stated it reviewed the redacted and unredacted versions of the report, and concluded that "[t]he underlying information in the different versions of the agency report ... had not changed, and there is no indication in the record that the agency changed any documentation concerning the evaluation of offerors' proposals."

- **Allegation 6 — The Department did not perform the Price Realism Analysis of offers for the questioned SBA Section 8(a) set-aside solicitation as it promised to GAO in response to a GAO bid protest decision. When the Department performed the Price Realism Analysis, it should have rejected 21st Century's proposed price as unrealistically low.**

Waterfront contended that the Department did not perform the Price Realism Analysis of Offers for the questioned SBA Section 8(a) set-aside solicitation as it promised to GAO in response to Waterfront's bid protest B-401948.13, and should have rejected 21st Century's proposed price as unrealistically low.

The GAO attorney assigned to protest B-401948.13 conducted "outcome prediction" alternative dispute resolution during which the attorney expressed his view that GAO would likely sustain Waterfront's protest regarding the

Department's evaluation of 21st Century's price. Specifically, the GAO attorney advised that the record showed the Department did not conduct a Price Realism Analysis, as required by the solicitation. The Department subsequently advised GAO that it would take corrective action by conducting a Price Realism Analysis of the offerors' proposals. Based on this notice, GAO dismissed the protest. The Department subsequently completed the Price Realism Analysis and concluded that 21st Century's proposed price was realistic. In bid protest decisions B-401948.16 and B-401948.18, GAO reviewed the Department's evaluation of 21st Century's proposed price, including all direct and indirect components of that price, and concluded that the Department reasonably found 21st Century's proposed price to be realistic. GAO further stated that the "protester's disagreement with the agency's judgment provides no basis to sustain the protest."

Given the Department's corrective action with respect to conducting a Price Realism Analysis as well as GAO's bid protest decisions B-401948.16 and B-401948.18 on this subject, OIG has no basis to dispute the Department's Price Realism Analysis.