

## LATE PROPOSAL PROPERLY REJECTED

As a general rule, a proposal that is not received by the submission deadline is late and must be rejected. There are exceptions, however, such as where the government's conduct is the paramount cause of the late delivery or the late-submitted proposal was "under the government's control" prior to the time set for receipt of proposals.

In one recent case, an offeror was delivering a proposal to a secure location which required that all non-government visitors be authorized by agency personnel to enter the facility. The offeror's messenger arrived at the facility approximately one hour before the submission deadline, but sought access at an entrance that was not designated for non-government visitors. Additionally, the offeror had not made advance arrangements for the necessary access authorization. The access issue was resolved after about ½ hour and the messenger then followed the driving directions that the guard gave him, but he became lost. The messenger received a cell phone call from the contracting officer's representative (COR) shortly before the deadline. The COR was able to locate the messenger and had the messenger follow his vehicle to the location designated for receipt of proposals. Upon arrival at the designated location, the COR accepted the proposal and issued a receipt to the messenger which noted that the proposal was received at 2:05 pm, 5 minutes after the 2:00 pm deadline.

The Government Accountability Office (GAO) concluded that the proposal was late and was properly rejected, finding that none of the offeror's arguments had merit. The offeror first argued that the COR actually received the proposal before the 2:00 pm deadline. In addition to the receipt which showed that the COR received the proposal at 2:05 pm, the COR's cell phone records revealed that the COR first called the messenger at 1:59 pm. It was only after this phone call that the COR located the messenger and escorted him to the location designated for receipt of proposals. The offeror presented no contradictory evidence and GAO found nothing unreasonable in the agency's determination that the proposal was received after the 2:00 pm deadline.

The offeror also argued that the agency was the principal cause of the late receipt and that an exception to the "late is late" rule should apply. GAO concluded, however, that the alleged government misdirection and/or delays associated with the messenger's entry into the facility were not the paramount cause of the late delivery of the proposal. Rather, GAO concluded that the offeror's own actions contributed significantly to the late submission of its proposal, specifically its decision to use an entrance not designated for non-government visitors with less than one hour remaining before the deadline and its failure to ascertain the location of and directions to the site designated for proposal submission.

Finally, the offeror argued that the proposal was under government control before the 2:00 pm deadline. To meet the requirements for this exception, the offeror must demonstrate that it relinquished physical custody of the proposal. This requirement is necessary in order to preclude any potential that an offeror could modify its proposal after other offerors' proposals have been submitted. Because the messenger did not relinquish physical control of the proposal until it handed the proposal to the COR at the designated location, the agency reasonably determined that the transfer of physical custody did not occur until after the deadline. In the circumstances, the offeror clearly had no opportunity to modify its proposal. Nonetheless, GAO applied the "late is late" rule. GAO recognized that its application of the rule in this and similar cases may seem harsh, but noted that "the rules are aimed at ensuring equal treatment of all offerors, and promoting confidence in the competitive system, thereby protecting the integrity of the procurement process – goals that are of greater importance than the possible advantage gained by considering a late proposal in a single procurement." ■

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### Inside...

BLM Engaged In Improper  
Land Transactions ..... 2

Helicopter Company Not  
Entitled To Compensation  
For Unauthorized Order To  
Cease Operations..... 2

Despite Contrary Information  
Provided By Contract  
Specialist, Bid Cannot Be  
Submitted By Fax Unless  
Expressly Authorized By  
Solicitation ..... 2

Agency Properly Rejected  
Bid Where Bid Guarantee  
Contained Copy Of Surety's  
Signature ..... 3

Discrepancy In The Name  
Of The Bidder And The  
Bid Bond Principal Not  
Fatal..... 3

Company Successfully  
Protests Unduly Restrictive  
Terms Of Solicitation ..... 3

Company Pleads Guilty  
to Violating Endangered  
Species Act And Migratory  
Bird Treaty Act..... 4

OIG Issues Audit Report On  
Forest Service Firefighting  
Safety..... 4

## BLM ENGAGED IN IMPROPER LAND TRANSACTIONS

The Government Accountability Office (GAO) has concluded that the Bureau of Land Management (BLM) engaged in a series of improper land transactions with third parties beginning in 1995. According to GAO, a number of land transactions in California and Washington involved the unauthorized sale or purchase of land, rather than land exchanges which are permitted under the authority of the Federal Land Policy and Management Act (FLPMA) and the California Desert Protection Act (CDPA). GAO also concluded that BLM violated the law by conducting unauthorized non-competitive land sales and by failing to deposit the funds generated by these sales into the appropriate accounts in the United States Treasury. Additionally, GAO found that by using the sale proceeds to purchase additional lands, BLM improperly augmented its land acquisition appropriations from Congress which circumvented Congress's so-called "power of the purse." GAO's conclusions were similar to those it reached after conducting a similar review of federal land transactions over 10 years ago.

GAO's decision is available at <http://www.gao.gov/decisions/appro/318274.pdf>. ■

### HELICOPTER COMPANY NOT ENTITLED TO COMPENSATION FOR UNAUTHORIZED ORDER TO CEASE OPERATIONS

A company that operated a helicopter tour business sued the United States for compensation for allegedly "taking" its business due to the action of the Federal Aviation Administration (FAA). The company claimed that the taking of its business violated the Fifth Amendment to the Constitution, which prohibits the government from taking a person's property without just compensation.

An FAA operations inspector had required the company to stop using a particular helipad location because he determined that the location was unsafe. Upon receipt of the direction from the inspector, the company relocated its business to a less favorable location, where the volume of customers declined dramatically and the company eventually went out of business. Also in response to the direction from the inspector, the company notified the FAA that it would rectify the helipad's deficiencies and asked the FAA to either rescind the order or grant it an administrative hearing so that it could contest the order. The FAA refused the company's request for a hearing because the operations inspector did not have the authority to issue an order requiring the company to cease using the helipad. The FAA never responded to the company's request that it rescind the order.

Although the inspector issued an order requiring the company to cease using the helipad, the inspector lacked the legal authority to issue such an order and no authorized government agent ever ratified the inspector's action. Because the FAA never ratified the order, the government action which caused the alleged taking of the company's business was unauthorized. A taking is compensable under the Fifth Amendment only if the government action in question is authorized. ■

### DESPITE CONTRARY INFORMATION PROVIDED BY CONTRACT SPECIALIST, BID CANNOT BE SUBMITTED BY FAX UNLESS EXPRESSLY AUTHORIZED BY SOLICITATION

A contract solicitation instructed prospective bidders to contact the contract specialist in the event of questions. One bidder contacted the contract specialist to ask whether the bid could be submitted by email or fax. The contract specialist informed the bidder that it could transmit the bid by fax and provided a fax number for the bidder to use. Consistent with applicable regulation, however, the bid incorporated by reference a standard provision which provides that faxed bids cannot be considered unless authorized by the solicitation. Consequently, the contracting officer rejected the bid because the solicitation did not authorize faxed bids.

The bidder protested to the Government Accountability Office (GAO), arguing that the contract specialist gave it permission to submit its bid by fax. The bidder also argued that it would have submitted its bid by courier if it had not been misled by the contract specialist. Because information concerning the ability to submit a bid by fax is information that must be provided to all bidders and the applicable regulation expressly provides that a bid sent by fax must be rejected unless permitted by the solicitation, GAO denied the protest. GAO noted, however, that contracting agencies should ensure that the personnel designated in solicitation documents to respond to prospective bidders' questions provide accurate information concerning a solicitation.

In another recent case involving the same standard provision, a bidder faxed its bid the day before a solicitation closing date. After the bid was rejected, the bidder argued that the Forest Service should have contacted it to advise that the bid was unacceptable as submitted. The bidder claimed that it could have timely submitted its bid by courier if it had been informed that the faxed bid was unacceptable. GAO rejected this argument because the agency had no duty to advise the bidder that its bid was submitted improperly. ■

### **AGENCY PROPERLY REJECTED BID WHERE BID GUARANTEE CONTAINED COPY OF SURETY'S SIGNATURE**

Bidders continue to have bids rejected because they fail to include an original signature of surety on their bid guarantees. In one recent case, a protester contended that the bid bond it submitted was valid and enforceable because it was an original print-out of the bond emailed to it by its surety. The enforceability of the bid bond was questionable, however, because there was no assurance that the copy submitted by the protester was the document signed by the surety.

The sufficiency of a bid guarantee depends on whether the surety is clearly bound by its terms; when the liability of the surety is not clear, the bond is defective. A copy of the surety's signature on a bid bond does not allow the government to ascertain whether there had been alterations to which the surety had not consented and which could be used as a basis for the surety to disclaim liability. Copies of bid guarantee documents, whether submitted electronically or by hand, generally do not satisfy the requirement for a bid guarantee because there is no way, other than by referring to the original document after bid opening, for the government to be certain that there had been no alterations to which the surety had not consented. A bid guarantee deficiency cannot be cured by submitting the original after bid opening because this would essentially provide the bidder with the option of accepting or rejecting award by either correcting or not correcting the deficiency, something which is inconsistent with the competitive bidding system.■

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### **DISCREPANCY IN THE NAME OF THE BIDDER AND THE BID BOND PRINCIPAL NOT FATAL**

Generally, a bid bond which names a principal different from the bidder is deficient and the bid must be rejected. However, when it can be established that the different names identify the same entity, the discrepancy can be viewed as a minor informality. In one recent case, the entity that submitted the bid and was identified as the bid bond principal was the same but there was a discrepancy between the names provided for the bidder and for the bid bond principal – the name of the company on the bid included the word “Construction,” whereas the name of the company on the bid bond did not. Other evidence submitted with the bid made clear that the different names referred to the same entity, including the DUNS number shown on both documents, that the same individual signed both documents as vice-president, and that the business address was the same. In these circumstances, the discrepancy between the name of the bidder and the bid bond principal was determined to be a minor informality. Of course, it certainly would have been better for the bidder to ensure that the name on the bid and on the bid bond matched exactly and that the name conformed with its corporate documents.■

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### **COMPANY SUCCESSFULLY PROTESTS UNDULY RESTRICTIVE TERMS OF SOLICITATION**

A company successfully protested the terms of a solicitation for the repair and overhaul of certain pumps used on patrol boats because the solicitation required that the vendor be an authorized repair facility. Full and open competition is generally required in government procurements. One exception to the competition requirement is where the agency's requirements can be performed by only one source or a limited number of sources. However, in such circumstances, the agency must justify its decision with sufficient facts and rationale. In this case, the Government Accountability Office (GAO) agreed with the protester that the agency failed to justify its decision and that the requirement unduly restricted competition.

The agency justified its decision to limit competition because it lacked the data needed to assure that non-authorized repair facilities would have access to original equipment manufacturer (OEM) parts. The protester had successfully performed many contracts for the agency and argued that non-authorized facilities can obtain OEM parts and that it had used OEM parts when performing prior contracts. In response, the agency suggested that the protestor would need much longer to repair the pumps than the time needed by an authorized repair facility. Even assuming this were true, the agency failed to explain the need for urgency, especially because the pumps were to be warehoused. Additionally, while a longer repair time may cause the protester's quotation not to be selected for award, this was not a reason for excluding the company from the competition before it even got underway. GAO confirmed that the manufacturer allowed authorized facilities to sell OEM parts to non-authorized facilities, and therefore concluded that the assumptions underlying the agency's limits on competition were unfounded.■

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### COMPANY PLEADS GUILTY TO VIOLATING ENDANGERED SPECIES ACT AND MIGRATORY BIRD TREATY ACT

A company pleaded guilty to two counts of a 19-count indictment alleging a number of criminal violations of the Endangered Species Act and the Migratory Bird Treaty Act. The indictment alleged that the company violated the Acts by the “taking” of federally protected threatened seabirds in Hawaii, principally due to bird collisions with its power lines. Under the Acts, “taking” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in such conduct. In the plea agreement, the company admitted that it knew the seabirds could collide with its power lines and that the collisions could kill or otherwise harm the birds. Although line modification or reconfiguration had been recommended years ago, the company failed to undertake the recommended actions even after it was notified that it was a target of a federal investigation.

In accordance with the terms of the plea agreement, the company was sentenced to the maximum statutory fine of \$40,000 for the two counts to which it pleaded guilty and a period of probation of 18 months with specific conditions intended to avoid additional violations during the probation period. The company is also required to modify and reconfigure power lines associated with the highest incidences of take and to apply for an incidental take permit that would authorize the taking of protected seabirds under certain conditions in the future. The plea agreement also requires the company to make a \$225,000 payment to benefit the protected seabirds. ■

### OIG ISSUES AUDIT REPORT ON FOREST SERVICE FIREFIGHTING SAFETY

The Department of Agriculture’s Office of Inspector General (OIG) recently completed an audit to determine whether the Forest Service had adequately implemented corrective actions recommended in two prior audits regarding firefighting safety. The prior audits, conducted in 2004 and 2006, identified nine issues and made 18 recommendations to enhance firefighter safety and strengthen Forest Service controls over contract crews. The current audit covered Forest Service firefighting personnel and contract crews operating during the 2006 through 2008 fire seasons, during which there were a total of 12 serious fire accidents nationwide (excluding vehicular accidents and fatalities as a result of natural causes). Although the OIG concluded that the Forest Service had taken significant steps towards implementing the earlier recommendations, it also found that four recommendations remained to be implemented to better ensure firefighter safety. The OIG criticisms focused on the failure of the Forest Service to “establish sufficient emphasis or controls” to implement the earlier recommendations. The OIG directed the Forest Service to (1) establish additional controls for its consolidated incident tracking system to ensure that all required information is captured and monitored, (2) incorporate requirements into the Wildland Fire Suppression Manual Handbook for a professional peer review panel to review all incidents with evidence of misconduct or violation of safety standards or policy, and (3) implement a formal written policy that outlines how contract crew qualifications will be reviewed. The Forest Service has implemented or is in the process of implementing procedures to improve its oversight processes and comply with the OIG recommendations. The OIG Report is available at <http://www.usda.gov/oig/webdocs/08601-58-SF.pdf>. ■

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