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## Decision

**Matter of:** Dev Technology Group

**File:** B-412163; B-412163.5

**Date:** January 4, 2016

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### DIGEST

1. Protest that an alleged exception to the solicitation's fixed-price term rendered awardee's proposal unacceptable is denied where proposal language in question reflects the reservation of a right to request, rather than receive, a price adjustment.
  2. Protest that agency should have rejected awardee's proposal on the basis that the firm's key personnel allegedly failed to meet minimum qualification requirements is denied where solicitation did not contemplate the evaluation of key personnel qualifications prior to award, and where record contains nothing to suggest that agency favorably evaluated the individual in question.
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### DECISION

Dev Technology Group (DTG), of Reston, Virginia, protests the issuance of a task order to Pyramid Systems, Inc., of Fairfax, Virginia, under task order request for proposals (RFP) No. HSSCCG-15-R-00003 issued by the Department of Homeland Security, United States Citizenship and Immigration Services, for Agile development and maintenance services to support agency information technology (IT) systems.

DTG alleges that the agency's evaluation of proposals was unreasonable in various respects and that its source selection decision was flawed.

We deny the protest.<sup>1</sup>

## BACKGROUND

On February 17, 2015, the agency issued the solicitation under the provisions of Federal Acquisition Regulation (FAR) subpart 16.5 to firms holding contracts under functional category 1 (service delivery) of an existing multiple-award, indefinite-delivery, indefinite-quantity contract vehicle known as second-generation Enterprise Acquisition Gateway for Leading-Edge Solutions (EAGLE II). See RFP at 1.<sup>2</sup> The solicitation sought services to support the agency's joint engineering teams--sustainment (JETS) program. See id. The solicitation included a performance work statement (PWS) specifying, at the highest level, that the JETS contractors would be responsible for providing "high-productivity Agile development services and Lean processes focused on IT sustainment of applications that support [the agency's] core business areas." PWS § 3.

The solicitation anticipated the award of four fixed-price<sup>3</sup> task orders, each with a six-month base period and four one-year option periods. RFP at 2-9, 19. The task orders were for work in four mission-area "portfolios." The portfolios were records, benefits, customer service, and biometrics.<sup>4</sup> Id. As attachments, the PWS included a supplemental PWS specific to each portfolio. This protest concerns only the biometrics portfolio.

Each award was to be made on a best-value tradeoff basis, considering price and the following four equally-weighted nonprice factors: corporate experience of the prime contractor; technical approach of the contractor team; management approach of the contractor team; and oral presentation. RFP at 19-20. The solicitation stated

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<sup>1</sup> The value of the task order at issue is in excess of \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award indefinite-delivery, indefinite-quantity contracts. 41 U.S.C. § 4106(f)(1)(B).

<sup>2</sup> Citations to the RFP refer to the "conformed" version that was issued under RFP amendment No. 01.

<sup>3</sup> The solicitation included a single time-and-materials type contract line item number for "surge" work. RFP at 2-9.

<sup>4</sup> The solicitation stated that the agency intended to award the task orders to four different contractors, but that it reserved the right to award more than one task order to the same contractor if adequate competition was not achieved. RFP at 19.

that the nonprice factors, when combined, were more important than price. Id. at 19. Additionally, the solicitation included evaluation criteria for each nonprice factor, and stated that under these factors, the agency would assign adjectival ratings of high confidence, some confidence, or low confidence. RFP at 19-20. Finally, the solicitation stated that the agency would employ a multistep source selection process under which only those offerors whose proposals were evaluated as the “most likely to provide the best value solutions” under factors 1 (corporate experience), 2 (technical approach), 3 (management approach), and 5 (price) would be further considered for award and invited to give oral presentations under factor 4. Id. at 20.

The agency received numerous proposals in response to the solicitation, including proposals from DTG and Pyramid. Agency Report (AR), Tab 32, Source Selection Decision Document (SSDD), at 1, 7. A technical evaluation committee (TEC) evaluated the proposals under factors 1, 2, and 3 and assigned adjectival ratings. See id. Based on the TEC’s evaluations, as well as a price evaluation by a business evaluation committee, the source selection authority (SSA) selected 10 offerors to provide oral presentations under factor 4. See id. at 1. Of those 10 offerors, 4 submitted proposals for the biometrics portfolio, including DTG and Pyramid. Id. at 7.

Following the oral presentations, the TEC completed its evaluation. The adjectival ratings and total evaluated pricing for the proposals submitted for the biometrics portfolio are shown in the table below.

	<b>DTG</b>	<b>Pyramid</b>	<b>Offeror 3</b>	<b>Offeror 4</b>
<b>Factor 1-- Corporate Experience</b>	High Confidence	High Confidence	[DELETED]	[DELETED]
<b>Factor 2-- Technical Approach</b>	High Confidence	High Confidence	[DELETED]	[DELETED]
<b>Factor 3-- Management Approach</b>	High Confidence	High Confidence	[DELETED]	[DELETED]
<b>Factor 4-- Oral Presentation</b>	High Confidence	High Confidence	[DELETED]	[DELETED]
<b>Factor 5--Price</b>	\$71.9 million	\$81.1 million	[DELETED]	[DELETED]

AR, Tab 32, SSDD, at 9.

The SSA documented a source selection decision for each portfolio. For the biometrics portfolio, the SSA documented reasons why, in his view, Pyramid’s proposal represented the best value to the government, notwithstanding its higher

evaluated price. AR, Tab 32, SSDD, at 7-8. With respect to DTG's lower-priced, equally-technically-rated proposal, the SSA documented the following tradeoff analysis:

[A]lthough both [DTG] and Pyramid Sys. had received High Confidence ratings in all non-price factors, there was more consistency of opinion among the TEC regarding Pyramid Sys. I could see this reflected in their point-by-point technical evaluations, where Pyramid Sys. was commended for 22 items that increased confidence, while [DTG] had 12 items that increased confidence and one item that decreased confidence. The number of comments was not an absolute criterion in itself, but reflects the strong confidence in Pyramid Sys.'s technical abilities. I found this consistent with the Factor 3 comments . . . and with the evaluation of the oral presentations. Although [DTG] received a High Confidence rating for its oral presentation, one TEC member noted some concerns with DevTech's response to addressing budget cuts and how it would approach them. . . . I [also] found [Pyramid's] knowledge of the DevOps approach to be sophisticated and deep, particularly in the areas of [DELETED] and their [DELETED].

My conclusion therefore was that Pyramid Sys. inspired an unusually high level of confidence, higher than [DTG] . . . . In weighing the prices as part of the trade-off, I decided that the price premium for Pyramid Sys. was justified and that Pyramid Sys.'s offer provides the best value to the Government.

AR, Tab 32, SSDD, at 7-8.

Based on the SSA's best-value determination, the agency awarded a task order to Pyramid for the biometrics portfolio. Following a debriefing, DTG filed a protest with our Office. After the agency filed its report in response to the protest, DTG filed a supplemental protest.

## DISCUSSION

DTG's protest and supplemental protest include more than two dozen grounds of protest, each claiming that some separate facet of the agency's evaluation of proposals or best-value determination was unreasonable. We have considered all of DTG's claims, and we conclude, based on the record, that none furnishes a basis on which to sustain the protest. Below we discuss the firm's strongest claims.

DTG alleges that an assumption in Pyramid's price proposal took exception to the solicitation's requirement that offerors propose fixed prices. Supp. Protest at 8-10; Supp. Comments at 1-5. Based on the alleged exception, DTG argues that the

agency should have rejected Pyramid's proposal as unacceptable. Supp. Protest at 8-10; Supp. Comments at 1-5.

The requirement to propose fixed prices is a material term or condition of a solicitation requiring such pricing. See Advanced Techs. & Labs. Int'l, Inc., B-411658 et al., Sept. 21, 2015, 2015 CPD ¶ 301 at 10; Forensic Med. Advisory Serv., Inc., B-248551.2, Oct. 28, 1992, 92-2 CPD ¶ 316 at 7. Where a solicitation requests offers on a fixed-price basis, an offer that is conditional and not firm cannot be considered for award. See Advanced Techs. & Labs. Int'l, Inc., supra; Forensic Med. Advisory Serv., Inc., supra.

As relevant to DTG's claim, the solicitation instructed offerors as follows:

The offering contractor shall provide an unambiguous statement that it agrees to all clauses, terms, or conditions (including all PWS requirements) . . . in the solicitation. If the offering contractor takes exception to the solicitation in any way, it shall provide a table describing its exceptions . . . .

RFP at 17. As also relevant to DTG's claim, the PWS for the biometrics portfolio included the following requirement:

The technical landscape may change in the course of performing the tasks outlined in this PWS. As applications evolve, so must the technical expertise of the teams' makeup. Applications may be decommissioned, and if so, it is expected that the associated teams shall transition to support different applications (either existing applications within this portfolio or new applications transitioned onto this portfolio). The Contractor may be required to reorganize teams in order to support different applications and portfolio needs.

PWS, app. D, Biometrics Portfolio, § 1.

Pyramid's proposal included unit prices for the teams that would perform the work under the PWS. AR, Tab 16, Pyramid Proposal, pt. 2, at 2-3. Pyramid's proposal also included a statement that "Pyramid . . . agrees to all clauses, terms, and conditions (including all PWS requirements) as shown in the JETS solicitation." Id. at 1. However, on the same page that this statement appeared, Pyramid's proposal also stated: "It is assumed that as the Technical Landscape changes over time and the team requires new or additional skills, the pricing of the team can be renegotiated." Id.

DTG argues that the scenario described in the above-quoted assumption (i.e., a change in the technical landscape requiring a team with new or additional skills) is encompassed in the requirements of the above-quoted portion of the biometrics

PWS (i.e., the requirements that as applications evolve, so must the team's technical expertise, and that the contractor may be called to support new applications). Supp. Protest at 9; Supp. Comments at 3-4. DTG then argues that because the PWS expressly included this scenario as a requirement, Pyramid's assumption that pricing can be renegotiated in that scenario constitutes an exception to the solicitation's fixed-price term. Supp. Protest at 9; Supp. Comments at 3-4. Stated differently, in DTG's words, "the possible change in the 'Technical Landscape' was a risk that the offeror/contractor had to assume when submitting its fixed-price proposal[,] and such changes would not reasonably be considered a change under the contract's applicable Changes clause." Supp. Protest at 9; see also Supp. Comments at 3.

We agree with DTG that the scenario described in Pyramid's assumption reasonably is read to be encompassed in the above-quoted portion of the biometrics PWS. For the reasons discussed below, however, we do not agree that Pyramid's assumption constitutes an exception to the fixed-price term of the solicitation.

Again, Pyramid's assumption states: "It is assumed that as the Technical Landscape changes over time and the team requires new or additional skills, the pricing of the team can be renegotiated." AR, Tab 16, Pyramid Proposal, pt. 2, at 1. DTG has not pointed to anything in Pyramid's proposal that would form the basis of alternative or renegotiated pricing. DTG also has not identified anything in Pyramid's proposal making the firm's performance contingent on an additional payment if the technical landscape changes. To the contrary, Pyramid's proposal included a statement that the firm agreed to all solicitation terms, including, specifically, the PWS requirements. Id.

Given these circumstances, we view the statement as reasonably being read to mean that Pyramid assumes it may attempt to renegotiate pricing in the event that the scenario in the assumption manifests itself. As we previously have established, however, the mere reservation of the right to request a price adjustment--a request that the agency here could decline, consistent with the above-quoted requirement in the biometrics PWS--is not equivalent to the right to receive an adjustment. See Language Servs. Assocs., Inc., B-297392, Jan. 17, 2006, 2006 CPD ¶ 20 at 10 n.10 (statement reserving right to negotiate equitable adjustment was not exception to solicitation's fixed-price term); Jantec, Inc., B-292668, B-292668.2, Nov. 6, 2003, 2003 CPD ¶ 222 at 9-10 (statement that "we would ask the Government to consider this extra cost" was not exception to solicitation's fixed-price term); Forensic Med. Advisory Serv., Inc., supra, at 7-8 (request, rather than demand, that estimates be incorporated into contract was not exception to solicitation's fixed-price term). Since Pyramid's proposal was not conditioned on the right to receive an additional payment, DTG's claim that the proposal should have been rejected as taking exception to the solicitation's fixed-price term is denied.

DTG also claims that the agency should have rejected Pyramid's proposal on the basis that one of Pyramid's proposed key personnel allegedly does not meet minimum qualifications in the PWS. Supp. Protest at 12-14; Supp. Comments at 6-11. As relevant to DTG's claim, section 7 of the PWS stated that two key personnel--a management lead and a technical lead--would be required for each portfolio. PWS § 7. PWS section 7 also set forth minimum qualifications for these two positions. Id. Finally, PWS section 7 stated that "[t]he Contractors shall identify key personnel and provide statements of qualifications for these individuals." Id.

Pyramid's proposal identified two individuals to fill the management and technical lead positions. AR, Tab 15, Pyramid Proposal, pt. 1, at 21. Pyramid's proposal provided a brief summary of both individuals' qualifications. Id. DTG claims that the individual named as the technical lead does not meet the qualifications in PWS section 7. Supp. Protest at 12; Supp. Comments at 8. DTG bases this allegation on a résumé for the individual that DTG accessed through a social networking website. Supp. Protest, attach. 2, Pyramid Technical Lead Résumé.

We need not reach the issue of whether the individual actually meets the qualifications in PWS section 7 for two reasons. First, the solicitation did not contemplate the evaluation of key personnel qualifications. Second, we see nothing in the record to indicate that the agency evaluated key personnel qualifications or favorably evaluated the individual named as Pyramid's technical lead. Below we discuss these findings in greater detail. At the outset, however, we observe that in reviewing protests of an agency's evaluation and source selection decision, even in a task or delivery order competition as here, we do not reevaluate proposals; rather, we review the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. Ball Aerospace & Techs. Corp., B-411359, B-411359.2, July 16, 2015, 2015 CPD ¶ 219 at 7.

In response to DTG's claim, the agency asserts that it did not evaluate the qualifications of Pyramid's proposed technical lead because the solicitation did not contemplate the submission of key personnel résumés or the evaluation of key personnel qualifications for purposes of the task order award. Supp. Mem. of Law at 4-5. Rather, the agency asserts, key personnel qualifications were to be considered "when the key personnel report for work, as a matter of post-award task order administration." Id. at 5.

We acknowledge, as DTG points out, that PWS section 7 provides that "Contractors shall identify key personnel and provide statements of qualifications for these individuals." However, we agree with the agency that when the solicitation is read as a whole, PWS section 7 reasonably is interpreted to refer to the identification of key personnel and their qualifications at the outset of performance rather than for purposes of the task order award. In this regard, the solicitation's proposal preparation instructions do not direct offerors to submit résumés or any other

information for key personnel. See RFP at 16-18. Additionally, none of the evaluation criteria provide for the consideration of key personnel qualifications.<sup>5</sup> See RFP at 19-20. Finally, the conclusion that the solicitation did not contemplate the evaluation of key personnel qualifications for purposes of the task order award is reinforced by information that the agency provided to industry prior to the solicitation's closing date. Specifically, the solicitation question/answer exchanges included the following:

[Question No. 19:] How would you prefer we provide information on the Key Personnel and their qualifications?

[Answer:] The solicitation does not ask for key personnel resumes, and does not include a key personnel evaluation. An offering contractor wanting to provide information on its key personnel may do so to the degree such information fits in the . . . discussions for Factors 1, 2, or 3.

[Question No. 31:] The Factors and evaluation criteria don't provide clear guidance about how and where to present [key personnel] information. Will the government provide additional information on how they intend offerors to present this Key Personnel information?

[Answer:] [T]he solicitation does not ask offering contractors to submit information on key personnel or to address specific information.

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<sup>5</sup> This includes the evaluation criteria for the management approach factor, which were as follows:

The Government will assess . . . the management approach of the contractor team, considering matters such as--

- (i) attracting and retaining the right people for JETS;
- (ii) managing the contractor team, including prime contractor and subcontractor roles and responsibilities;
- (iii) organizing the Agile teams initially and managing them over time; and
- (iv) being continually responsive in the Government's environment of evolving needs.

RFP at 19-20.

[Question No. 32:] Does the government intend to evaluate key staff in terms of level of confidence? If yes, please add key staff to the evaluation criteria in Factor 3, Management approach. . . .

[Answer:] The solicitation does not provide for a key personnel evaluation.

[Question No. 69:] [PWS section 7 states:] “The Contractors shall identify key personnel and provide statements of qualifications for these individuals. . . .” Do the proposed key personnel need to be full time employee[s] of the Prime Offeror’s team . . . ?

[Answer:] Successful offering contractors will comply with Section 7 of the PWS as a matter of post-award task order administration. . . .

Supp. Protest, attach. 3, RFP Questions and Answers, at 6, 9-10, 18. In sum, since the solicitation did not provide for the evaluation of key personnel qualifications for purposes of the task order award, we need not consider DTG’s claim that the agency unreasonably failed to reject Pyramid’s proposal on the basis that one of the firm’s proposed key personnel allegedly did not meet the key personnel qualifications.

As a related argument, DTG asserts that Pyramid’s proposal misrepresented the proposed technical lead’s qualifications, and that DTG was prejudiced by the alleged misrepresentation because the agency favorably evaluated Pyramid’s proposed technical lead. See Supp. Comments at 10-11. In support of this claim, DTG points to the following finding that the TEC documented for Pyramid’s proposal under factor 3, management approach: “Use of [DELETED] teams increases confidence in ability to provide a high performing team for JETS quickly.” Id. (quoting AR, Tab 28, TEC Rep., Factors 2 and 3, at 59). We conclude that this claim also does not furnish a basis on which to sustain the protest.

An offeror’s material misrepresentation may provide a basis for disqualification of the proposal and cancellation of the contract award based upon the proposal. RQ Constr., LLC, B-409131, Jan. 13, 2014, 2014 CPD ¶ 30 at 5. A misrepresentation is material where an agency has relied on the misrepresentation and that misrepresentation likely had a significant impact on the evaluation. Id.

Even assuming for the sake of argument that Pyramid’s proposal misrepresented the technical lead’s qualifications, the record shows that the alleged misrepresentation was not material for at least two reasons. First, as discussed above, the solicitation is reasonably interpreted as not contemplating the evaluation of key personnel qualifications for purposes of the task order award, and we see nothing in the record to show that the agency engaged in such an evaluation. Second, as explained below, the TEC evaluation finding on which DTG bases its

claim does not support DTG's argument that the agency favorably evaluated Pyramid's proposed technical lead.

As previously stated, the TEC finding underpinning DTG's claim is as follows: "Use of [DELETED] teams increases confidence in ability to provide a high performing team for JETS quickly." AR, Tab 28, TEC Rep., Factors 2 and 3, at 59. This finding does not refer to Pyramid's proposed technical lead or his qualifications. Rather, the finding refers to a portion of the management approach section of Pyramid's proposal where Pyramid proposes an approach of [DELETED]. See AR, Tab 15, Pyramid Proposal, pt. 1, at 3, 20. Accordingly, DTG's claim regarding Pyramid's purported misrepresentation is denied.

Finally, DTG raises dozens of challenges against various TEC findings, arguing that the findings are unreasonable or reflect unequal treatment of DTG relative to Pyramid. As stated above, we find that none of these claims furnishes a basis on which to sustain the protest.<sup>6</sup> To illustrate, below we discuss one of DTG's claims.

In his source selection decision, the SSA noted that under factor 4, oral presentation, one TEC member "noted some concerns with [DTG's] response to addressing budget cuts and how it would approach them." AR, Tab 32, SSDD, at 7. DTG argues that the TEC member's finding reflects the application of an unstated evaluation criterion and that it was unreasonable. Protest at 9-10; Comments at 2-3.

While agencies are not permitted to use unstated evaluation factors, an agency properly may take into account specific matters that are logically encompassed by, or related to, the stated evaluation criteria, even when they are not expressly identified as evaluation criteria. MINACT, Inc., B-400951, Mar. 27, 2009, 2009 CPD ¶ 76 at 3; USGC Inc., B-400184.2 et al., Dec. 24, 2008, 2009 CPD ¶ 9 at 6. Further, an offeror's mere disagreement with an agency's subjective evaluation judgments does not render the evaluation unreasonable. See Ball Aerospace & Techs. Corp., *supra*.

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<sup>6</sup> We find that the record shows the vast majority of the TEC findings at issue to be reasonable. We acknowledge that in very limited instances the TEC arguably may have evaluated features of Pyramid's proposal more favorably than similar features of DTG's proposal, we see no reasonable possibility that the agency's actions prejudiced DTG. Competitive prejudice is an essential element of every viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. See HP Enter. Servs., LLC, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6.

As relevant to DTG's claim, the PWS stated that the agency has 250 offices worldwide. PWS § 2. The PWS also stated that the JETS contractor would be responsible for "adjusting to and meeting changing requirements and expectations" related to the Agile development support services. Id. § 5. Finally, the PWS stated that the contractor must collaborate with various stakeholders. Id. § 5.1.

With regard to factor 4, oral presentation, the solicitation stated that at the outset of the session, the agency evaluators would provide the offeror's representatives with "a problem statement . . . involving issues the offering contractor should reasonably expect on an Agile contract." RFP at 18. After receiving the problem statement, the offeror's representatives were to develop a solution and share it with the evaluators. Id. The oral presentation evaluation criteria were described as follows: "The Government will assess its level of confidence that the offering contractor will successfully perform the task order requirements based on its oral presentation." Id. at 20.

The portion of DTG's oral presentation problem statement at issue here was as follows<sup>7</sup>:

The [agency] customer base for a product within your JETS portfolio works in 90 field offices across the country. That product is facing a mandated hardware, software, cabling, network and process upgrade over the next three months with hard deadlines tied to the OIT [office of information technology] budget. Your travel budget has just been reduced to zero. What do you do?

AR, Tab 31, TEC Rep., Factor 4, at 11. As previously stated, the SSA specifically considered that a TEC member had concerns with DTG's response to this portion of the problem statement. AR, Tab 32, SSDD, at 7. DTG claims that the TEC member's concern reflects the application of an unstated evaluation criterion and was unreasonable. Protest at 9-10; Comments at 2-3. We disagree.

The PWS advised offerors of the breadth of the agency's field offices, and it established that the contractor would be responsible for "adjusting to and meeting changing requirements and expectations." PWS §§ 2, 5. Additionally, the solicitation advised that the oral presentation problem statement would "involv[e] issues the offering contractor should reasonably expect on an Agile contract." RFP at 18. Based on these provisions, we view the issue of how an offeror would deliver its Agile development services remotely in order to overcome a budgetary constraint to be logically encompassed in the solicitation's evaluation criteria.

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<sup>7</sup> This was one of seven scenarios that DTG was to address in its oral presentation. AR, Tab 31, TEC Rep., Factor 4, at 11.

Further, we conclude that the agency's concern regarding DTG's response to this part of the problem statement was reasonable. In this regard, the TEC chair explains the agency's concern as follows:

The JETS solicitation emphasized working in a collaborative environment, but [DTG] did not adequately address working in collaboration with the local offices . . . . The focus of the presentation was on what was created for the local office to download as though the offices were all identical rather than how they could interact directly with the local offices through teleconferences or video or other methods to support those offices. USCIS employees are located in hundreds of offices across the country. [E]ach office uses different applications as listed in the [PWS] Appendices. . . . DevTech's answer . . . did not provide confidence that it could manage an implementation that would vary depending on the type and size of the office requiring an upgrade.

Contracting Officer's Statement, attach. 1, TEC Chair Decl., ¶ 4. While DTG responds that these concerns were "not relevant" to the problem, Comments at 3, DTG's argument amounts to disagreement with the agency's evaluation judgment. Such disagreement does not render the judgment unreasonable.

The protest is denied.

Susan A. Poling  
General Counsel