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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

# Decision

**Matter of:** C&B Construction, Inc.

**File:** B-401988.2

**Date:** January 6, 2010

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Carrie Mills-Kugler and Bruce Kugler for the protester.

Antonio Robinson, Esq., United States Department of Agriculture, Forest Service, for the agency.

Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

1. The limit on GAO's bid protest jurisdiction at 41 U.S.C. § 253j(e) to review protests of orders under task or delivery order contracts only where the order is valued in excess of \$10 million, does not apply to a protest challenging the issuance of task order valued under \$10 million where the task order was issued under a blanket purchase agreement (BPA), since a BPA is not a task or delivery order contract.
2. Protest challenging task order issued to higher-rated, but higher-priced, vendor is sustained where the contemporaneous evaluation record consists of numerical scores assigned to each vendor's quotation, and lacks any information to show a basis for those scores, or a reasoned basis for any tradeoff judgments made in the source selection.

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## **DECISION**

C&B Construction, Inc., of Hillsboro, Oregon, a small business, protests the issuance of a task order to Aquatic Contracting, LLC, of Portland, Oregon, by the United States Department of Agriculture, Forest Service, under a solicitation (identified as a task order solicitation) for stream restoration work for Trout Creek within the Ochoco National Forest, near Prineville, Oregon. C&B argues that Aquatic does not have the equipment needed to perform the work, and that the agency unreasonably selected Aquatic at its higher price.

We sustain the protest.

## BACKGROUND

This protest involves a competition for a task order under the Forest Service's forest engineering and road maintenance (FERM) blanket purchase agreements (BPA). On August 14, the contracting officer sent a solicitation to vendors that held BPAs for stream restoration and rehabilitation services in Area 1 (which includes the Ochoco National Forest). This solicitation requested quotations to perform stream restoration at a particular location in Trout Creek, within the Ochoco National Forest. The solicitation specified that the vendor use a walking excavator to perform the work.<sup>1</sup> Task Order Solicitation at 1.

The solicitation instructed vendors to submit quotations describing their past performance, key personnel (including the qualifications of the walking excavator operator), and equipment. Task Order Solicitation at 11. Vendors were also directed to submit their prices based on an estimated 25 days of work. Task Order Solicitation at 1. The solicitation stated that the agency would select the vendor whose quotation provided the best value, as evaluated under three equally-weighted factors: cost/price, past performance, and key personnel. Task Order Solicitation at 10.

The Forest Service received quotations from three firms, including Aquatic and C&B. Based on the estimated level of effort in the solicitation, Aquatic's price was \$45,150, while C&B's price was \$40,750. AR Tab 5, Aquatic quotation, at 1; AR Tab 6, C&B Quotation, at 1.

The source selection authority prepared an award justification document, which sets forth the results of the evaluation, as follows:

<b>Vendor</b>	<b>Cost or Price<sup>2</sup></b>	<b>Past Performance</b>	<b>Key Personnel</b>	<b>Equipment</b>	<b>Total</b>
<b>Aquatic</b>	12	20	20	18	<b>70</b>
<b>C&amp;B</b>	17	16	17	18	<b>68</b>

Agency Report (AR), Tab 8, Award Justification at 1.<sup>3</sup>

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<sup>1</sup> A walking excavator, or "Spyder Hoe," is similar to a backhoe, but instead of maneuvering on wheels or treads, it uses four independent hydraulically-articulated legs, usually with 1 or 2 wheels on each leg, giving it an appearance somewhat like a mechanized spider.

<sup>2</sup> For reasons not apparent from the record, the Forest Service assigned point scores to the vendors' prices.

<sup>3</sup> We have omitted the third vendor from all subsequent descriptions. It was rated significantly inferior to both Aquatic and C&B under each factor.

The award justification document states that Aquatic was selected based on its key personnel, including a heavy equipment operator with significant experience operating a walking excavator for stream restoration, availability of back-up personnel, and similar past performance. Id. However, the contemporaneous record has no other information on the evaluation of Aquatic's quotation, and no information at all (other than the point scores above) on the evaluation of C&B's quotation. In other words, the record lacks any details concerning the merits of the quotations under each non-price evaluation factor.

On September 16, the Forest Service announced that it had issued the task order to Aquatic at a price of \$45,150. C&B filed an agency-level protest on September 25. In a letter dated September 26, the contracting officer denied that protest. In the letter denying the agency-level protest, the contracting officer described differences in the quotations of Aquatic and C&B that purportedly justified selecting Aquatic. The contemporaneous record of the evaluation and source selection did not contain any similar analysis to support the selection of Aquatic. After receiving the agency-level protest decision, C&B filed this protest with our Office on October 2.

## DISCUSSION

C&B argues that Aquatic does not have a walking excavator to perform the task order, and therefore its quotation should have been rejected. C&B also argues that the Forest Service unreasonably selected Aquatic at a higher price.

### Jurisdiction

This protest involves the issuance of a task order. Our jurisdiction to consider protests of orders issued under task or delivery order contracts is limited to protests where the order is valued over \$10 million, or where the protester can show that the order exceeds the scope, term, or maximum value of the task or delivery order contract. 41 U.S.C.A §§ 253j(e), (g), 253k(1) (West 2009); e.g., e-Management Consultants, Inc.; Centech Group, Inc., B-400585.2, B-400585.3, Feb. 3, 2009, 2009 CPD ¶ 39 at 6; see also Armorworks Enters., LLC, B-401671.3, Nov. 6, 2009, 2009 CPD ¶ 225 at 3 (protest dismissed where agency issued orders valued under \$10 million under a delivery order contract).

In reviewing the agency report, our Office noted that the task order at issue had been issued under the terms of another contract vehicle, the FERM BPA, and the task order itself was clearly valued under \$10 million. Since the agency report did not contain a copy of a FERM BPA, and the terminology used in the agency report was not precise, we asked the Forest Service to provide additional documentation about the FERM BPA, and invited both parties to submit additional briefs. Based on information produced by the Forest Service, the relevant facts regarding our jurisdiction follow.

The FERM BPAs were established pursuant to request for quotations (RFQ) No. AG-04N0-S-09-0004, which was issued by the Forest Service on May 6, 2009. The

FERM RFQ requested quotations to provide 13 types of forest engineering and road maintenance services, including stream restoration and rehabilitation services, across 11 geographic areas in Oregon. FERM RFQ at 2. In addition to providing a price quotation for the relevant line items, the FERM RFQ instructed vendors to submit a technical statement, a “benefit to local community” statement, and past performance information. FERM RFQ at 53-55.

The FERM RFQ emphasized that the procurement was expected to conclude with the establishment of multiple BPAs, and expressly stated that no contracts would be awarded. FERM RFQ at 15. Consistent with this approach, the FERM RFQ did not include a guaranteed minimum quantity, although the RFQ did specify an annual ceiling amount of \$1 million per vendor.

After the Forest Service evaluated quotations from numerous vendors, including both Aquatic and C&B, the agency established FERM BPAs with 43 vendors. The BPAs established with Aquatic and C&B included the services relevant here: stream restoration and rehabilitation services within Area 1.

In response to our inquiry, the Forest Service now argues that our Office does not have jurisdiction to consider this protest because the FERM BPA is functionally equivalent to a task order contract, and the value of the task order is less than \$10 million.<sup>4</sup> We disagree.

In order for the task order protest bar to apply, there must be a task or delivery order contract pursuant to which the order is being placed. A task order contract for purposes of 41 U.S.C. § 253j—the section that sets forth the limitation of our jurisdiction to hear protests challenging the issuance of task or delivery orders under such contracts—is defined as

a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

41 U.S.C. § 253k(1) (2006).

To be an enforceable contract, an indefinite-delivery/indefinite-quantity task or delivery order contract must require the government to order, and the contractor to furnish, at least a stated minimum quantity of supplies or services. Federal Acquisition Regulation (FAR) § 16.504(a)(1). Additionally, to ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but should not exceed the amount that the government is fairly certain to order. FAR

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<sup>4</sup> There is no argument in the protest that the task order exceeds the scope, term, or value of the FERM BPA.

§ 16.504(a)(2). Information Ventures, Inc., B-299255, Mar. 19, 2007, 2007 CPD ¶ 80 at 6.

In contrast, a BPA is generally not a contract, and a BPA does not obligate the agency to enter into future contracts with the vendor. FAR § 13.303-1(a); see also Logan, LLC, B-294974.6, Dec. 1, 2006, 2006 CPD ¶ 188 at 2-3 n.2.<sup>5</sup> Here there is no underlying task order contract; the task order is being placed under a BPA.

Since GAO's jurisdiction at 41 U.S.C. § 253j(e) to consider protests of task orders is limited with respect to task orders under task or delivery order contracts, and since a BPA is not a contract, we have no basis to dismiss C&B's challenge for lack of jurisdiction. See, e.g., Envirosolve LLC, B-294974.4, June 8, 2005, 2005 CPD ¶ 106 at 7-8 (sustaining protest against orders placed under multiple-award BPAs where orders were valued under \$100,000).

#### Merits of the Protest

With respect to C&B's contention that Aquatic does not own a walking excavator, the Forest Service argues first that the solicitation did not require the vendor to own the walking excavator, and second, that as a factual matter, Aquatic's quotation states that it owns the equipment.

In considering protests against an agency's evaluation of proposals, we will not reevaluate the proposals in order to make our own determination as to their acceptability or relative merits. Technical Servs. Corp., B-216408.2, June 5, 1985, 85-1 CPD ¶ 640 at 6. However, we will examine the record to determine whether the evaluation was fair, reasonable and consistent with the evaluation criteria. Bendix Field Eng'g Corp., B-219406, Oct. 31, 1985, 85-2 CPD ¶ 496 at 3.

In its comments on the agency report, C&B fails to meaningfully challenge the Forest Service on either point.<sup>6</sup> Indeed, as noted above, the FERM RFQ specifically asked vendors to list equipment that it would use pursuant to a lease or subcontract. FERM RFQ at 54. In our view, the FERM RFQ made it reasonably clear that ownership of all equipment was not required generally. The solicitation for this task

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<sup>5</sup> The Forest Service has not argued that there are particular circumstances here that convert the FERM BPA into the binding obligation that would be required to create an enforceable contract. See Logan, LLC, supra, at 3 n.2 (citing Almar Indus. v. United States, 16 Cl. Ct. 243, 245-47 (1989)).

<sup>6</sup> C&B requested that the Forest Service produce additional evidence, such as the time cards used by Aquatic showing the name of the excavator operator. We denied these requests because this information was irrelevant to the issue of the proper evaluation of Aquatic's quotation, particularly since C&B has not shown that ownership of the excavator was required.

order also did not require ownership of the equipment. Accordingly, we deny this ground of protest.

Next, C&B argues that the Forest Service unreasonably selected Aquatic at its higher price. The Forest Service responded by comparing the quotations from C&B and Aquatic, and advising that “[t]he protest[e]r was not awarded the contract although it met and exceeded the required minimum of experience, because so did the awardee.” Agency Report at 5. Nevertheless, the contemporaneous record provides no information to explain the point scores given to C&B. Although the source selection decision briefly mentions positive aspects of Aquatic’s quotation, it provides no comparison to C&B, and does not indicate that the source selection authority understood the price difference here, or made a decision that the perceived technical merit of Aquatic’s quotation justified paying a higher price.

Our Office will review the documentation supporting a source selection decision to determine whether that decision was adequately supported and rationally related to the evaluation factors. Universal Shipping Co., B-223905.2, Apr. 20, 1987, 87-1 CPD ¶ 424, at 10.

Implicit in the foregoing is that the evaluation must be documented in sufficient detail to show that it was not arbitrary, Adelaide Blomfield Mgmt. Co., B-253128.2, Sept. 27, 1993, 93-2 CPD ¶ 197 at 4, and a selection decision may not be made on point scores alone where the agency selection official has inadequate documentation on which to base a reasoned decision. J.A. Jones Mgmt. Servs., Inc., B-276864, July 24, 1997, 97-2 CPD ¶ 47 at 4. While we are mindful that when an agency places an order under a BPA, limited documentation of the source selection is permissible, the agency must at least provide a sufficient record to show that the source selection was reasonable. FAR § 13.303-5(e); see also FAR §§ 13.106-3(b)(3)(ii) (in a simplified acquisition record must include additional statements to explain the basis for award when factors other than price are used).

In short, the contemporaneous record here is inadequate for our Office to determine whether the Forest Service had a reasonable basis to select Aquatic at its higher price. Additionally, the record shows that the Forest service used an evaluation factor (equipment) that was not disclosed in the solicitation, and which had the effect of reducing the significance of the cost/price factor.<sup>7</sup> Since the record provides no contemporaneous tradeoff comparing Aquatic to C&B, other than on the basis of their point scores, we sustain the protest. See. Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 8 (protest sustained where Forest Service relied solely on point scores and failed to document

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<sup>7</sup> Nevertheless, this flaw by itself may not have prejudiced C&B since both Aquatic and C&B received the same score under the equipment factor.

any comparison of protester's lower-priced and lower-rated proposal to awardee's higher-priced, higher-rated proposal, in source selection decision).

With respect to the Forest Service's more detailed explanation of its evaluation, offered in response to C&B's protests, our Office generally gives little weight to such reevaluations and judgments prepared in the heat of the adversarial process. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. In our view, the explanation offered by the Forest Service in response to the protests cannot overcome the failure of the contemporaneous record to provide any explanation of the evaluation of C&B (other than point scores) on which the agency could make a reasoned selection decision.

#### RECOMMENDATION

We recommend that the Forest Service reevaluate the quotations consistent with the terms of the solicitation, and document the basis for its judgments consistent with the requirements for a simplified acquisition. After the reevaluation, we recommend that the Forest Service prepare a new selection decision, including an explanation of any tradeoffs. If that decision results in the selection of another vendor, we also recommend that the Forest Service terminate for convenience the task order issued to Aquatic, if feasible. We further recommend that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2009). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receiving this decision.

The protest is sustained.

Lynn H. Gibson  
Acting General Counsel