

Federal Contracts Report™

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Past Performance

Navy Unfairly Disqualified Firm From \$240M Competition

BNA Snapshot

- GAO recommends reevaluating proposal of firm Navy disqualified from \$240 million design-build competition
- Past performance evaluation treated competitors unequally



By [Daniel Seiden](#)

Sept. 30 — The Navy unfairly disqualified Halbert Construction Company Inc. from a \$240 million design-build contract competition by engaging in disparate treatment of competitors' past performance, the Government Accountability Office held ([Halbert Constr. Co. Inc.](#), GAO, B-413213, 9/8/16, decision released 9/29/16).

The Navy also improperly relied on adjectival ratings to distinguish competitors, the GAO said.

Therefore, the GAO recommended that the Navy conduct a new past performance evaluation and tradeoff analysis to see if Halbert should be selected for the second part of the two-phase procurement.

Stephen E. Ruscus of Morgan, Lewis & Bockius LLP told Bloomberg BNA that the Navy's conduct put it in a "Catch-22."

Either the GAO would conclude that the Navy treated offerors unequally in the past performance evaluation, he said, or it would find that the Navy deviated from solicitation requirements when it decided to consider an adverse past performance reference for Halbert that didn't satisfy relevancy criteria in the request for proposals (RFP).

Ruscus also said Halbert benefited because its "lower past performance score was likely the sole reason it wasn't awarded a contract, and therefore, it met the standard for having been prejudiced by the agency's error. Ultimately, the protest was sustained because Halbert could point to concrete evidence in the record clearly supporting its claim that the agency treated it unfairly."

Navy Didn't Follow Rules

Justin Chiarodo of Blank Rome LLP said the decision reflects the GAO's enforcement of a well-settled standard—that an agency's evaluation must be consistent with the ground rules it lays out in the RFP.

The agency "didn't follow its own rules," he said, because it favorably considered a past performance evaluation for a successful offeror where the project didn't meet solicitation size requirements. It broke its own rules when it considered performance on a project that was wasn't fully complete, he added.

Chiarodo also said the decision "demonstrates how the protest process can reveal procurement violations that might not be readily apparent—the bases for sustaining this protest would not have leapt off the page, and required a careful review of the record."

Three Awards Planned

The Navy sought Historically Underutilized Business Zone small businesses and service-disabled veteran-owned small businesses to perform three design-build services contracts at government installations in several western states.

The estimated value of all contracts when combined is \$240 million, the GAO said.

The Navy said it would make the award on a best-value basis using two phase design-build procedures established in the Federal Acquisition Regulation.

Twenty-four offerors submitted proposals, including protester Halbert. The Navy decided not to advance Halbert to the second-phase of the competition, and Halbert protested.

Past Performance Evaluation

The GAO sustained the protest because the Navy unfairly rated one of Halbert's past performance references compared to an unnamed offeror selected for the second competition phase.

The Navy didn't consider an adverse past performance reference for the unnamed offeror that fell below that solicitation's minimum cost requirement, but considered one for Halbert, which harmed its evaluation rating, the GAO found.

Halbert also convinced the GAO that the Navy's trade-off analysis improperly relied on adjectival ratings to distinguish Halbert from a competitor.

No meaningful distinction existed between an "outstanding" rating Halbert received, and an "exceptional" rating a competitor received, the GAO said.

Joseph Berger Thompson Hine LLP agreed with Chiarodo that the protest process often reveals subtle flaws and errors "that would otherwise not have been brought to light, which ultimately is good for the procurement system. Halbert's protest was sustained on relatively narrow grounds, which were subtle but clear enough to demonstrate competitive prejudice."

David S. Demian and others from Finch, Thornton & Baird LLP, San Diego, represented the protester. Katie Slayton and Paul Clay represented the Navy. Susan A. Poling and others from the Office of the General Counsel, GAO, participated in the decision.

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