

Public Contracts Update

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SOLICITATIONS AND THE MEANING OF EVALUATION CRITERIA

Every company that regularly competes for government contracts is familiar with the evaluation criteria usually contained in Section M of the solicitation or elsewhere in the solicitation for purchases of commercial items. These criteria generally address how the agency will evaluate the relative strength of technical capabilities, past performance, experience, key personnel, and price. Other evaluation factors also can be included, depending on the nature of the particular procurement. Clients have frequently asked whether they will get “extra credit” if they not only submit a good technical proposal, but offer more than the solicitation requested or, in some other way, enhance their proposal.

The FAR is silent with respect to this issue. Proposal evaluation is treated at FAR 15.305. This paragraph provides *inter alia*:

Proposal evaluation is an assessment of the proposal and the offeror’s ability to perform the prospective contract successfully. An agency shall evaluate competitive proposals and then assess the relative qualities solely on the factors and sub-factors specified in the solicitation. Evaluation may be conducted

using any rating method or combination of methods....[t]he relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file.

Id. at (a)

Concerning technical evaluation, 15.305 provides

“When tradeoffs are performed, the source selection record shall include –

(i) an assessment of each offeror’s ability to accomplish the technical requirements; and

(ii) a summary, matrix, or quantitative ranking, along with appropriate supporting narrative, of each technical proposal using the evaluation factors.”

Id. at (3)

From review of the above, it appears that the government’s evaluation should be limited according to the terms specified in the solicitation and the evaluation factors. A recent case, however, at the General Accountability Office, indicates that GAO believes that the FAR goes further than the words indicate. In *IAP World Services, Inc.* B-297084 (November 1, 2005) the protestor asserted that the agency improperly

applied unstated evaluation criteria because the agency evaluated technical proposals based on whether the offeror “exceeded” the stated requirements or used innovation in responding to them. GAO denied the protest. GAO’s rationale was that “where a solicitation indicates the relative weights of evaluation factors, as opposed to providing for selection of the lowest-priced, technically acceptable proposal, the agency is not limited to determining whether a proposal is merely technically acceptable; rather, proposals may be evaluated to distinguish the relative quality by considering the degree to which they exceed the minimum requirements or will better satisfy the agency’s needs”. GAO went on to state that, as the solicitation provided for award on the basis of factors whose relative weights were disclosed, the agency could properly consider, in its evaluation, both the extent to which the proposals exceeded the requirements and the extent to which offerors use innovative measures to respond to those requirements.

Our review of GAO’s decision leads to a troubling conclusion. GAO has not only found that the agency can evaluate a proposal as

Exceptional, Good, etc., based upon its ability to provide the stated technical result, but also to give additional credit for enhancements that were not addressed in the solicitation. The protestor argued that the agency used unstated or hidden evaluation factors. Our analysis of GAO’s decision reveals GAO appears to have crafted a principle that, despite what the evaluation factors say, the agency can give credit for proposals that offer items or services that exceed the stated requirements. This appears to us to be unstated evaluation criteria, as the protestor alleged. We have always understood the government can accept more than requested, when offered. Giving extra credit for the enhancement is another matter.

The moral of the story is clear. Carefully and thoroughly review all

solicitations and the evaluation factors. Thereafter, when preparing proposals, consider whether you can provide additional value in your proposal for which credit may be given. Finally, if questions arise about the interpretation of the evaluation criteria or whether you will receive extra credit if enhancements are offered, contact the contracting officer.

We would welcome any input from our readers as to whether or not they have experienced a similar outcome as described in *LAP World Services*.

For more information or to schedule an appointment to discuss this Update on a no-obligation basis, please contact Bob Fryling at 215-569-5534 or fryling@blankrome.com. ■

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