

Manfredonia Law Offices, LLC
MONTHLY GOVERNMENT CONTRACTS NEWSLETTER
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Our goal is to educate our readers so they can better protect their interests when dealing with the federal government. In this edition, we describe two recent decisions where the Government compromised the solicitation by not following the evaluation criteria and by providing misleading statements to an offeror. We also discuss a case that describes the Government's discretion to, or not to, exercise an option.

Thank you for your interest in our newsletter.

John Manfredonia

Government Misapplies Past Performance Criteria

In a recent protest decision, the GAO found that the Department of Justice failed to adhere to evaluation criteria in a solicitation for investigative support services. The solicitation included past performance and technical evaluation factors, which were to be independently rated. The GAO held that the DOJ failed to adhere to this evaluation scheme by considering past performance under a technical evaluation factor. This gave greater weight to past performance than the evaluation scheme allowed.

For example, the Government rated one offeror's Technical Approach "thorough and complete," but downgraded its proposal under this factor because "the offeror could not demonstrate experience performing prior contracts that were sufficiently similar." This, in effect, allowed past performance to influence the technical capability factor in violation of the evaluation criteria.

The GAO also held that the Government failed to consider the relevance of past performance references in accordance with the stated evaluation criteria. "An agency's evaluation of an offeror's past performance is unreasonable where the solicitation requires the agency to consider the relevance of the offerors' references as compared to the solicited requirement, and the agency fails to document any evaluation of relevance." In this case, the RFP required that offerors submit past performance references of similar size and scope to the RFP requirements, and stated that the agency would evaluate the "extent and relevance" of each offeror's past performance. The record, however, consisted of averaged past performance questionnaire ratings for each offeror with no analysis or evaluation of the relevance of the past performance references to the solicitation's requirements.

Artic Slope Mission Services, LLC B-410992.5, B-410992.6 (January 8, 2016)

Procurement Compromised by the Government's Misleading Statements

The Court of Federal Claims found that the Department of State mishandled a procurement to construct an embassy compound in Maputo, Mozambique. During pre-award discussions, the Government informed one offeror that its price was above the Independent Government Cost Estimate ("IGE"). This statement was false and unfairly done to put pressure on the offeror to

lower its price. This offeror lowered its price and received award. A protest followed. The Court held that the Government violated the fundamental requirement of fairness in the procurement process by misguiding the awardee that its price was above the IGE, when it was not:

The "technique" of misinforming an offeror that its price was high when in fact its price was low, and concomitantly misguiding that offeror about how "high" certain sub-elements were, is not a "price analysis technique or procedure" that meets the fundamental purpose of the FAR to ensure the "final price is fair and reasonable." FAR 15.404-1(a)(1) Because the awardee's price resulting from the erroneous discussion letter was not based upon reality or the offeror's accurate understanding of its pricing status vis-à-vis the IGE, that price cannot be said to be "fair" or "reasonable." Nor can such a price form the basis of an "adequate price competition" within the meaning of FAR 15.404-1, as one offeror's price was influenced by erroneous, misleading discussions that were never corrected. As such, Plaintiff has established that the Agency violated the procedure in the FAR for assessing price reasonableness.

The Court upheld the protest based on the Government's misleading statements. The Court directed the Government to open discussions with the company that received award, but not with other offerors. Normally when discussions are reopened for one offeror, they are reopened for all offerors. In this case, however, the Court felt that allowing the awardee to change its price, but not others, was the appropriate remedy. In reaching this decision, the Court found that all other offerors already had a fair opportunity to revise their offerors during discussions, and that they would be given an unfair competitive advantage if allowed to revise their pricing again after the awardee's price and the IGE have been disclosed.

Caddell Construction Company, Plaintiff, v. The United States, Defendant, and Pernix Group, Inc. Intervenor, Court of Federal Claims, Docket No. 15-645C (February 10, 2016)

Contractor Can't Complain that Government Did Not Exercise Option

In a recent Board of Contract Appeals case, the contractor sought over a \$1M for "the remaining balance" under a contract for the general storage and delivery of stored goods. The contract contained clause H.2, "Option to Extend the Term of the Contract - Fixed-Price Contract." This clause allowed the Government to extend the term of the contract for three additional periods. The contractor sought compensation for services as if the Government exercised the option, claiming the Government was obligated to do so.

The Civilian Board of Contract Appeals denied the claim, noting that "an option clause does not obligate the Government to exercise an option." The Board said "the Government's decision not to exercise an option can provide a vehicle for relief only if the contractor proves that the decision was made in bad faith or was so arbitrary or capricious as to constitute an abuse of discretion." In this case, there was no evidence the Government's decision not to exercise the option was made in bad faith.

G2G, LLC v. Department of Commerce, CBCA 4996 (February 24, 2016)

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