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Proposal Rejected as Technically Unacceptable Where the Contractor Attempted to Limit the Government's Rights in Data

A recent protest decision from the Government Accountability Office illustrates the importance of strictly complying with data rights clauses contained in solicitations. In *Northern Light Productions*, B-401182, June 1, 2009, the GAO denied the protest, finding that the agency properly rejected Northern Light's proposal as technically unacceptable on the grounds that it took exception to the Rights in Data clause set out in the solicitation.

Request for Proposals — Under the subject Request for Proposals, the National Park Service sought proposals for various audiovisual and productions services. The RFP included a data rights clause, FAR 52.227-17, which provides in part that the "Government shall have unlimited rights in all data delivered under this contract." The RFP also had an Ownership of Products clause, which clearly stated that "[a]ll original media produced under this contract is the property of the National Park Service" and that the government's "use of the materials provided shall not be restricted in any manner."

One of the evaluation factors in Section M of the RFP was for the offerors' "comprehensive plan." Among other things, the evaluation of the comprehensive plan would "include your understanding of the Rights in Data clause and other licensing requirements."

Northern Light's first proposal did not mention data rights. Its final revised proposal, however, stated that "[a]ll materials will be cleared for educational and museum presentation use for the life of the programs, up to twenty years."

Evaluation of Proposals — After an evaluation of proposals, the agency highly rated Northern Light's proposal under the various technical factors. While the proposal earned more than 95 out of 100 points, it was rejected as technically unacceptable on the basis that it took exception to the data rights clause. The contracting officer determined that Northern Light's final proposal imposed a limit on the agency's use of the materials to no more than twenty years, which was directly at odds with the Rights in Data and the Ownership of Products clauses of the contract.

Protest — In the protest that followed, Northern Light argued that the agency should have numerically downgraded its proposal under the "comprehensive plan" factor, rather than reject the entire proposal as technically unacceptable, because the evaluation under that factor was to include offerors' understanding of the Rights in Data clause. In other words, Northern Light urged that the restriction of data rights contained in its proposal should only be viewed as an issue of technical merit, reflecting perhaps a limited understanding of the data rights requirements of the

contract, instead of an issue of acceptability.

The GAO disagreed with Northern Light’s argument. Interestingly, the GAO noted that it was “unclear what purpose was served by the agency’s inclusion of an offeror’s understanding of the Rights in Data clause as one aspect of the comprehensive plan evaluation.” Nevertheless, the GAO found that both the Rights in Data clause and the Ownership in Products provision required offerors to grant the government unrestricted rights in the media produced under the contract. Despite this requirement, Northern Light limited the National Park Service’s rights to media delivered under the contract to no more than twenty years and, as a consequence, the GAO found that the agency properly rejected Northern Light’s proposal.

Practitioner’s Tips — The *Northern Light* decision should serve as a reminder of the importance of strictly complying with solicitation requirements. In this case, Northern Light submitted a highly rated technical proposal, yet was eliminated from the competition because it attempted to limit the government’s rights in data. Contractors should also be cognizant of attempts by agencies to obtain unrestricted data rights.

- Use of the FAR 52.227-17 Rights in Data clause is showing up in government solicitations with increasing frequency. Where this clause is incorporated into a solicitation that calls for the delivery of data pertaining to a “commercial item or process,” contractors should consider objecting to the solicitation. Such objection can be based on FAR 12.211, which states that “[e]xcept as provided by agency-specific statutes, the Government shall acquire only the technical data and the rights in that data customarily provided to the public with a commercial item or process.” If you encounter data rights clauses in solicitations that are too restrictive, you must object before the due date of proposals.
- If FAR 52.215-1 is included in a solicitation, you may be permitted to submit alternative proposals, including one that departs from the solicitation’s data rights clause. This approach would ensure that at least one of your proposals would remain in the competition in the event the government is unwilling to award a contract or modify a solicitation where data rights are restricted.

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