



VENABLE

Oops! I Bid It Again:
Avoiding Common Mistakes in
Proposal Preparation and Maximizing
Your Chances for Awards

Wednesday, February 28, 2018
12:00pm-1:30pm ET



Source Selection Objective

“The objective of source selection is to select the proposal that represents the best value.”

- FAR 15.302



Key Portions of Solicitation

- The Schedule, Section C
- Representations, Instructions, Evaluations
 - Section K – Representations, certifications and other statements of offerors or respondents
 - Section L – Instructions, conditions and notices to offerors or respondents
 - Section M – Evaluation factors for award



The Schedule, Section C

- Tells the potential contractors what goods or services the Government is interested in purchasing



Solicitation Clauses

- This section provides offerors with the following information:
 - Whether the Government intends to award the contract without discussions,
 - Whether the Government will accept alternate proposals, and
 - Whether the Government will accept facsimile proposals



Section K – Representations, Certifications

- Contains representations, certifications and other information required of all offerors
- Examples include:
 - Certificate of Procurement Integrity
 - Small Business Certification
 - Buy America Act Compliance
 - Place of Performance



Section L – Instructions, Conditions and Notices to Offerors or Respondents

- Contains information and instructions not required elsewhere to assist potential offerors with preparing their proposals
- Tells offerors to submit proposals in a specific format or to organize their proposals in a certain manner (*e.g.*, administration, management, technical, past performance, and price)



Section M – Evaluation Factors for Award

- Contains all of the significant factors and any significant subfactors as well as their relative importance in the Government's award decision



Section M – Evaluation Factors for Award (Cont'd)

- Evaluation factors and subfactors:
 - “(1) Represent the key areas of importance and emphasis to be considered in the source selection decision; and
 - (2) Support meaningful comparison and discrimination between and among competing proposals.”



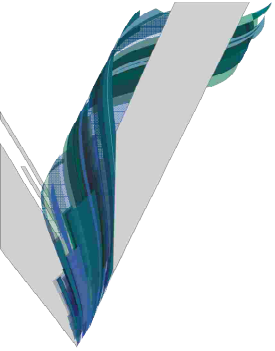
Section M – Evaluation Factors for Award (Cont'd)

- Key: Government has broad discretion in determining the evaluation factors and subfactors that apply to a specific acquisition.



Summary

- Proposal writing also requires a bit of ESP because you have to review the evaluation factors and try to figure out what the Government really wants or what you can do to submit a proposal that distinguishes yours from other offerors.



What does the Government look for when it reviews a proposal?



Does the Proposal Conform to the RFP's Requirements (i.e., did you follow the instructions in Section L)?

- The Government is serious about page limitations and font size:
 - If an offeror exceeds the limits, the Government will remove the excess pages and the offer will not be scored on them
 - Provide all of the information requested in the designated format
 - Answer the questions posed, even if you think the Government ought to already know the answer



Does Your Proposal Show That You Understand the Requirement?

- Proposal must demonstrate that you understand the technical aspects of performing the SOW
- Proposal must demonstrate that you understand the environment in which the contract will be performed



Does the Proposal Contain a Good Technical Approach?

- The technical approach must produce the outcome outlined in the SOW (*see Solicitation, Section C*)
- Be wary of relying on conclusory statements regarding incumbent practice without full explanation



Does the Proposal Show That You Understand How to Manage the Contract?

- Describe your company's internal control systems
- Describe your strategy for technical oversight
- Show that your staff understands government contracting
- Highlight that your accounting system can accurately track costs



Are the Types and Quantities of Effort You Propose Appropriate for the Required Task?

- Do they match the scope of work in your technical proposal?
- Are the experience and education levels appropriate?
- Is the bill of materials (“BOM”) logical?
- Does the BOM reflect appropriate scrap and rework requirements?
- Does the BOM reflect average workmanship standards?



Does the Price Proposal Add Up?

- Are the rates and factors reasonable?
- Does the proposal account for overtime appropriately?
- Are any escalations contained in the proposal reasonable?
- Are there any mathematical errors in the proposal?
- Is the price proposal unbalanced?
- Key: If the proposal is for a cost type contract, the Government will adjust the proposal to the “most likely” cost



Does the Proposal Show That You Have a Good Record of Past Performance?

- Proposal should describe your company's performance and not simply your company's best projects
- Proposal should focus on work of a similar size and scope
- Proposal should highlight experience as a prime or sub
- Proposal should demonstrate experience within any timeframe designated by the Solicitation



Past Performance: Key Points

- Government can consider performance of principals
- Government will review whether you have other contracts with the Government
- Government will verify references and check with others



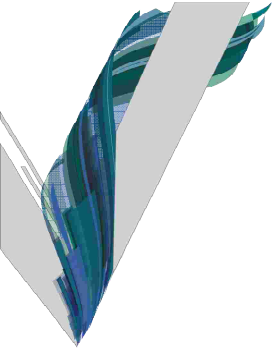
Does the Proposal Show That You Are a Responsible Contractor?

- Do you have adequate financial resources to perform the contract, or the ability to obtain them?
- Can you meet delivery schedule given your other business commitments?
- Does your company have a satisfactory performance record?
- Does your company have a satisfactory record of integrity and business ethics?

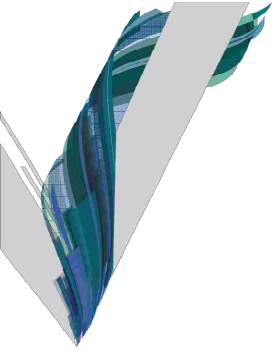


Does the Proposal Show That You Are a Responsible Contractor? (Cont'd)

- Does the proposal show that you have the necessary organization, experience, accounting and operational controls and technical skills, or the ability to obtain them, to perform the contract?
- Does the proposal establish that your company has the necessary personnel, production, construction, technical equipment and facilities to perform the contract?
- Is your company otherwise qualified and eligible to receive an award under applicable laws and regulations?



Recent Government Accountability (GAO) and United States Court of Federal Claims (COFC) Decisions Concerning Proposal Preparation Issues and Bid Protests



What issues or mistakes prevent offerors from winning a contract or cause the GAO or COFC to overturn the Agency's award decision?



Overview

- The GAO's and COFC's Role in the Proposal Process
- GAO
 - Procuring agencies have broad discretion in evaluating proposals
 - GAO limits review of award decision to whether the agency's decision "was reasonable, consistent, and in accord with law, regulation and the terms of the solicitation." (citation omitted)
 - GAO does not reevaluate proposal and the protestor's mere disagreement is not a valid protest ground



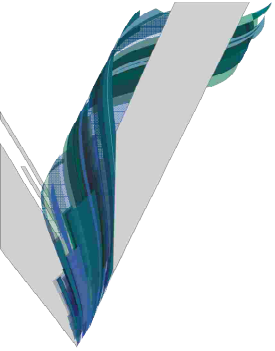
Overview (Cont'd)

- COFC
 - COFC will set aside an award decision if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “without observance of procedure required by law.” (citations omitted)
 - Focus: Did the Government’s award decision have a rational basis?



Common Mistakes

Recent decisions highlight a number of fundamental mistakes made by offerors forming lessons learned for future procurements



Pricing Issues



Pricing Issues

- *ACADEMI Training Center, LLC*, B-415416 (Dec. 18, 2017).
 - RFP “advised offerors that proposed course prices ‘cannot exceed the ceiling prices in the base contract award.’”
 - State Department rejected proposals that proposed prices that exceeded the ceiling for the IDIQ contract’s base period, despite having determined those prices were fair and reasonable.
 - GAO denied ACADEMI’s protest finding that ACADEMI’s proposal failed to comply with the RFP’s unambiguous material requirement.



Pricing Issues

- *Sallyport Global Holdings, Inc.*, B-415460, B-415460.4 (Jan. 9, 2018)
 - State Department issued TORFP to IDIQ contract holders for security services in Afghanistan.
 - The RFP included a number of instructions concerning price submissions.
 - GAO denied protest where the Agency was unable to validate the underlying basis for the total price based on the Protester's failure to follow the RFP's instructions.



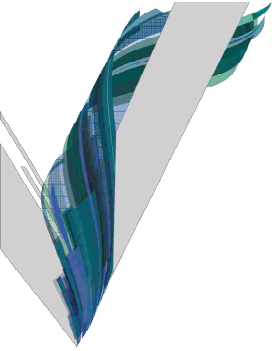
Pricing Issues

- *EMR, Inc.*, B-406625 (July 12, 2012).
 - U.S. Department of Air Force RFP for COMPEC II.
 - Agency informed EMR that certain of its proposed labor rates were lower in comparison to other offerors, while others were high in comparison, both of these constituting a weakness.
 - EMR's revised price was higher overall and it was not among the lowest-price offerors selected for award.
 - GAO denied EMR's protest claiming that it was coerced into raising its labor rates, putting its proposal outside the range of awardees, because contractor had no obligation to revise its proposal in response.



Clear and Convincing Evidence of Price Mistake

- *Herman Construction Group, Inc.*, B-415480 (Jan. 5, 2018)
 - Protester alleged that the awardee was improperly permitted to correct a mistake in its bid regarding its price.
 - Herman's Bid - \$7,820,508
 - Awardee's Bid - \$6,635,332, corrected to \$7,771,658
 - "A bidder may be permitted to upwardly correct its bid price prior to award where there is clear and convincing evidence that both a mistake was made and the intended bid price."
 - GAO sustained protest where record lacked evidence to prove the mistake and awardee provided only an "uncorroborated and self-serving" explanation of the discrepancy.



Issues Concerning Proposal Key Personnel



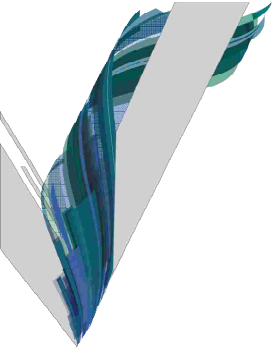
Key Personnel Issues

- Requirement to provide letters of intent for key personnel cannot be satisfied by piecemeal information in proposal.
- *DataSource, Inc.*, B-412468 (Feb. 16, 2016).
 - Department of the Navy issued RFP for information technology support services.
 - RFP provided that letters of intent for all key personnel not currently employed by the prime or subcontractor must be provided.
 - Protester failed to provide a letter of intent for one of its key personnel and was eliminated from the competition.
 - Protest claiming that material included elsewhere in DataSource's proposal was a reasonable substitute is denied where a letter of commitment is not provided.



Key Personnel Issues

- Agency not obligated to re-open discussions to remedy issue of unavailability of key personnel.
 - *A-T Solutions, Inc.*, B-413652.2, B-413652.3 (July 5, 2017)
 - Agency engaged in two rounds of discussions with offerors and offerors submitted final proposal revisions.
 - Following submission of revised proposals, one of protester's key personnel became unavailable during the evaluation process.
 - A-T Solutions was informed its proposal was no longer technically acceptable; filed protest claiming Agency unreasonably declined to reopen discussions.
 - GAO denied protest finding there existed no issue with the substance of the discussions that took place and that Agency had no obligation to reopen discussions with A-T Solutions to allow it to revise its proposal.

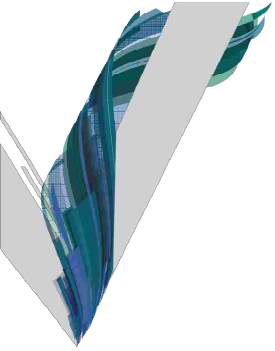


Untimely Submissions



Untimely Submissions

- *T-Square Logistics Services Corp. v. United States*, 134 Fed. Cl. 550 (2017)
 - Air Force solicitation for base supply, vehicle operations and vehicle maintenance services.
 - Solicitation required offerors to submit both electronic and hard copy versions of bids.
 - Plaintiff’s bid was rejected where delivery of the hard copy version was late due to inclement weather.
 - The Court held that the Agency erred in failing to consider whether to waive the late submission as a minor informality, where Contracting Specialist indicated in writing that it would waive the hard copy submission as inconsequential.



Failure to Comply with Solicitation Requirements



Failure to Support Prior Experience

- *Planning & Learning Technologies, Inc.* (Advisory Opinion), B-413156.23 (Oct. 14, 2016)
 - GSA issued the Human Capital and Training Solutions Small Business (HCaTS SB) RFP to provide training and development services across the federal government.
 - As an eligibility requirement, the RFP stated that offerors must have performed six relevant experience projects, which must have been performed within the past five years prior to the solicitation closing date, or be ongoing, and supported by a “verifiable contract document.”
 - Protest denied where contract submitted did not support timeframe required.



Failure to Acknowledge Amendment

- *Nu-Way Security and Investigative Services, Inc.*, B-414988.2 (Oct. 20, 2017)
 - GSA issued RFQ for the establishment of a BPA under GSA Schedule 84 for guard and transportation services.
 - Amendment 2 made several changes, including to Attachment E, pricing spreadsheet, which added CLIN 1003C for a project manager in San Diego.
 - Agency rejected protester's quote as nonresponsive where it failed to include pricing information for CLIN 1003C.
 - GAO denied protest where protester failed to acknowledge the material amendment and rejected argument that revised attachment was not apparent from the face of the Amendment.



Incorrect Version of Attachment

- *The Arbinger Co.*, (Advisory Opinion), B-413156.21 (Oct. 14, 2016)
 - Protester submitted its self-scoring sheet for the unrestricted pool, rather than the small business pool, and the Agency rejected its proposal on that basis.
 - GAO denied the protest stating that the Agency acted reasonably in excluding Arbinger’s proposal from consideration for failure to submit the correct attachment and found that the agency was not required to engage in clarifications regarding this point.



Attempt at “Added Value” Backfires

- *Murphy Co.*, B-415589; B-415589.2 (Jan. 29, 2018)
 - Department of Agriculture, Forest Service, sought proposals for the WWB Stewardship Integrated Resource Timber contract to provide timber removal and restoration services.
 - Sample contract provided for a stump height requirement of 10” minimum and 40’ maximum log length.
 - GAO denied protest because “[w]here a proposal omits, inadequately addresses, or fails to clearly convey required information, the offeror runs the risk of an adverse agency evaluation.”



Fully and Accurately Describe the Experience of Your Company and any Subcontractors or Joint Venture Partners

- *RISC Management Joint Venture v. United States*, 69 Fed. Cl. 624 (Feb 24, 2006)
 - Air Force issued solicitation for solid waste management services and the operation of a landfill at Vandenberg Air Force Base
 - CO requested references for one of RISC's subcontractors and RISC provided: summary of individuals who served in technology group; description of unique processes used by company; and, five references
 - CO rated this information as neutral because it did not describe pertinent past-performance experience – did not provide adequate information in the form required by the solicitation
 - Court found past performance information provided was lacking or deficient.



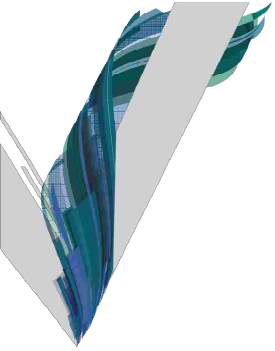
Failure to Demonstrate Compliance with DFARS Clause

- *CR/ZWS LLC*, B-414766; B-414766.2 (Sept. 13, 2017)
 - Air Force RFP for waste management services.
 - Technical evaluation limited to whether the offerors' Mission-Essential Contractor Services Plans met the requirements of DFARS 252.237.7024.
 - GAO agreed that the awardee's plan failed to address two of five key components of the DFARS requirement.



Proper Identification of Affiliate Performance

- *IAP World Services, Inc.; EMCOR Government Services, B-417917.2, et. al. (July 10, 2013)*
 - Awardee identified experience of two corporate affiliates, despite no evidence indicating affiliate's performance in the procurement at issue.
 - "While it is appropriate to consider an affiliate's performance record where the affiliate will be involved in the contract effort or where it shares management with the offeror, it is inappropriate to consider an affiliate's record where that record does not bear on the likelihood of successful performance by the offeror."
 - GAO sustained protest.



Organizational Conflicts of Interest



OCI – Defined

“An organizational conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.”

- FAR 2.101



Contracting Officer's Responsibilities

(FAR 9.504)

- Identify and evaluate potential OCIs
- Avoid, neutralize, or mitigate *significant* OCIs before contract award
 - Recommend action to HCA to resolve any OCIs identified before issuance of solicitation
 - Avoid unnecessary delays or unduly burdensome information requirements (only required to formally document judgments when a substantive issue involving OCI arises)
 - Afford apparent successful offeror opportunity to respond before withholding award based on identified OCI



Types of OCIs

- Biased Ground Rules
 - A contractor has provided systems engineering or similar technical assistance for a system or has developed a contract specification or work statement (FAR 9.505-1, 9.505.2)
- Impaired Objectivity
 - Contract source selection or award will result in contractor evaluating itself or competitor (FAR 9.505-3)
- Unequal Access to Information
 - A contractor has access to proprietary or source selection information that provides an unfair advantage in future procurement(s) (FAR 9.505-4)



How and Why Do OCIs Arise?

- Increased government use of management support and consultant services
- Government use of contractors to assist in source selection and contract administration
- Use of government-wide and multiple agency schedule and other “umbrella” contract vehicles
- Mergers, acquisitions, and teaming among government contractors



Failure to Identify OCI

- *AdvanceMed Corporation*, B-415062; B-415062.2 (Nov. 17, 2016)
 - Department of Health and Human Services RFP for a task order to conduct program integrity audit and investigation work for Medicare and Medicaid operations.
 - Offerors were instructed to identify any actual or potential conflicts of interest for itself or parents/affiliates.
 - AdvanceMed claimed that the awardee had an OCI that the agency failed to meaningfully consider.
 - GAO sustained protest finding the Agency's consideration lacking and that the Agency's assessment of a "perceived" OCI was in direct conflict with the RFP's definition.



Biased Ground Rules

- *L-3 Services, Inc.*, B-400134.11, B-400134.12 (Sept. 3, 2009)
 - Air Force Space Command RFP for Uni-Comm Task Order.
 - Offerors for development of the task order requirements were required to agree that they would be excluded from competing for the resulting Task Order.
 - Awardee proposed subcontractor involved in Task Order development.
 - GAO overturned Agency's determination that no biased ground rules or unequal access to information OCI existed.



Practice Tips – Address OCIs Prior to Solicitation and Proposal Preparation

- Analyze current contracts, programs, and teaming arrangements for potential OCIs that may arise in subsequent “follow-on” procurements
- Review Proposed Teaming Agreements and Joint Ventures from a “Strategic” Perspective
- Weigh benefits of bidding on management support and technical assistance contracts against potential costs of disqualifications from subsequent programs



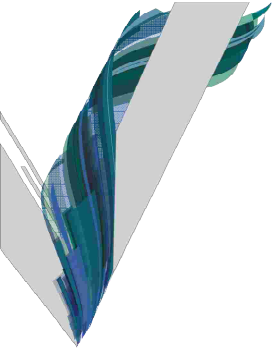
Practice Tips – Address and Resolve OCIs During Proposal Preparation

- Carefully review solicitation for inclusion of OCI identification and mitigation requirements
- Identify potential OCIs presented by past and ongoing programs
- Where appropriate, prepare and provide detailed plan for neutralizing actual and potential OCIs



Practice Tips – Ensure CO Addresses and Resolves OCIs Prior to Contract Award

- Consider raising potential OCIs early in the source selection process
- Provide timely and complete responses to all CO requests for information and plans for dealing with OCIs



Best Practices for Drafting a Proposal That Can (1) Win and (2) Withstand a Protest



Follow the Proposal Preparation Instructions Contained in Section L

- Irrelevant/extraneous information will not be evaluated
- Agencies may **discard** proposal



Ensure That the Proposal Is Well Organized

- KEY: Tailor proposal to evaluation criteria contained in Section M
- Large source selection teams only read their area
- Poor organization influences the evaluators state of mind, *i.e.*, if you cannot organize your proposal, how will you be able to organize the effort required under this contract?



Draft Your Proposal to the Evaluation Criteria

- Do not write the proposal to what you *think* the Government wants to read (incumbents frequently guilty of this mistake).
- Pay close attention to the discriminators (this is what the Government wants to read)



Review RFP (or Draft) and Ask Questions

- Identify any incongruences between Section L and M early in the solicitation process
- Request clarification of any solicitation provision that you believe are difficult to address or understand
- **Do Not** simply paraphrase the SOW or the evaluation criteria in your proposal



Identify the Key Schedule Dates

- What is the end date for questions and answers?
- When is the proposal due?
(Focus on date, time and location for receipt of proposals)



Questions?

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Next Month's Government Contracts Webinar:
**The Evolution of *Escobar* in 2017
and the False Claims Act in 2018**

Wednesday, March 21, 2018

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