

DOCUMENTING THE CONTENT OF ORAL PRESENTATIONS DURING SOURCE SELECTIONS

The increased use of oral presentations as a source selection technique can be traced to the acquisition reform initiatives flowing from the enactment of the Federal Acquisition Streamlining Act of 1994, Pub L. No. 103-355, 108 Stat. 3243 (FASA) and the Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub L. No. 104-106, 110 Stat. 186 (FARA). The FAR Part 15 Rewrite (Federal Acquisition Regulation: Part 15 Rewrite: Contracting by Negotiation and Competitive Range Determination, 62 Fed Reg 51, 224 (1997)), for the first time, explicitly recognized oral presentations as a source selection technique in negotiated procurements by providing for them in FAR 15.102. Among the few conditions placed on oral presentations in the new FAR Part 15 is that the Contracting Officer maintain a record of oral presentations to document what the agency relied on in making the source selection decision. FAR 15.102(e)

Two recent decisions by the Comptroller General clearly illustrate that the failure to comply with this FAR provision will result in the General Accounting Office (GAO) sustaining a protest challenging the reasonableness of an agency's source selection decision. In Future-Tec Management Systems, Inc.; Computer and Hi-Tech Management, Inc., B-283793.5; B-283793.6 dated 20 March 2000, a Request for Proposals (RFP) was issued by the Navy Fleet and Industrial Supply Center (FISC)-Norfolk Detachment, Philadelphia on behalf of the Navy Reserve Information Systems Office and Systems Executive Office for Manpower and Personnel located in New Orleans, Louisiana. The RFP sought offers for a broad range of automated information system support and infrastructure services for those offices. The RFP was a competitive procurement and contemplated the award of a Cost-Plus-Fixed-Fee (CPFF) Indefinite-Delivery/Indefinite-Quantity (ID/IQ) contract. The RFP provided that the award would be made on a best value basis and that the technical factor was more important than the cost factor in the evaluation. Offerors were to prepare their technical proposals in two volumes.

The first volume was to include written descriptions of the offeror's past performance and its personnel resources. The second volume was to consist of slides that the offeror would use in oral presentations addressing its technical approach, management plan and corporate experience. Five offerors submitted proposals and a Technical Evaluation Committee (TEC) reviewed them and prepared a written technical evaluation. The GAO stated that although the evaluation report provided a separate evaluation for each offeror's proposal, the comments for the proposals were identical for Future-Tec Management Systems, Inc. (Future-Tec) and Computer and Hi-Tech Management Systems, Inc. (CHM) – the protestors – and Systems Engineering and Security, Inc. (SES) – the awardee, and provided no explanation regarding any perceived differences among the proposals.

Based on the TEC's evaluation and the Contracting Officer's review of the proposals, the Contracting Officer included Future-Tec, CHM, and SES in the competitive range. These offerors were then allowed to make their oral presentations and to answer questions posed by the TEC. The GAO noted that at the protest hearing, the Contracting Officer stated that no written record was made of the oral presentations or the follow-up discussions. After discussions were completed, the offerors were requested to submit revised technical proposals. The TEC reviewed the revised proposals and prepared a revised technical evaluation report which differed from its initial report only in the evaluation of key personnel resources, for which each proposal was now rated acceptable (in its initial report the TEC rated each proposal as unacceptable in this area). Overall, SES was rated highly acceptable, while Future-Tec and CHM were rated acceptable. These three offerors were then requested to submit best and final offers (BAFOs). The Contracting Officer, acting as the Source Selection Authority (SSA), analyzed the technical ratings and costs for the three proposals and selected SES for award. In her Source Selection Decision Memorandum, the Contracting Officer ranked Future-Tec's proposal third, based on its combined technical rating and cost. Comparing the remaining two proposals, the Decision Memorandum noted that SES' proposal was rated more highly on technical merit though higher-priced than CHM's proposal and then refers to a cost/technical tradeoff analysis for which the

only documentation was the Contracting Officer's conclusory statement in the Decision Memorandum that "the substantial technical superiority of the SES proposal outweighs any benefit that would be gained from CHM's lower cost proposal." Following award to SES and debriefings to Future-Tec and CHM, Future-Tec and CHM protested on, among other grounds, the fact that the Navy's evaluation of the offerors' technical proposals and resulting source selection were improper.

The GAO reiterated its general rule that in reviewing an agency's evaluation of proposals and the source selection decision, its review is confined to a determination as to whether an agency acted reasonably and consistently with the stated evaluation factors and applicable procurement statutes and regulations. GAO also stated that an agency's evaluation of proposals and source selection decision must be documented in sufficient detail to allow for the review of the merits of a protest. Where an agency fails to adequately document its evaluation of proposals and source selection decision in sufficient detail to show that they are not arbitrary, the GAO will conclude that the agency did not have a reasonable basis for its determination.

Applying these rules to the instant protest, the GAO concluded that the Navy did not adequately document its evaluation of the proposals and that the documentation and further explanation offered during the course of the protest, including the hearing, failed to demonstrate that the evaluation and source selection were reasonable and supported by the facts. In support of this conclusion, the GAO found that the Navy's entire technical evaluation record consisted of only three documents: the TEC's extremely brief and conclusory evaluation of initial proposals; the TEC's revised technical evaluation, unchanged from the initial evaluation except in the area of key personnel resources; and the abbreviated Source Selection Decision Memorandum, which generally adopted the TEC's findings and ratings with little further explanation. The GAO found that the documentation lacked any discussion of the relative strengths and weaknesses of each of the proposals under each of the evaluation factors, and contained no evidence that the factors were weighted differently under the evaluation or how the information provided in the oral

presentations was considered. Regarding the oral presentations, the GAO noted that during the hearing when the Contracting Officer was asked why SES' proposal was rated highly acceptable under the technical factor while the protestors' proposals were rated acceptable, she stated that SES went into much greater detail to explain its approach during its oral presentation, and that, therefore, it was clear that it offered a superior technical approach. She also stated that although the TEC members discussed their ratings after the oral presentations, no notes were made of the oral presentations, nor was the evaluation of the oral presentations documented in any way.

The GAO also found that the Contracting Officer at the protest hearing recognized that the source selection decision was poorly documented and attempted to provide additional support. The GAO stated that where post-protest explanations provide sufficient, consistent detail by which the rationality of an evaluation decision can be judged, it is possible to conclude that the agency had a reasonable basis for the decision, however, here, the explanations provided no such reasonable basis. In conclusion, the GAO determined that since the record, including the hearing testimony, offered no convincing explanation as to why SES' proposal was rated technically higher than the protestors' proposals, the source selection lacked a reasonable basis and, accordingly, sustained both protests.

Although the GAO didn't cite or refer to any FAR provisions in sustaining these protests, it specifically did so in a protest decision a few months later. Like the protests discussed above, the GAO sustained the protest in J&J Maintenance, Inc. (J&J), B-284708.2; B-284708.3, decided 5 June 2000 on the basis that the agency's record of the source selection decision did not establish the reasonableness of the evaluation or the cost/technical tradeoff underlying the source selection.

The RFP in this protest was issued by the Army for maintenance and repair of family housing and for operation of a "self-help" center at Ft. Polk, Louisiana. The RFP contemplated award of a requirements contract on a best value basis. The evaluation factors were quality, price

and past performance in descending order of importance. The RFP required the quality portion of each offeror's proposal to be presented orally and indicated that the agency intended to award the contract without discussions.

Six firms, including J&J, the protestor, submitted proposals. Each offeror made an oral presentation as required by the RFP and after the initial evaluation two proposals were rated unsatisfactory. The SSA reviewed the rankings of the four remaining proposals and decided to award the contract on the basis of initial proposals without discussions. The SSA noted that Day and Zimmerman Services' (D&Z's) proposal had the highest score under the quality factor and determined D&Z's proposal to represent the best overall value to the Government and be worth the additional cost to have D&Z rather than J&J perform the work. Based on this determination, the contract was awarded to D&Z and, after a debriefing, J&J filed a protest. The basis of J&J's protest was that the award based upon D&Z's higher priced but higher rated proposal under the quality factor was flawed because the Army had unreasonably downgraded J&J's proposal and evaluated proposals unequally giving D&Z's proposal higher ratings in a number of areas even though J&J's proposal contained similar or better features.

When the GAO reviewed the record, it concluded that the agency did not adequately document its evaluation of the proposals and the source selection decision. As stated above, the RFP required each offeror to make an oral presentation of quality, the most important evaluation factor. The GAO cited FAR 15.102(e), which requires the Contracting Officer to maintain a record of oral presentations to document what the agency relied on in making the source selection decision. The GAO noted that FAR 15.102(e) allows the SSA to select the method of recording the oral presentations and gives the following examples: videotaping, audio tape recording, written record, Government notes, copies of offerors' briefing slides or presentation notes. Regarding the instant protest, the GAO commented that the quality factor proposals consisted of oral presentations, briefing slides and resumes only. While the RFP stated that the agency could videotape and/or record the oral presentations, the agency chose not to do so.

The only record of the oral presentations was the offerors' slides and evaluators' notes. The GAO, while recognizing the discretion of the SSA to decide the method and level of detail of the record of an oral presentation and that the use of offerors' slides and Government notes are two possible methods under the FAR, stated that in the instant protest, the slides and notes did not present sufficient information to determine the reasonableness of the evaluations of J&J's and D&Z's proposals. The GAO commented that the slides were only an outline and did not describe what was included in the two-hour oral presentations and question and answer sessions. The GAO found that the evaluators' notes were not summaries of the oral presentations but mostly sketchy comments providing no elaboration or description of what was in the portion of the oral presentation being commented on by the evaluator. As a result of this lack of adequate documentation of the oral presentations, the GAO concluded that the Army did not meet the requirements of FAR 15.102(e). The GAO also found that the Army failed to meet the requirements of FAR 15.305(a) which requires agencies to document in the record of the evaluation the relative strengths, deficiencies, significant weaknesses and risks of each of the competing proposals. The GAO found that there was nothing in the evaluators' notes of the oral presentations or elsewhere that discussed these aspects of the offerors' proposals. The GAO also concluded that the SSA's Source Selection Decision Document did not meet the requirements of FAR 15.308. That provision requires that the selection decision be documented and include the rationale for any tradeoffs made or relied on. In the instant protest, the GAO found that although the Source Selection Decision Document listed several advantages of D&Z's oral presentation, it did not address any of the advantages or disadvantages of J&J's oral presentation. The SSA simply compared the overall scores of the two offerors in the quality and past performance evaluations and their total prices. This comparison the GAO found failed to document the rationale for the tradeoff between J&J's lower rated, but lower priced proposal and D&Z's high rated and higher priced proposal.

As a result of the agency's failure to provide an adequate record of the oral presentations and the evaluation and adequate rationale for the source selection decision as required by FAR 15.102(e), 15.305(a) and 15.308, the GAO concluded that it had no means to determine, based on the record before it, the reasonableness of the agency's selection and, therefore, sustained J&J's protest.

As the above two protest decisions indicate, the use of oral presentations can become a double-edged sword. Although they are an effective means of streamlining, simplifying and enhancing the acquisition process, when used, the oral presentations, as well as the balance of the evaluation, the strengths and weaknesses of the competing proposals, any tradeoffs made and the rationale for the source selection decision, must be thoroughly documented.

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