

AGENCY CANNOT ASSUME PERFORMANCE NOT IN OFFER

Copyright 2019 Richard D. Lieberman, Consultant & Retired Attorney

Agencies cannot assign strengths for features not included in an offeror's proposal, by assuming that these features would be provided based on the offeror's performance of the incumbent contract. *Native Energy & Tech., Inc.*, B-416783, Dec. 13, 2018. The issue came up in the award of a contract by the Customs and Border Protection ("CBP") Service in a contract for maintenance and repair services of equipment.

The solicitation stated that proposals would be evaluated on price and three non-price factors, with technical approach being the most important factor. Native Energy was rated "Very Good" in technical approach, with a price of \$28 million, while Emcor, the awardee, was rated "Outstanding," with a price of \$31.2 million. The protester (Native Energy) asserted that the strengths in Emcor's proposal that were cited as the basis for selecting Emcor's higher priced proposal were *not* in Emcor's technical proposal. CBP contended that they could properly rely on their own knowledge of the awardee's performance of the incumbent contract to assume or infer that the awardee would perform the new contract in the same manner, and thereby provide these features.

The GAO noted that agencies must evaluate proposals based on the material contained in those proposals. GAO also noted that in some circumstances, agencies may supplement their evaluations with evaluator's personal knowledge, but GAO has never found that an agency may assume or infer that an offeror will perform a contract using a technical approach that is not included in the offeror's proposal, and cite that approach as a discriminator in favor of award.

GAO examined five discriminators at issue, noting as follows:

- Weekly preventive maintenance forecasts-not stated in Emcor's proposal
- Computer Maintenance Management System: work control procedures-Emcor's proposal does not state that it will attach information to work orders regarding permits, certifications, test results and warranties
- Mobile application – Emcor does not indicate in its proposal that it will provide training of CBP personnel
- (Two other discriminators were properly included in Emcor's proposal, and credited by CBP).

The GAO concluded that three of the five strengths cited by the agency as discriminators in favor of award to Emcor were not supported by the record and did not have a reasonable basis. Therefore, GAO sustained the protest.

Takeaway. First, if you want to receive credit for aspects of your proposal, you must include an explanation of how those aspects will be performed in your proposal. Do not assume that the agency "knows what you can do."

Second, agencies are cautioned to rely solely on the written technical proposals when evaluating an offer. Knowledge of performance "outside" the proposal will not be allowed to be used as an award discriminator.

**For other helpful suggestions on government contracting, visit:
Richard D. Lieberman's FAR Consulting & Training at <https://www.richarddlieberman.com/>, and
Mistakes in Government Contracting at <https://richarddlieberman.wixsite.com/mistakes>**