

IMPROPER DISCUSSIONS: AGENCY TREATED NEUTRAL PAST PERFORMANCE AS “INCREASED RISK” WITHOUT MENTIONING IT IN DISCUSSIONS

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In a recent bid protest case, the Court of Federal Claims included two important conclusions: (1) in determining whether a deficiency or weakness exists in a proposal, an agency must use a fact-centered, materiality or competitive impact analysis, not a categorical statement that an offeror has received a “neutral” past performance rating; and (2) although a neutral past performance rating (described in FAR 15.305(a)(2)(iv)) may have been given to a proposal, the agency may not choose to treat the proposal as having an increased risk of unacceptable performance, unless it identifies it to the offeror as a significant weakness in discussions. *Precision Asset Management Corp. v. United States*, No. 16-261C (Fed. Cl. Dec. 13, 2017).

The Federal Housing Authority issued a solicitation for asset management services that involved a two step evaluation process. First, the agency would determine whether each proposal was technically acceptable on a pass/fail basis. Second, the agency considered past performance and price (equally weighted). The agency analyzed recency, relevancy and quality of past performance, along with the confidence in the bidder’s ability to perform under the contract.

As has been noted in this blog before, FAR 15.306(d) requires that discussions indicate to each offeror the deficiencies and significant weaknesses in their proposal. In evaluating Precision’s proposal, the agency found three flaws but never raised them in discussions: (1) failure to propose a teaming partner in one geographic area; (2) two references were deemed “not relevant” and (3) the proposal didn’t demonstrate Precision’s ability to manage the scope and complexity of the work.

The agency assigned a “neutral” rating to Precision’s proposal, which by definition is “not unfavorable and is not less than satisfactory.” Because of the neutral rating, the agency didn’t raise these deficiencies in discussions.

The court noted that the solicitation specifically stated that “a strong record of recent and relevant performance may be considered more advantageous to the government than an “unknown confidence” rating, and therefore, the confidence rating was of critical importance in this solicitation. The source selection decision stated it was “essential...to award the contract to the offeror who will provide the best confidence of likely success....” The court concluded that the agency exercised its discretion to conclude that an unknown or neutral confidence rating was “unfavorable”. The court stated “While it may be true that an unknown risk does not necessarily equate to an increased risk of unacceptable performance, it is clear that the evaluators in this case chose to treat it as such.” The court concluded that the agency had to treat this as a significant weakness and was required to raise it in discussions—which the agency failed to do. These lack of meaningful discussions prejudiced plaintiff, and the court found the award was irrational, granting judgment for Precision, and issuing a permanent injunction.

Takeaways: An agency must look underneath mere assertions that a proposal has received a “neutral” past performance, to see if the underlying facts cause that proposal to have a significant

weakness or deficiency. Just because an agency labels something as “neutral” does *not* mean it has no material impact on the source selection.

And finally, agencies are once again cautioned that they must discuss all deficiencies and significant weaknesses in discussions, or risk those discussions being held as “not meaningful.”

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