

GAO DISLIKES UNCOOPERATIVE AGENCIES, AND INADEQUATE DOCUMENTATION OF SOURCE SELECTION

By Richard D. Lieberman, Consultant and Retired Attorney

Sometimes the Government Accountability Office (“GAO”) unleashes its criticism on a protester, particularly when their arguments are completely illogical or contradictory. Every now and then the GAO heavily criticizes an agency not only for conducting a procurement improperly and in violation of the Federal Acquisition Regulation, but because the agency essentially “thumbed its nose” at GAO. An agency does this by not cooperating in developing the protest, by providing incomplete information or by not producing documentation needed for an adequate protest record. *CORTEK, Inc.*, B-412047 *et al*, Dec. 17, 2015, is such a bid protest. In this procurement of training for aircrews and aircraft maintenance, the GAO heavily criticized the U.S. Navy for its poor cooperation in the protest, inadequate documentation, and sustained the protest on three separate grounds.

The GAO criticized the Navy’s report on the protest, which included only selected documents, and only “very circumscribed portions thereof.” This resulted in a piecemeal protest presentation and an inadequate record which failed to explain such basic details of the acquisition as the adjectival rating scheme used to evaluate proposals. GAO said the Navy had engaged in “overly aggressive efforts to limit document production” which “frustrate[d] the mandate of the Competition in Contracting Act” to have GAO resolve bid protests.

The GAO reserved its heaviest criticism for the way the Navy actually evaluated proposals. First, the Solicitation required offerors to propose instructors that had a minimum of 8 years of experience, but the Navy selected a company (ESP) whose personnel had only 3 years of experience. The Navy simply relied on the company’s proposal which included a blanket representation that its personnel would “meet all of the solicitation’s qualifications requirements” (but they did not). GAO said that even though offerors were not required to submit resumes, the Navy could not ignore the actual contents of the ESP proposal, and sustained the protest on that ground.

Second, the Navy imposed a 25 page limit on proposals, and stated it would not read beyond 25 pages. ESP’s proposal included 26 pages. The information on page 26 was used in discussions, and caused the Navy to upgrade ESP’s evaluation score significantly. GAO held that using the information on page 26 violated the solicitation, and sustained this ground of protest as well.

Third, the protester questioned the evaluation score given by the Navy for ESP’s past performance and corporate experience. Because the Navy submitted such poor documentation, lacking substantive portions of the ESP proposal on past performance, and lacking even the Navy’s evaluation record, GAO concluded that the record contained inadequate documentation for it to review the propriety of the Navy’s evaluation. Accordingly, GAO sustained this protest ground as well.

The message of *CORTEK* could not be any clearer. Agencies that fail to cooperate in developing a GAO protest record, or who omit important parts of their procurement documents or scoring

sheets (or never prepared them), are likely to find that the protest will be sustained by the GAO. A few quotes from some sustained GAO protests in this area demonstrate how important it is that agencies prepare and produce adequate documentation: (all internal citations are omitted):

Where an agency fails to adequately document its decision it bears the risk that there may not be adequate supporting rationale in the record for our Office to conclude that the agency had a reasonable basis for the award decision. *Deloitte Consulting, LLP; Booz Allen Hamilton, Inc.; Calibre Sys., Inc.*, B-411884 Nov. 16, 2015, 2015 WL 9701026.

[W]e find that neither the contemporaneous record nor the hearing testimony provides a basis for our Office to find that DISA [Defense Information Systems Agency] reasonably evaluated the realism of DSA's proposed labor mix []. We specifically note here that our conclusions are based on the inadequacies of the contemporaneous record, as produced by DISA. DISA was provided multiple opportunities to ensure that the record was complete. GAO specifically requested additional information to address the lack of an adequate record, but none were provided. *Solers Inc.*, B-409079, Jan. 27, 2014, 2014 CPD ¶ 74.

Where an agency fails to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for the source selection decision. [T]he agency's evaluation and source selection were inconsistent with the terms of the solicitation and, in various respects, without a reasonable basis. *The Clay Grp., LLC*, B-406647, July 30, 2012, 2012 CPD ¶ 214.

Here, we find the record to be devoid of any justification for the agency's determination that the offerors were essentially equal under the past performance factor. [] On this record, we conclude that the agency's evaluation of past performance was unreasonable, inconsistent with the RFP, and insufficiently documented. *Philips Healthcare Informatics*, B-405382.2 (May 14, 2012).

Where an agency fails to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for the source selection decision. *Sys. Research & Applications Corporation; Booz Allen Hamilton, Inc.*, B-299818, Sept. 6, 2007, 2008 CPD ¶ 28.