

DISCRETION OF THE SOURCE SELECTION AUTHORITY TO CHANGE RATINGS

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Negotiated procurements conducted pursuant to Federal Acquisition Regulation (“FAR”) Part 15 are structured with one Source Selection Authority (“SSA”), who acts on behalf of the Agency head in making a source selection. (Remember: the U.S.Code provides, and FAR 1.601(a) repeats that “[u]nless specifically prohibited by another provision of law, authority and responsibility to contract for authorized supplies and services are vested in the agency head.”) The FAR provides as follows:

FAR 15.303 Responsibilities.

(a) Agency heads are responsible for source selection. The contracting officer is designated as the source selection authority, unless the agency head appoints another individual for a particular acquisition or group of acquisitions.

(b) The source selection authority shall—

- (1) Establish an evaluation team, tailored for the particular acquisition, that includes appropriate contracting, legal, logistics, technical, and other expertise to ensure a comprehensive evaluation of offers;
- (2) Approve the source selection strategy or acquisition plan, if applicable, before solicitation release;
- (3) Ensure consistency among the solicitation requirements, notices to offerors, proposal preparation instructions, evaluation factors and subfactors, solicitation provisions or contract clauses, and data requirements;
- (4) Ensure that proposals are evaluated based solely on the factors and subfactors contained in the solicitation ([10 U.S.C. 2305\(b\)\(4\)\(C\)](#) and [41 U.S.C. 3703\(c\)](#));
- (5) Consider the recommendations of advisory boards or panels (if any); and
- (6) Select the source or sources whose proposal is the best value to the Government ([10 U.S.C. 2305\(b\)\(4\)\(C\)](#) and [41 U.S.C. 3703\(c\)](#)).

(c) The contracting officer shall—

- (1) After release of a solicitation, serve as the focal point for inquiries from actual or prospective offerors;
- (2) After receipt of proposals, control exchanges with offerors in accordance with [15.306](#); and
- (3) Award the contract(s).

In larger procurements the agency may use both a technical evaluation board or team, a cost evaluation team or board, and an intermediate Source Evaluation Board or Source Selection Evaluation Board that makes a source selection recommendation to the SSA. In smaller procurements, there may be no teams and the contracting officer is the SSA, as stated in FAR 15.303. But how much discretion does an SSA have? May the SSA change or ignore the recommendations that he or she receives? The answer is actually very simple, according to the Governmental Accountability Office—the SSA has broad discretion in determining the manner in which technical and cost evaluations are used, is permitted to make an independent evaluation of proposals, and may disagree with or expand upon the findings of lower-level evaluators, *provided* the basis for the evaluation is reasonable and is documented in the contemporaneous

record. *Federal Maintenance Logistics Solutions, LLC*, B412270.5, Nov. 15, 2016, is a good example where an SSA had good reasons to disagree with his lower level technical panel.

In *Federal Maintenance*, a procurement of logistics support services in Afghanistan, the lower level evaluation panel (the SSEB) initially assessed the awardee's past performance as "substantial confidence," but based on three safety-related incidents during evaluation of final proposal revisions, recommended downgrading the awardee's past performance to "satisfactory confidence." The SSA disagreed with this recommendation, and retained it as "substantial confidence" in making his source selection. In his source selection decision, the SSA explained that the three incidents did not warrant a change because the awardee's overall safety incident rate for the incumbent contract (including the time when the incidents occurred) was in fact, "exceptionally low." Therefore, "the three incidents did not indicate a trend or warrant a downgrade" of the past performance relating. The SSA also disagreed that these incidents reflected "systemic issues." The SSA's source selection decision explained that each incident was "distinctly different in nature," concluding that they were not caused by an inadequate safety system.

The GAO held that the SSA's independent evaluation of the awardee's performance was reasonable and adequately documented in the source selection decision, and the protest was denied.

Contrast this SSA's explanation with a few more GAO decisions, where the SSA *failed* to explain a change in a technical rating:

The SSA's explanation for elevating Valor's rating under this factor from good to excellent did not include a finding that Valor's approach exceeded all of the VA's requirements or that it indicated a thorough understanding of the requirements; rather, the SSA simply explained that Valor was rated as excellent because "they have five significant strengths, two strengths, and one weakness and meet the definition for [excellent] because in this factor they exceeded the VA requirement...."

Sterling Med. Corp., B-412407, Feb. 3, 2016, 2016 CPD ¶ 73,

[T]here is nothing in the record concerning the SSA's rationale for the conclusion that the [past performance] reference for [DELETED] is relevant; further our review of the record has not uncovered any documentation to support the SSA's decision to view this [past performance] reference differently than the evaluators viewed it.

W. Sound Servs. Grp., LLC, B-406583.2, July 3, 2013, 2013 CPD ¶ 276

For the record, we note the agency's selection decision contains the only contemporaneous characterization of the IBM proposed solution as "proprietary." [] Here, there is nothing in the agency's underlying evaluation record or other materials presented to the SSA discussing or supporting her conclusion, and the SSA provides no independent details or explanation for her finding. While it is true that IBM proposed [deleted], that fact, without more, does not demonstrate that the IBM solution is any more or less "proprietary" than the solution offered by HP, or that the IBM solution is, comparatively, less open or agnostic than the HP solution. We therefore have no basis on the record before us to find reasonable the SSA's conclusion that the IBM proposed solution is, as compared to the HP solution, proprietary.

IBM Corp., U.S. Fed., B-406934 *et al.*, 2013 CPD ¶ 89.

Source Selection Authorities (and all source selection officials) should take note: when you disagree with a lower level evaluation panel, you must clearly *explain*, in a clear and convincing manner, your reasons for changing a rating. Otherwise, you run the risk of having a protest be sustained.