

## ORAL ADVICE CANNOT AMEND A SOLICITATION

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This blog has frequently frowned on any government contractor taking oral advice from any government official, even a contracting officer. For the most part, unless confronted with an emergency or time sensitive situation, contractors should insist that contracting officers place advice or direction in writing, modifying a solicitation or an actual contract as necessary. (Even if a contractor accepts oral advice in an emergency, it should email or otherwise immediately document to the agency the contracting officer's emergency advice or direction). This is an elementary protective tactic for contractors. Recently, in *Technology and Telecom. Consultants, Inc.*, B-415029, Oct. 26, 2017, the Government Accountability Office ("GAO") denied a protest where a contractor relied on oral advice on how to interpret a solicitation that was given during a pre-proposal conference by a Contracting Officer's Representative ("COR"). Not surprisingly, since this advice contradicted the written terms of the solicitation, GAO refused to honor the advice when the result was protested.

The procurement was for information technology services to support the Air Force Combat Command Personnel Recovery Division. The solicitation included a performance work statement ("PWS") that stated that the awardee would be expected to provide "support via task 4.2 to [Air Force Special Operations Command ("AFSOC")] at Hurlburt Field, FL." At the pre-proposal conference, industry personnel asked if the AFSOC position was funded and was still a requirement. The COR responded that the "AFSOC position is still funded and yes, it is still a requirement."

After proposals were submitted, Technology and Telecommunications Consultants protested, arguing that the award made to Constellation West was improper because it failed to propose an employee specifically dedicated to support AFSOC. The protester asserted that the solicitation required offerors to propose at least one employee whose sole job would be to support AFSOC. The GAO disagreed with this interpretation—which was based in part on the COR's statement at the pre-proposal conference.

GAO concluded that:

- The solicitation's plain language did not require any particular staffing plan and did not require offerors to propose at least one employee dedicated to support AFSOC
- The solicitation used a performance based contracting method. The PWS requirements were stated in terms of function or performance requirements, thereby permitting offerors to propose their own unique approach to fulfilling the solicitation's work requirements, without specifying the number of employees for each mission or function.
- The protester's assertion that the AFSOC support could not be provided without a dedicated employee, which is the way the protester (the incumbent) was handling this requirement, was without any basis when the plain language of the solicitation was examined. The solicitation did not say that such an employee was required.
- GAO cases have frequently concluded that "offerors rely upon oral advice from an agency at their own risk." Oral advice, even if given, does not amend the solicitation or

otherwise legally bind the agency. This is particularly the case where, as was the case here, the oral advice directly conflicted with the plain language of the solicitation. The protester could not use the erroneous oral advice to revise the solicitation's plain language in order to support its own erroneous interpretation.

The takeaway is simple: Read and follow the text of the solicitation. Do not rely on anyone's oral advice that changes the plain meaning of the words in the solicitation. If you are given a conflicting interpretation, as this protester was given, *even if that informal interpretation comes from the contracting officer*, you should consider making an informal agency protest to force the agency to clarify which interpretation it will use in evaluating proposals. This author is betting that the agency will either support the plain language of the solicitation (and reject the oral advice) or amend the written solicitation. Only if you make your informal protest *before* proposals are due to be submitted will you have any basis to subsequently protest at the GAO or the Court of Federal Claims.

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