

UNREASONABLE LIMITATIONS ON PROPOSAL REVISIONS DURING THE CORRECTIVE ACTION PHASE OF PROTESTS

Copyright Richard D. Lieberman, Consultant and Retired Attorney

In what appears to be a first, the Government Accountability Office (“GAO”) sustained a protest because an agency imposed unreasonably restrictive limitations on the scope of proposal revisions. In this protest, *Deloitte Consulting, LLP*, B-412125.6, Nov. 28, 2016, GAO held that the restrictions prevented offerors from revising proposal information that had been materially impacted by the corrective action.

Deloitte protested the corrective action of the Defense Health Agency (“DHA”), taken in response to Deloitte’s prior protest of the award of a contract to another vendor for DHA’s governance, requirements and architecture management support. In its earlier sustained protest of this procurement, Deloitte alleged that DHA had conducted an unreasonable evaluation of the key personnel resumes under the staffing approach subfactor, and had unreasonably evaluated past performance. DHA agreed to take corrective action by holding new discussions and permitting final proposal revisions. However, DHA advised offerors that the discussions would be held “ONLY in the areas specifically related to Sub-factor 1B Key Personnel and Past Performance,” and final proposal revisions could update proposals “ONLY in the areas addressed in the enclosed evaluation notice.”

When Deloitte objected to these restrictions in final proposal revisions as overly restrictive, DHA updated its restrictions as follows:

(1) You may make written changes to Vol. 1 Key Personnel, under technical Subfactor 1B, and (2) you may make written changes to other aspects of your technical proposal (under Subfactors 1A, 1C and 1D) but only to the extent that your initial proposal referenced your key personnel and/or the qualifications of said key personnel relative to their ability to execute your proposed technical approach. More specifically, the scope of changes to your technical proposal outside of technical Subfactor 1B is limited to updating the names of key personnel (as necessary) and updating any accompanying qualification descriptions for such new key personnel. You may not update your technical approach under Subfactors 1A, 1C or 1D.

Deloitte’s second protest was that the above instructions excluded proposal restrictions that were “inextricably linked to key personnel substitutions permitted in response to discussions.” Deloitte stated that the limitations, for example, prohibited necessary revisions to its transition plan and unreasonably restricted the specific content of proposal updates in areas where revisions are permitted. The DHA argued that the restrictions were reasonable, and that Deloitte’s intention was to “augment its technical approach,” which should not be allowed.

The GAO used a three step analysis to the scope of proposal revisions when an agency takes correction actions:

- (1) An agency's discretion when taking corrective action extends to the scope of proposal revisions
- (2) As a general matter, offerors in response to discussions may revise any aspect of their proposals as they see fit, including portions of their proposals which were not subject to discussions, however, in conducting discussions to implement corrective action, an agency may reasonably limit the scope of revisions. But the limits must be reasonable in nature and must remedy the established or suspected procurement impropriety
- (3) In reviewing the reasonableness of an agency's restrictions on proposal revisions in the context of discussions to implement corrective action, the GAO will consider whether the discussions and permitted revisions are expected to have a material impact on *other areas* of the offeror's proposal.

Using this analysis, the GAO's review of the record showed that DHA was actually prohibiting offerors from revising related areas of their proposals which were materially impacted by the discussions. The proper way to judge the limitations is not, as DHA suggested, whether Deloitte could "augment its technical approach," but rather, the extent to which the discussions and the permitted changes in response to them, materially impact or are "inextricably linked" with other aspects of the offeror's proposal. The GAO concluded that the corrective action *did* materially impact Deloitte's technical proposal beyond the limited revisions permitted by the DHA. The key personnel substitutions broadly impacted Deloitte's proposal due to the differing qualifications, capability and experience of the key personnel substitutions, and their relative ability to perform the proposal as initially proposed. Where an agency's limitations on proposal revision prohibit such changes, GAO will find them to be unreasonable and sustain a protest, as they did here.

The GAO reviewed three previous similar protests of limitations on proposal revisions during corrective actions, (*Evergreen Helicopters of Alaska*, B-409327.3, Apr. 14, 2014, 2014 CPD ¶ 128; *Honeywell Tech. Sols*, B-400771.6, Nov. 23, 2009, 2009 CPD ¶ 240; and *Rel-Tek Sys & Design, Inc.-Mod of remedy*, B-280463.7, July 1, 1999, 99-2 CPD ¶ 1) but concluded that they were reasonable in all three cases. The GAO also pointed to a fourth case, *Power Connector, Inc.*, B-404916.2, Aug. 15, 2011, 2011 CPD ¶ 186, where GAO concluded that offerors should be permitted to make revisions to all aspects of their proposals in response to corrective action. However, the corrective action in *Power Connector* was to issue an amendment to the solicitation, and where an agency amends the solicitation and permits offerors to revise proposals, the offerors should be permitted to revise any aspect of their proposal, including those that were not the subject of the amendment, unless the amendment could not reasonable have an effect on other aspects of the proposals or permitting such revisions would detrimentally impact the competitive process.

So the takeaway is simple: if corrective action on a protest involves further discussions, and such discussions materially impact or are "inextricably linked" with other aspects of an offeror's proposal, then limitations on final proposal revisions are likely to be unreasonable.