

EXPERIENCE vs. PAST PERFORMANCE AND WHAT ABOUT MULTIPLE OFFERS?

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Two recent Government Accountability Office (“GAO”) protest decisions highlighted once again the difference between an offeror’s experience and its past performance, and how this difference plays out in source selections. *AnderCorp, LLC*, B-419984, Oct. 14, 2021 and *Primacy Care Solutions*, B-418799 et al., Sept. 8, 2021.

AnderCorp involved a Department of Labor lowest-price technically acceptable procurement for construction services. The solicitation included an evaluation factor for the offeror’s prior experience and a separate evaluation factor for the offeror’s past performance. *AnderCorp* acknowledged that it had no (zero) prior experience because it was a recently formed company. The issue in the protest was whether it was proper to evaluate the protester’s experience negatively, rather than neutrally, because of the firm’s lack of experience.

The agency evaluation found *AnderCorp*’s experience “unacceptable” but found its past performance “acceptable”. (The GAO noted that in a lowest price technically acceptable procurement, assigning an “acceptable” rating to offerors without relevant past performance is, effectively, no different than assigning a neutral rating.) *AnderCorp* only protested the unacceptable rating in experience. The protester asserted that when an offeror does not have a record of relevant experience agencies should receive a neutral rating for the experience evaluation factor.

The GAO noted that evaluation under an experience factor is distinct from its evaluation of an offeror’s past performance.

- The experience factor focuses on the degree to which an offeror has actually performed similar work.
- The past performance factor focuses on the quality of the work performed. Offerors without a record of relevant past performance “may not be evaluated favorably or unfavorably on past performance (i.e. they should receive a “neutral” rating). FAR 15.305(a)(2)(iv).

In this procurement, offerors were required, under the experience factor, to submit three examples of substantially completed projects within the past 5 years which demonstrated the offeror’s technical capabilities to perform the work. *AnderCorp* did not submit any project examples to satisfy the experience factor, and admitted it had no directly relevant experience. It was for this reason that the Department of Labor found the protester’s experience as “unacceptable.” The GAO denied *AnderCorp*’s argument that *both* past performance as well as experience should be rated “neutral” where the offeror has no past performance. The GAO rejected this argument because the FAR provision cited above only applies to past performance, not experience.

In *Primary Care*, the agency (Department of Veterans Affairs) specified different evaluation factors for experience (which was a subfactor within a

Management/Experience/Staffing/Transition plan factor) and past performance, a separate factor. Once again GAO explained that an agency's evaluation under an experience factor is distinct from an evaluation of the offeror's past performance.

The agency awarded this contract for a community based outpatient clinic to Clinovators. Clinovators was given a rating of "neutral/unknown risk" based on the fact that this offeror's only past performance was for a one contract in Texas that was awarded in 2020 and terminated for the government's convenience. The agency concluded that Clinovators lacked relevant past performance, and assigned a neutral rating to this aspect of its proposal. However, the agency's evaluation noted that experience was only one of several elements to be considered in the evaluation of proposals and Clinovators had multiple strengths within the larger evaluation factor. Both offerors were rated as good overall, and Clinovator's price proposal was approximately \$1.3 million less than the protester's proposals. The agency ultimately concluded that Clinovator's proposal was a better value. GAO denied the protest.

One other aspect of the Primary Care protest is worth discussing. The solicitation permitted alternate (multiple) proposals, as follows:

Multiple offers. Offerors are encouraged to submit multiple offers presenting alternative terms and conditions, including alternative line items (provided that the alternative line items are consistent with subpart 4.10 of the Federal Acquisition Regulation), or alternative commercial items for satisfying the requirements of this solicitation. Each offer submitted will be evaluated separately.

FAR 52.212-1(e), incorporated in the solicitation. Primary Care submitted an alternate proposal, but according to the agency and GAO, it contained a different line item (CLIN) structure and did not comply with the solicitation's requirement, therefore it was proper that the agency did not consider it. GAO stated "

FAR provision 52.212-1 also requires that offers be submitted "as otherwise specified in the solicitation," and further states that "Offers that fail to furnish required representations or information, or reject the terms and conditions of the solicitation may be excluded from consideration." FAR provision 52.212-1(b). Here, the RFP expressly required that the price schedule be used, and that if necessary, build-out costs be included in CLIN 0001. On this record, we find that PCS's alternate price proposal did not conform to the pricing terms of the solicitation, accordingly the agency was not required to consider it.

Takeaways.

- (1) Understand the difference between experience and past performance. A lack of relevant past performance should result in a "neutral" evaluation by the agency. However, a lack of experience may easily be rated as "unacceptable," depending on the solicitation.
- (2) If you submit multiple offers, be sure that each one fully conforms to the requirements of the solicitation.

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