

DATA RIGHTS CLAUSE IN SOLICITATION IS MATERIAL

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A recent case at the Government Accountability Office (“GAO”) clearly establishes that the technical data rights clauses in a solicitation are material clauses. If an offeror takes exception to them, or attempts to limit them, the offer must be deemed unacceptable. The GAO has repeatedly stated that in negotiated procurements, clearly stated solicitation requirements are considered material to the needs of the government, and any quotation that fails to conform to material terms and conditions of the solicitation is unacceptable and cannot form the basis for award. *Carahsoft Tech. Corp.*, B-401169, June 29, 2009, 2009 CPD ¶134.

Technical data is “recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). It does not include computer software or data incidental to contract administration, such as financial and/or management information. Defense FAR Supplement (“DFARS”) 252.227-7013. Technical data is frequently needed for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles.

In *Deloitte Consulting, LLP et al*, B-411884 et al., Nov. 16, 2015, the GAO considered a protest against award of a task order issued pursuant to the Federal Supply Schedules for management and process improvement services for the Defense Health Agency. The Request For Quotations included the standard data rights provisions (DFARS 252.227-7013 and DFARS 252.227-7014), but added the following provision on data rights:

The government has unlimited rights to all documents/material produced under this contract. All documents and materials...are the property of the Government with all rights and privileges of ownership/copyright belonging exclusively to the government. These documents and materials may not be used or sold by the contractor without written permission from the contracting officer....

The awardee, PriceWaterhouse Coopers (“PwC”) included the following statement in its quote:

Unless required [] neither the contract deliverables nor their content may be distributed to, discussed with, or otherwise disclosed to any Third Party without PwC’s prior written consent.

The GAO sustained a protest that PwC’s quote took exception to the solicitation’s data rights clause because the quote limited the government’s right to distribute contract deliverables without PwC’s prior written consent, but the solicitation gave the government unlimited and exclusive property rights to all documents produced under the contract.

The Agency asserted that PwC’s quotation was acceptable because:

- 1) The Agency did not view the data rights clause to be a material term. GAO stated this was “not consistent with the plain language of the data rights clause.”

- 2) The Agency did not view PwC's language as taking exception because the underlying schedule contract data rights clause, which took precedence over the quote, granted the government unlimited rights. GAO rejected this argument, stating that the agency couldn't ignore the exception by including the same solicitation requirement in the resulting contract because a quote that failed to conform to a material term was technically unacceptable.
- 3) The Agency argued that the government's unlimited rights in documents were separate from the government's obligations to release the documents to third parties. GAO rejected this argument because a third party's right to seek documents is wholly separate from the government's otherwise unlimited rights to use the data created. GAO said that the agency's argument did not resolve PwC's express limitation on the rights of the government to distribute, discuss or disclose documents to third parties.

The GAO sustained the protest, and concluded that PwC's quote was unacceptable because it took exception to the data rights clause. GAO noted that the argument that *other vendor's quotes* also limited the government's rights had not bearing on the protester—who did not take exception to the requirement. The GAO recommended that the agency reevaluate quotations, and if necessary amend the solicitation if it deemed the data rights clause not to be material.