

PERFORMANCE RISK IS INTRINSIC TO STATED EVALUATION FACTORS

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In a recent protest, the Government Accountability Office (“GAO”) held that although performance risk was not specifically listed as an evaluation criterion, an agency may always consider risk that is intrinsic to the stated evaluation factors. *South Dade A/C and Refrig.*, B-421406, April 25, 2023. The protester’s assertion that the agency used risk as an unstated evaluation factor was dismissed by the GAO.

South Dade submitted a proposal for a Blanket Purchase Agreement (“BPA”) under a General Services Administration (“GSA”) solicitation for facilities engineering, operations and related services at 14 locations in Alabama. The Solicitation contemplated the establishment of one BPA under GSA’s Multiple Award Schedule for Facilities and Maintenance repair, in accordance with Federal Acquisition Regulation (“FAR”) subpart 8.4.

The solicitation provided for a best value decision, and the following non-price factors and their components were listed in descending order of importance:

1. Management Plan
 - a. Management approach
 - i. Staffing plan
 - ii. Monthly progress and communications plan
 - iii. Quality control plan
 - b. Technical Approach
 - i. Preventive/predictive maintenance
 - ii. National Computerized Maintenance Mgt. System (“NCMMS”) usage
 - iii. Data management plan
 - iv. Energy and water management approach
 - v. Technical program
 - vi. Property and project support plan
 - vii. Elevator support plan

In determining acceptability, the agency defined “unacceptable” as

The contractor is unlikely to meet some or all of the requirements of the BPA. An ‘unacceptable’ quote cannot be awarded. The overall quality of the quote is not acceptable, there is a limited probability of success and a high level of overall risk to the Government is recognized.

The agency evaluated South Dade’s quote and concluded that it failed to meet solicitation requirements for four elements:

- Staffing plan with six unfavorable aspects
- Quality control plan with four unfavorable aspects
- NCMMS usage and data management plan with two unfavorable aspects
- Service request and administrative support plan with five unfavorable aspects

As a result of the quote's failure to meet these requirements, South Dade was rated unacceptable under the management plan factor and unacceptable overall under the technical factor. South Dade was not considered for award.

South Dade's protested that GSA had used unstated evaluation criteria, namely finding risk even though risk was not identified as an evaluation factor.

GAO made short work of this allegation, noting that there was no legal basis for it. "[E]ven when performance risk is not specifically listed in the solicitation as an evaluation criterion, an agency may always consider risk intrinsic to the stated evaluation factors, that is, risk that arises from the vendor's proposed approach or demonstrated lack of understanding." The GAO dismissed this aspect of the protest.

Takeaway. Remember that an agency may always consider risk as an intrinsic part of its evaluation, even if not specifically stated in the solicitation. In this procurement, the risk issue was addressed in the agency's internal definition, but GAO made it clear that it can always be considered.

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