

Evaluation of Factors

A. Background

FAR 15.304(c) sets forth the factors that must be evaluated in competitive negotiated acquisitions. The FAR makes clear that all proposals received in response to a particular solicitation must be evaluated against the factors stated in the solicitation prior to establishing the competitive range. Specifically, FAR 15.306(c)(1) states: "Based on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range" Where the Government intends to award without discussions, in accordance with FAR 15.304(a), the ultimate award decision is "based on evaluation factors and significant subfactors" contained in the solicitation. Hence, the evaluation of proposals against all stated evaluation criteria must precede establishment of the competitive range or, in the case of award without discussions, the source selection decision.

Prior to the issuance of FAC 90-26, dated March 31, 1995, agencies were required to include only two factors in solicitations for competitive negotiated acquisitions, namely, cost/price and quality (technical considerations). Where technical considerations were of paramount importance and the initial technical evaluation revealed that a proposal was technically unacceptable, the cost/price proposal of the "unacceptable" offeror was not subjected to an evaluation. While this appears to run counter to the Competition in Contracting Act as well as FAR Subpart 15.3., it has been well established through case law that an evaluation of cost/price under such circumstances would amount to a useless exercise.

With the advent of the Federal Acquisition Streamlining Act and changes to the Small Business Act, agencies may be required to include up to five non-price evaluation factors in solicitations for competitive solicitations. These include: (1) quality of the product or service; (2) past performance, *for solicitations over \$100,000, unless waived by the contracting officer*; (3) past performance in meeting goals for subcontracting to small businesses,

for solicitations involving bundling that offer a significant opportunity for subcontracting; (4) the extent of participation of small disadvantaged business concerns, *for solicitations over \$500,000 (\$1,000,000 for construction) (see FAR 19.1202-2 for exceptions)*; and (5) proposed small business subcontracting participation in the subcontracting plan, *for solicitations involving bundling that offer a significant opportunity for subcontracting*. The introduction of additional non-price factors requires that the OCM reassess NIH practices and establish operating principles relating to the FAR language requiring that proposals be evaluated against all stated evaluation factors and that such evaluation occur prior to the competitive range decision (or, in the case of award without discussions, the source selection decision).

B. Current Guidelines

1. FAR 15.306(c)(1)

All proposals must be evaluated against all evaluation factors prior to establishment of the competitive range. (But see B.2. below.)

2. Case Law

Cost/price need not be evaluated on any proposal determined to be "technically unacceptable."

C. Proposed Guidelines - (See Attachments 1 and 2)