Source Selection Guide

Overview

Recent regulation changes have introduced greater flexibility and discretion into the source selection process. This section provides guidance to contracting staff on conducting source selection.

Background

The last decade has seen significant change in many areas of procurement, particularly in the introduction of new tools and processes that help the procurement professional better meet the needs of demanding customers. The passage of the Federal Acquisition Reform Act in 1995 and the Federal Acquisition Streamlining Act in 1994, coupled with Government-wide and Department of Energy (DOE) contract reform efforts have not only changed traditional procurement processes but have also changed the role of the procurement professional. No longer are procurement professionals merely the keepers of what some view as an arcane process called Federal contracting.

One area that has received considerable attention in most all of the reform initiatives is source selection, as set forth in Part 15 of the Federal Acquisition Regulation (FAR).
In 1998, significant, and sometimes subtle, changes were made to long-standing policies, practices and procedures relating to competitive negotiation. These included the introduction of oral presentations, changes in the standards for determining competitive range, and new rules governing communications and the submission of best and final offers. These changes place an even greater responsibility on today's procurement professional to ensure that the integrity and fairness of procurement is maintained and that the contract ultimately awarded delivers high-quality goods and services to the customer.

General

In today's world, the procurement professional needs to be not only an expert in procurement laws, regulations and policies, but also an expert in business and market areas. The procurement

professional is now an integral part of a team that manages all phases of the acquisition process, from requirements identification to contract close-out. This is reinforced in guiding principles for the Federal Acquisition System (see FAR 1.102).

This guide provides a series of topics-focused dissertations on key areas of source selection. The intent of the guide is to present DOE procurement professionals with useful "hands-on" information on key principles and practices that will enhance the effectiveness of the source selection process. The guide does not present a road map of the source selection process, nor does it mandate activities or actions. The source selection process is adequately set out in regulation and other instruction material. This guide should not be construed to convey any rights to third parties.

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PART I DRAFT REQUEST FOR PROPOSAL (DRFP)

Background

The Draft Request For Proposal (DRFP) is the initial, informal document(s) that communicates the Government's intentions/needs to industry and requests questions, comments, suggestions, and corrections that improve the final product. It is a communication tool used early in competitive acquisitions to promote a clearer understanding of the Government's requirements to industry and to obtain industry feedback on the planned acquisition. The DRFP need not include all of the sections of the Request For Proposal (RFP), but should contain as much as possible of the "business" sections necessary for industry to provide meaningful comments. As a minimum, the DRFP should include Section L (Instructions to Offerors) and Section M (Evaluation Criteria), and the Specification/Statement of Work.

No hard and fast rule exists as to when it is desirable to issue a DRFP; however, in the early stages of acquisition planning/procurement strategy development, the program officer(s), advisory (legal) staff and Contracting Officer/Contract Specialist are strongly encouraged to address the desirability of issuing a DRFP in advance of the final RFP. Likewise, no formal process for comment resolution presently exists. However, a methodology should be established to ensure implementation of beneficial comments in the final RFP as well as ensuring fair disposition of all comments.

Applicable statutes, procurement regulations, or small business regulations

FAR 3.104-2 (General [Procurement Integrity]); FAR 15.201(Exchanges with Industry Before Receipt of Proposals); and FAR 5.101(b) (Methods of Disseminating Information)

Issues/Questions

- When is it appropriate to issue a DRFP?
- What should a DRFP include?
- What are the requirements for publicizing a DRFP?
- What benefits are accrued from issuing a DRFP in advance of issuing a final RFP?
- How should comments received in response to the DRFP be handled?

Discussion Topics

When is it appropriate to issue a Draft Request for Proposal (DRFP)?

It is appropriate to use DRFP's whenever, in the Contracting Officer's (CO's) judgment, the acquisition will benefit significantly from early involvement from interested parties and when award without discussions is contemplated.

Considerations in determining the feasibility of issuing a DRFP in advance of an RFP for an acquisition include: complexity and dollar value, introduction of new business and/or technical requirements, timing and/or uncertainties as to the clarity of the proposed Statement of Work/Statement of Objective. DRFP's are not used for a noncompetitive procurement.

What should a Draft Request for Proposal (DRFP) include?

To the extent practicable, the DRFP should include all relevant parts of the solicitation, including the model contract, Statement of Work (SOW), technical requirements, instructions to offerors (Section L), and the evaluation criteria (Section M). The DRFP should identify the point of contact to which comments should be directed, the preferred method by which contact may be established, i.e., via e-mail, facsimile, and the date by which all comments are due, etc. The DRFP should include a statement to the effect that "information presented in the DRFP is subject to change and that incurring expenses or beginning to formulate an approach in preparation for the acquisition based on information presented in the DRFP is solely at the potential offerors risk".

What are the requirements for publicizing a DRFP?

The Contracting Officer/Contract Specialist should publicize the DRFP in much the same manner as the final RFP would be publicized, using a variety of methods, such as posting announcements on the INTERNET using Federal Business Opportunities for Vendors (FBO for Vendors) at http://www.eps.gov/spg/, posting the DRFP on the DOE Industry Interactive Procurement System (IIPS) at http://e-center.doe.gov and those methods addressed at FAR 15.201(c) and FAR 5.101(b). Publication and response times for proposed contract actions at FAR 5.203 are not mandatory for DRFPs. The Contracting Officer should establish reasonable times for receipt of responses to DRFPs that reflect the nature of the product or service, the supply base, and the specifics of the individual procurement. Requirements shall be synopsized in accordance with FAR 5.203 prior to issuance of the solicitation. Alternatively, the notice of availability of a DRFP and a future date when the solicitation will be issued may be included in the same synopsis.

What benefits are accrued from issuing a DRFP in advance of issuing a final RFP?

DRFP's provide an effective means to resolve potential contract issues and obtain feedback from prospective offerors in advance of issuing the final RFP. In certain cases, such information can lead to (1) significant cost savings and productivity enhancements; (2) reduce proposal preparation and evaluation time; (3) reduce the need for solicitation amendments and preclude other delays that disrupt timely completion of the acquisition; or (4) result in better proposals, end products and services.

How should comments received in response to the DRFP be handled?

The Contracting Officer/Contract Specialist, in conjunction with support from appropriate technical or other functional advisory staff as merited (i.e., cost price analysts, legal counsel,

Small and Disadvantaged Business Specialist) should carefully review each question to: (1) determine whether the suggestion has merit and should be pursued; (2) develop a recommended course of action considering the impact to other processes and elements of the RFP or program; and (3) develop a proposed Government response. Care must also be taken to ensure that incorporating a comment into the RFP does not give and unfair competitive advantage to an offeror.

Though not mandatory, two suggested means by which the Contracting Officer/Contract Specialist may disseminate the government's response to industry are:

(1) A DRFP Amendment or letter may be prepared that formally responds to the comments received. This response may group similar questions together for a single response. The amendment or letter should not attribute comments to any particular offeror. The amendment or letter should include a clear statement as to the comments disposition, i.e., accepted, rejected, deferred, etc., along with an explanation as to why that action was taken. The response should be made publicly available in the same manner as the DRFP.

(2) If the nature of the comment or the government response is complex, it may be beneficial for the government to convene a presolicitation conference to discuss the responses to the DRFP comments. Notice of the conference should be publicly announced in a manner to ensure that all interested parties/potential offerors have an opportunity to respond/attend. Minutes of the conference should be maintained which include a written response to all of the DRFP comments received. Copies of these minutes should be publicly distributed in the same manner as the DRFP, e.g., though posting on the website.

Regardless of which response method or combination of methods is used, it is critical that all potential offerors be treated fairly and given identical information so as not to provide a basis for a perception of unfair competitive advantage by any one offeror or group of offerors.

If a private conference is requested, the Contracting Officer/Contract Specialist must take special care to ensure that either: (1) no additional information is provided during the conference which would give the offeror an unfair competitive advantage; or (2) ensure that any new information provided during the conference is provided to all potential offerors.

PART II PREPROPOSAL CONFERENCES

Background

A preproposal conference is a technique to promote early exchange of information with industry after the solicitation is issued, and prior to receipt of proposals. The principal purpose of a preproposal conference is to provide for uniform interpretation and understanding of work statements, specifications, and other technical and administrative requirements by all prospective contractors responding to competitive solicitations.

Additionally, in conducting the preproposal conference, remember the following: (1) release information on a fair and equitable basis consistent with regulatory and legal restrictions; (2) establish clear ground rules for the conduct, timing, and documentation of preproposal conferences; (3) protect any proprietary information you may be given during this process; and (4) request legal counsel advice if any questions arise about any preproposal exchanges.

Applicable statutes, procurement regulations, or small business regulations

FAR 3.104-2 (General [Procurement Integrity]); and FAR 15.201 (Exchanges with Industry Before Receipt of Proposals)

Issues/Questions

- When is it appropriate to conduct a preproposal conference?
- What should preproposal conferences accomplish?
- How should the preproposal conference be conducted?

Discussion Topics

When is it appropriate to conduct a preproposal conference?

It is appropriate to conduct a preproposal conference when issues exist which make a government and industry dialogue necessary. The following factors often drive a need to conduct a preproposal conference: (1) the complexity of the project; (2) the desirability of having prospective contractors visually examine Government owned facilities (Site visits are normally conducted in conjunction with preproposal conferences); (3) the need to disseminate additional background data; (4) exceptional demands on a contractor's capability; (5) unavoidable ambiguities in the statement of work; or (6) complications involving access to classified material.

What should preproposal conference accomplish?

The preproposal conference should accomplish the following: (1) outline principal features of the project, (2) fully describe all details of the work statement and specifications, (3) explain and clarify instructions for completing the proposal, (4) provide an opportunity for offerors to ask

questions and receive answers, thus providing them with a better understanding of the government's requirements, and (5) stress the importance of significant elements of the solicitation.

How should the preproposal conference be conducted?

The Contracting Officer should publicize the arrangements for the conference in the solicitation. Attendees should be advised that remarks and explanations made by government personnel do not qualify, change, or otherwise amend the terms of the solicitation, and that only a formal, written amendment to the solicitation is binding. A written record of the conference proceedings should be kept. This record of proceedings, including any new material provided at the conference and questions and answers addressed should be provided to all potential offerors, regardless of whether they attend the conference.

Where possible, written questions should be requested in advance, and answers should be prepared in advance and delivered during the conference. Questions answered during the conference should be included in the record of conference proceedings.

As soon as possible after the preproposal conference, the Contracting Officer should ensure that all potential offerors receive the written record of the conference proceedings, including any new material provided, and any questions and answers addressed. If any of the terms and conditions or requirements of the solicitation were changed, a formal solicitation amendment should be issued.

Additionally, a site tour should be part of any preproposal conference if there is a site to tour.

Alternatives or In Addition to a Preproposal Conference

In addition to a preproposal conference, or in lieu thereof, the following approaches may also be used:

- Establish a reading room that contains public information regarding the requirement. A reading room is mandatory for any procurement. This can be accomplished either through a web-based electronic reading room, a walk-in reading room, or both.

- The Request for Proposal (RFP) should identify how questions regarding the RFP are to be submitted, and if a response to a question is appropriate, it should be conveyed to all potential offerors either by using the web, by letter, or by an amendment to the RFP when appropriate.

- One on one meetings can be held with potential offerors prior to submission of proposals with the express intent to receive feedback from potential offerors regarding the RFP. Based on these meetings, public information and exchanges

should be provided to all parties by using the web, by letter, or by an amendment to the RFP when appropriate. Note: Care must be taken during these one on one meetings to not provide information that might give a potential offeror an unfair competitive advantage.

PART III SCORING METHODOLOGIES

Background

The objective of an acquisition conducted under source selection procedures is to select the source or sources which represent the best value to the Government. FAR Part 15 discusses source selection processes and techniques, including tradeoff processes. The tradeoff process permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal. FAR 15.305 (a) Proposal Evaluation, states: "(a) Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and sub-factors specified in the solicitation. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file."

The Source Selection Authority (SSA) is required to follow the evaluation criteria and relative weighting factors set forth in the solicitation. How the SSA achieves this objective is not prescribed by the Regulations. In fact, the FAR specifically states that the rating method need not be disclosed in the solicitation. GAO has repeatedly held that Rating Plans are internal documents, and that offerors are not entitled to enforce the provisions of a Rating Plan that were not included in the solicitation. Beyond the implications in the FAR that a rating method will be used, there is no known regulatory requirement for creation of a Proposal Scoring or Rating Plan. In theory, an SSA could review the proposals, identify the strengths and weaknesses of the proposals and based on his/her judgment, following the evaluation factors and weightings in the solicitation, reach a selection decision. This approach is simply not practical and SSAs normally employ the use of an advisory board, team or panel to evaluate the proposals. Scoring/Rating Plans have evolved as the structured means of communicating the relative standings of each offeror to the SSA. In the end however, the SSA must base the selection decision on the strengths, deficiencies, and weaknesses of the proposals submitted - not merely on the score derived through use of a Proposal Scoring or Rating Plan.

A Proposal Scoring or Rating Plan helps evaluators assess a proposal's merit with respect to the evaluation factors and significant sub-factors in the solicitation. It uses a scale of words, colors, numbers, or other indicators to denote the degree to which proposals meet the standards for the non-cost evaluation factors. Some commonly used rating systems are adjectival, color coding, and numerical. What is key in using a rating system in proposal evaluations is not the method or combination of methods used, but rather the consistency with which the selected method is applied to all competing proposals and the adequacy of the narrative used to support the rating.

A traditional Scoring or Rating Plan is comprised of three basic elements: (1) evaluation factors and sub-factors set forth in the solicitation; (2) a rating system (e.g., adjectival, color coding, numerical, or ordinal); and (3) evaluation standards or descriptions which explain the basis for assignment of the various rating system grades/scores.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.305 (Proposal Evaluation); FAR 15.505 (Preaward Debriefing of Offerors); and FAR 15.506 (Postaward Debriefing of Offerors)

Issues/Questions

- What should be considered when developing evaluation standards?
- What are the most common types of rating systems?
- What does a sample rating scale look like?
- Does an evaluation need to include the identification of strengths and weaknesses?

Discussion Topics

What should be considered when developing evaluation standards?

Evaluators must be able to determine the relative merit of each proposal with respect to the evaluation factors. Evaluation standards/descriptions provide guides to help evaluators measure how well a proposal addresses each evaluation factor and sub-factor identified in the solicitation. (Standards must not introduce unstated evaluation criterion.) Standards permit the evaluation of proposals against a uniform objective baseline rather than against each other. The use of evaluation standards minimizes bias that can result from an initial direct comparison of proposals. Standards also promote consistency in the evaluation by ensuring that the evaluators evaluate each proposal against the same baseline. In developing standards for each evaluation factor and sub-factor, you should consider the following:

- As you develop your evaluation factors, concurrently draft a standard for each factor and sub-factor.

- Define the standard by a narrative description that specifies a target performance level that the proposal must achieve in order to meet the standard for the factor or sub-factor consistent with the requirements of the solicitation.

- Describe guidelines for higher or lower ratings compared to the standard "target."

- Overly general standards should be avoided because they make consensus among evaluators more difficult to obtain and may obscure the differences between proposals. A standard should be worded so that mere inclusion of a topic in an offeror's proposal will not result in a determination that the proposal meets the standard.

- While it is sometimes easier to develop quantitative standards because of their definitive nature, qualitative standards are commonly used in source selections.

What are the most common types of rating systems?

Common Rating Systems

Adjectival Ratings

Adjectival ratings are a frequently used method of scoring or rating an offeror's proposal. Adjectives are used to indicate the degree to which the offeror's proposal has met the standard for each factor evaluated. Subsequent to, and consistent with, the narrative evaluation, an appropriate adjective rating may be given to each factor and sometimes to each significant sub-factor. Adjectival systems may be employed independently or in connection with other rating systems.

Color Coding

This system uses colors to indicate the degree to which the offeror's proposal has met the standard for each factor evaluated. For instance, the colors blue, green, yellow, amber, and red may indicate excellent, good, satisfactory, marginal, or unsatisfactory degrees of merit, respectively.

Note: It should be noted that while the adjectival and color coding systems may be the most difficult to use; they may be the most effective. The reason for the difficulty in use results from having to derive a consensus rating when, for example, one element is weighted at 50% with a Good (Green) rating and one element is weighted at 40% with a Excellent (Blue) rating. Under these systems, there is not a simple process to aid the evaluators to reach the consensus rating. The evaluators must assess the collective impact of evaluation sub-factors on each higher tier factor, and then assess the totality of the evaluation factors as they related to each other under the weighting methodology set forth in the solicitation. This complexity forces the evaluators to thoroughly understand the strengths and weaknesses of each individual proposal in relation to the evaluation criteria and standards in order to reach consensus. While it is critical that this understanding is reflected in the narrative of the evaluation, this depth of understanding aids in the writing of the competitive range and source evaluation report.

Numerical

This system assigns point scores (such as 0-10 or 0-100) to rate proposals. This rating system may appear to give more precise distinctions of merit; however, numerical systems can have drawbacks as their apparent precision may obscure the strengths and weaknesses that support the numbers. As opposed to the adjective and color coding systems, numeric systems can provide a false sense of mathematical precision which can be distorted depending upon the evaluation factors used and the standards therefore. For example, if a standard indicated there could be no weaknesses, a very minor weakness in a proposal would force assignment of the next lower level rating. This would potentially cause a significant mathematical difference in the proposals.

In any evaluation process, the source evaluation board should first identify the strengths and weaknesses involved with a proposal, and then assign the adjective, color or numeric ratings to the criteria. However, this is particularly important when using numeric system because it is too easy to fall into the trap of relying on the numeric rating as opposed to the actual merits or weaknesses of the proposal. Due to the potential pitfalls with the use of numeric ratings, some organizations do not permit the use of numerical rating systems.

It is strongly suggested that if a numerical system is used, the point system used should be a staggered numeric rating system (e.g., 1, 3, 5, 8 and 10) representing the various ratings and not use a full sequential scale (i.e., 0, 1, 2, 3 . . . 10) to represent the various ratings. If the sequential system is used, it forces the evaluation team to differentiate the rating of each evaluation factor within a range of points (e.g., a satisfactory element of a proposal must receive either 4, 5 or 6 rating points) as opposed to the assignment of a standard 5 point rating for a satisfactory rating. The sequential system also can result in generating overall proposal ratings which are numerically close in the total rating which may disguise the proposal differences. Moreover, using a 1-100 scale often results in using "public school" types of grading levels, even if the rating plan provides differently - that is, an A proposal gets a 90-100, a B proposal gets 80-89, a C proposal gets 70-79, and so on. This results in over half of the rating scale [59 and below] effectively not being used. In our experience, using a 1-100 rating scale usually results in ratings being clustered in the 85 to 90 range and blurs the real distinctions between proposals. It also makes the cost-technical tradeoff more difficult, where the technical difference amounts to just a few percentage points.

What does a sample rating scale look like?

The following is a sample of a rating scale that could be used to evaluate technical and management factors and significant sub-factors. A proposal need not have all of the characteristics of a rating category in order to receive that rating. The evaluators must use judgment to rate the proposal using one of the three systems: numeric, adjectives or colors.

Examples

Typical Ratings and Descriptors
Each rating must have a definition.
TECHNICAL MERIT ratings reflect the government's confidence in each offeror's ability, as demonstrated in its proposal, to perform the requirements stated in the RFP. Choose one method (e.g., numerical, adjectival, or color) to evaluate technical merit.

NUMERICAL	ADJECTIVAL	COLOR	DEFINITION/STANDARDS
10	Excellent	Blue	Proposal demonstrates excellent understanding of requirements and approach that significantly exceeds performance or capability standards. Has exceptional strengths that will significantly benefit the Government.
8	Good	Green	Proposal demonstrates good understanding of requirements and approach that exceeds performance or capability standards. Has one or more strengths that will benefit the Government.
5	Satisfactory	Yellow	Proposal demonstrates acceptable understanding of requirements and approach that meets performance or capability standards. Acceptable solution. Few or no strengths.
3	Marginal	Amber	Proposal demonstrates shallow understanding of requirements and approach that only marginally meets performance or capability standards necessary for minimal but acceptable contract performance.
0	Unsatisfactory	Red	Fails to meet performance or capability standards. Requirements can only be met with major changes to the proposal.

COST - NOT "RATED." Reflects the evaluated cost. RFP must describe method by which cost will be evaluated (e.g., how probable cost or life cycle cost will be evaluated.)

Alternate language for defining the Standards might be:

Outstanding: <u>An outstanding proposal is characterized as follows:</u>

The proposed approach indicates an exceptionally thorough and comprehensive understanding of the program goals, resources, schedules, and other aspects essential to performance of the program.

In terms of the specific factor (or significant sub-factor), the proposal contains major strengths, exceptional features, or innovations that should substantially benefit the program.

There are no weaknesses or deficiencies.

The risk of unsuccessful contract performance is extremely low.

Good: <u>A good proposal is characterized as follows:</u>

The proposed approach indicates a thorough understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.

The proposal has major strengths and/or minor strengths which indicate the proposed approach will benefit the program.

Weaknesses, if any, are minor and are more than offset by strengths.

Risk of unsuccessful performance is very low.

Satisfactory: A satisfactory proposal is characterized as follows:

The proposed approach indicates an adequate understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.

There are few, if any, exceptional features to benefit the program.

The risk of unsuccessful performance is low.

Weaknesses are generally offset by strengths.

Marginal: A marginal proposal is characterized as follows:

The proposed approach indicates a superficial or vague understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.

The proposal has weaknesses that are not offset by strengths.

The risk of unsuccessful contract performance is moderate.

Unsatisfactory: An unsatisfactory proposal is characterized as follows:

The proposed approach indicates a lack of understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.

Numerous weaknesses and deficiencies exist.

The risk of unsuccessful performance is high.

Does an evaluation need to include the identification of strengths and weaknesses?

Strengths and Weaknesses

Regardless of whether an adjectival, color, or numerical rating system is used, proposal evaluations must be supported with narrative statements which describe each strength and weakness associated with each aspect of a proposal in relation to the evaluation criteria. The identification of the specific strengths and weaknesses provides the SSA the information needed to make a reasonable and rational basis for the selection decision. The detailed information on strengths and weaknesses is also required by the contracting officials in order to provide the debriefings to unsuccessful offerors required by FAR 15.506(d), as well as contracting and legal

personnel in order to defend any protests which might be filed with the agency or the General Accounting Office.

PART IV CONTRACTING OFFICER ROLE AND ROLE OF COUNSEL IN THE ACQUISITION PROCESS

Background

One important role of the contracting officer and counsel is to provide business, procurement and legal advice and guidance to the Source Selection Official and Source Evaluation Board Chair. Prior to the initiation of a procurement in a Federal Acquisition Regulations (FAR) Part 15 competitive procurement, the contracting officer and counsel should brief the source evaluation board or the technical evaluation committee (SEB/TEC) on the workings of the source selection process. The briefing should include an explanation of the evaluation process and pertinent documents, conflicts of interest, proposal security, and procurement integrity. The briefing should be designed to inform the evaluators of their responsibilities and provide guidance to the evaluators on how to review the proposals. If there are non-voting members on the SEB/TEC, the contracting officer should explain the limits of their involvement in the selection process. The contracting officer should also advise the SEB/TEC members of the planned schedule for the evaluations, including the time allotted for individual evaluations, consensus discussions, completion of a draft evaluation report, and the anticipated date for completion of the final report. If the solicitation included a requirement for oral presentations by the offerors, the contracting officer must explain the evaluation process for the oral presentations.

In any acquisition the contracting officer should involve the counsel to the greatest extent possible, and as early in the process as possible. The counsel should act as part of the team engaged in making this acquisition occur. At the latest, the counsel should be consulted while the Request for Proposals (RFP) is being drafted. By proceeding in this way, the contracting officer informs the counsel about the requirements of the acquisition, and anticipates problems which may arise in the award. Further, involving the counsel at the earliest part of the process so that he or she is fully informed regarding the program office's needs permits the counsel to suggest options available to accomplish those needs, which may result in changes to the RFP and model contract.

Time consuming activities associated with rework of the evaluation process can be avoided by taking the time for a thorough briefing prior to allowing the evaluators to open the proposals. The contracting officer leads the pre-evaluation briefing; however, the legal advisor to the SEB/TEC should attend and may take the lead for pieces of the briefing. For example, the contracting officer may ask the legal advisor to explain the procurement integrity or conflicts of interest provisions to the evaluators. Additionally, the counsel should be involved in reviewing solicitation strategy; reviewing the RFP (evaluation criteria, award criteria, applicable contract clauses) reviewing the rating plan; overseeing the evaluation; reviewing the competitive range determination (if any); overseeing the discussions (if any); and reviewing the selection, and the selection statement.

Applicable statutes, procurement regulations, or small business regulations:

FAR 3.104 (Procurement Integrity); FAR 15 (Contracting by Negotiation); DEAR 915 (Contracting by Negotiation); FAR Part 9.5 (Organizational and Consultant Conflicts of Interest); DEAR 909.5 (Organizational and Consultant Conflicts of Interest); DEAR 952.209-72 (Organizational Conflicts of Interest); DEAR 970.0905 (Organizational Conflicts of Interest); and DEAR 903.104-10 (Violations or Possible Violations)

Issues/Questions

- What aspects should the contracting officer brief the SEB/TEC prior to evaluation of proposals?

- What is the role of counsel in the procurement process?

Discussion Topics

What aspects should the contracting officer brief the SEB/TEC prior to evaluation of proposals?

Certification requirements for evaluators

The briefing is a good opportunity to make sure that all evaluators have signed the required certifications. Prior to commencing evaluations, evaluators are required to complete confidentiality certificates, conflict of interest certificates, or other certifications established in the rating plan.

Security of proposals

The proposals and any other proprietary or source selection information need to be kept in locked cabinets or locked rooms. The SEB/TEC chairman should arrange for appropriate facilities for safeguarding the proposals and other source selection information prior to the receipt of the proposals. Copies of proposals and proprietary/source selection information should be numbered and tracked by the SEB/TEC chairman or other clearly designated member of the evaluation board (for example, the contracting officer). The contracting officer should inform the evaluators that proposals shall not be taken home. The evaluation and contents of proposals shall not be discussed outside the SEB/TEC with the exception of ex-officio members, procurement advisors, legal advisors, and other selection officials.

Potential individual conflicts of interest

Individual conflicts of interest need to be resolved prior to commencing evaluation. The evaluators need to be reminded to review all contractors, subcontractors, consultants, and teaming arrangements proposed under the procurement and report any potential conflicts of interest to the contracting officer, legal advisor, and the SEB/TEC chairman. Evaluators need to report any relatives employed by the proposing entities, friendships, financial interests, pension benefits, and prior employment. The existence of these relationships does not necessarily mean that a conflict of interest exists, but legal counsel will review the specifics of the situation to determine if a potential conflict exists. The evaluator will then be informed if any actions need to be taken to avoid the conflict of interest. Actions that may be taken include divestment of stock, reclusion from review of selected offerors, or removing the evaluator from the source evaluation process.

The evaluators need to be advised against the appearance of a conflict of interest. For example, evaluators should not have lunch or go golfing with offerors or prospective offerors, or engage in any other activity that could give the appearance of a conflict of interest. Evaluators should be encouraged to discuss any questions regarding the appearance of a conflict of interest with the contracting officer and legal advisor.

Procurement Integrity Act

The procurement integrity provisions of the Office of Federal Procurement Policy Act (OFPP Act) (41USC 423) (commonly referred to as the Procurement Integrity Act) address a variety of issues, but the two of most concern to evaluators are the prohibitions against employment discussions and the release of information regarding a procurement. The provisions of the Procurement Integrity Act are implemented in FAR Part 3.104. The contracting officer should inform the evaluators that civil and criminal penalties, and administrative remedies, may apply to conduct that violates the Procurement Integrity Act and related statutes and regulations. The procurement integrity piece of the briefing to evaluators can either be provided by the contracting officer or the legal advisor to the SEB/TEC.

Employment prohibitions

Evaluators should be instructed to consult with the legal advisor and the legal staff of the agency ethics office regarding any contact with an offeror regarding non-Federal employment as well as questions related to post employment restrictions. In general, evaluators need to be informed that they can't be involved in the source selection process and discuss potential employment with any offerors, including subcontractors and consultants, proposing under the solicitation. This includes submitting resumes to firms. Evaluators need to be told that if they are approached by a firm, they can't leave the door open for employment discussions and tell the firm that conversations about employment will resume after the evaluation is completed.
In fact, the FAR requires that if an agency official is contacted by a person who is an offeror under the solicitation that official must report that contact, in writing, to the official's supervisor and the agency ethics official. The FAR further states that the agency official must either reject

the offer of employment or disqualify himself/herself from further participation in that procurement.

Evaluators should be advised that participation in a Federal agency procurement will result in some post-employment restrictions. Post-employment restrictions are covered by 18 U.S.C. 207 and 5 CFR Parts 2637 and 2641 and Subsection 27(d) of the OFPP Act and FAR 3.104-3(d). Former Government employees are prohibited from engaging in certain activities, including representation of a contractor before the Government in relation to any contract or other particular matter involving specific activities in which the former employee participated personally or substantially while employed by the Government. Evaluators who have concerns about the post-employment restrictions should be instructed to discuss their situation with the legal staff within the agency responsible for interpreting post-employment restrictions prior to commencing evaluation of the proposals or becoming further involved with the procurement.

Disclosure of proprietary or source selection information

The second area of concern to evaluators is the disclosure of any proprietary or source selection information during the conduct of a procurement. The Procurement Integrity Act prohibits the disclosure of contractor bid or proposal information or source selection information prior to the award of a Federal contract. Evaluators should be informed that source selection information includes: 1) proposed costs or prices; 2) source selection plans; 3) technical evaluation plans; 4) technical evaluation of proposals; 5) cost or price evaluation of proposals; 6) competitive range determinations; 7) ranking of bids, proposals, or competitors; 8) reports and evaluations of source selection panels, boards, or advisory counsel; and 9) any other information marked source selection.

Evaluators should be reminded that they can only discuss contractor bid or proposal information or source selection information with individuals who are authorized, in accordance with applicable agency regulations or procedures, to receive such information. It is useful for evaluators to keep in mind what is public information and what is not. For example, information in the solicitation is public, but the rating plan is not. The weights assigned to the evaluation criteria are not public unless they are identified in the solicitation. Once a competitive range is established, even though the Government has written letters to offerors letting them know whether or not they are in the competitive range, that is not public information. Evaluators should be cautioned against holding any conversations with or answering any questions from offerors. All questions should be referred to the contracting officer.
If a potential violation of the Procurement Integrity Act is reported, the contracting officer is required to determine if there is any impact on the pending award or selection of the contractor.

FAR Part 3.104-7 identifies the procedures the contracting officer and agency are required to follow. Evaluators should be advised that the earlier a potential procurement integrity violation is reported, the greater is the contacting officer's ability to mitigate its effect on the procurement. For example, the contracting officer may be able to mitigate an unauthorized disclosure of information by making that information available to all offerors or by taking other appropriate action. Additionally, evaluators should be advised that if they are asked to prepare information

related to solicitation or the evaluation that they cannot re-delegate the action to a contractor, even if the action appears to be clerical.

It is helpful to provide examples of procurement integrity violations in the briefing so that the evaluators can relate the procurement/legal jargon to real situations they may encounter. For example, in one case a SEB/TEC evaluator allegedly communicated to an offeror in the competitive range, in general terms, how it needed to revise its technical and price proposals in order to receive an award. The potential violation was reported by the offeror and the case was referred to the appropriate criminal investigative organization for further investigation. As another example, a senior level program official asked a support service contractor to assist in developing the statement of work and required labor mix for the re-compete of its own contract. After the violation was reported, the program official attempted to argue that the documents prepared by the support service contractor were only an outline and the information was significantly modified prior to release of the solicitation. This argument was not found to be convincing by the investigative organization.

Evaluation process

The contracting officer should provide an overview of the evaluation process and the steps to be followed. The evaluators should be instructed to review the pertinent documents prior to evaluating the proposals. Evaluators should review and become familiar with the source selection plan/rating plan, statement of work, evaluation scoring sheets, the evaluation criteria in sections L and M of the solicitation, and the established weights for each criterion and sub-criterion.

The proposals need to be individually evaluated by each SEB/TEC member. Evaluations shall be based on the evaluation criteria in the solicitation, and evaluators need to be cautioned against deviating from the evaluation criteria or substituting evaluation criteria.

The contracting officer should discuss the unique aspects of the past performance criteria, and how evaluation of past performance differs from the other criteria. Evaluation under this criterion relies on information provided by the offeror's previous customers.

Evaluators shall be instructed to develop strengths and weaknesses for each criteria that are sufficiently detailed to support the assigned score or adjectival rating. This does not mean that evaluators will assign individual scores or ratings. This depends on the evaluation process established in the source selection plan/rating plan.

Commonly, individual evaluators develop individual strengths and weaknesses, and then the SEB/TEC meets to develop consensus strengths and weaknesses prior to assigning scores. This is the preferred method at the Department of Energy. Evaluators should also be encouraged to use the full range of adjectival ratings or scores.

Evaluators must be cautioned not to compare proposals against each other. Proposals shall be evaluated against the criteria and standards established in the solicitation. FAR Part 15

specifically states that competitive proposals shall be evaluated solely on the factors and sub-factors identified in the solicitation. Evaluators should be instructed that if the information sought does not exist where it is expected, that they should check if it exists elsewhere, such as in the introduction, on a diagram, or in the appendices.

The briefing should advise evaluators to be consistent during the evaluations, scoring, and developing of questions. The contracting officer should instruct the evaluators to discuss questionable issues as a group. Evaluators should be instructed to only credit or fault an offeror once for the same fact or idea unless the solicitation has a redundancy in the criteria. Similarly, evaluators need to evaluate the same fact or idea consistently. If something is noted as a weakness under one proposal, it must be designated as a weakness in other proposals with the same fact or idea.

SEB/TEC report and documentation of evaluation

FAR Part 15 states that the source selection records must include "a summary, matrix, or quantitative ranking, along with appropriate supporting narrative, of each technical proposal using the evaluation factors." The consensus strengths and weaknesses by criterion are included in the SEB/TEC report. The contracting officer should advise the SEB/TEC that the report needs to be complete, accurate, and contain sufficient detail on strengths, weaknesses, deficiencies, and risks to demonstrate to an outside reviewer that the Government's evaluation was fair, reasonable, and unbiased. The evaluators should be informed that the reports prepared by the SEB/TEC must be clear, convincing and supportable, and may be reviewed by the General Accounting Office or a judge during a protest. Some contracting officers encourage evaluators to reference the pertinent part of the applicable evaluation criteria and the applicable page of the offeror's proposal for each strength or weakness. Evaluators should be told to avoid generalizations of a proposal's merits or problems, and instead state the facts that support the conclusions.

The contracting officer must instruct the evaluators to refrain from making personal notes in the proposals and on other documents that are retained. These documents may become part of the source selection record, and personal notes may be used during a protest to show inconsistencies. Evaluators must be advised to stamp all documents and worksheets with "Source Selection Information - See FAR 2.101 and 3.104.

What is the role of counsel in the procurement process?

Counsel Advisory Role

In some applicable cases, the Assistant General Counsel for Procurement and Financial Assistance, GC-61 acts by advising the Office of Contract Management, ME-62 in relation to all the above actions when the acquisition has been selected for headquarters review. In those cases, GC-61 advises ME-62, in addition to the advice given to the SEB/TEC and Source Selection Official by the applicable field attorney. In this situation, each attorney has a different client: the field attorney advises the SEB/TEC, and the Headquarters attorney advises ME-62. In most

cases, the advice is similar. Nothing prohibits field personnel from consulting the office of the Assistant General Counsel for Procurement and Financial Assistance at any time, but that office generally prefers that field personnel consult with the field counsel in the first instance, and that field consult contact GC-61 when necessary. Furthermore, both the field attorney and GC-61 are involved if there is a protest of any sort.

PART V PAST PERFORMANCE AS AN EVALUATION FACTOR

Background

The use of past performance as an evaluation factor adds a new aspect to the evaluation process. As required by FAR 9.1, past performance was generally examined only in the context of a determination of responsibility. Contractors with a history of unsatisfactory performance were considered not responsible contractors. This type of determination generally involved a minimum of paperwork and time. Formal documentation is required only if the contractor is found to be not responsible.

Now past performance must also be examined through a comparative assessment during the evaluation process. The examination is of information regarding a contractor's actions and performance under previously awarded contracts. It is a review of deeds not words. The currency and relevance of information, source of the information, context of the data, and general trends in contractor's performance shall be considered. This assessment is compared with the assessment of the past performance of the competing contractors to help determine which contractor is offering the best value.

Key to the successful use of past performance - and any factor- in the source selection process is the establishment of a clear relationship between the statement of work (SOW), Section L (instructions to offerors), and Section M (evaluation criteria). The factors chosen for evaluation must track back to the requirements in the SOW. They should be reasonable, logical, and coherent.

The use of past performance as an evaluation factor potentially increases the workload and paperwork related to the evaluation effort. The problem is that evaluating past performance requires gathering and evaluating additional information - information not found in proposals. The evaluation of past performance requires making inquires of third parties about contractor performance on other contracts and evaluating the responses.

Use of past performance as an evaluation factor is mandatory unless the contracting officer documents in the contract file why the evaluation of past performance is not appropriate. It is up to the contracting officer to document the reason that the use of past performance as an evaluation factor is inappropriate.

Using past performance as an evaluation factor depends on the significance of past performance as a discriminator. The purpose of an evaluation factor is to enhance the evaluator's ability to distinguish one proposal from another in terms of its relative worth or value to the government. An evaluation factor that does not help discriminate between proposals should not be used as an evaluation factor.

Applicable statutes, procurement regulations, or small business regulations

FAR 8.404 (b) (Using Schedules); FAR 15.101-2 (b) (Lowest Price Technically Acceptable Source Selection Process); FAR 15.102 (c) (Oral Presentations); FAR 15.202 (a) (Advisory Multi-Step Process); FAR 15.304 (Evaluation factors and significant sub-factors); FAR 15.305 (Proposal evaluation); FAR 15.306 (Exchanges with offeror after receipt of proposals); FAR 16.505 (b) (Order under multiple award contract; and FAR 42.15 (Contractor Performance Information)

Issues/Questions

- What past performance information should be requested?
- How should the solicitation aspects regarding past performance be structured?
- How much past performance information should be requested?
- How much weight should be placed on past performance information?
- When and what information can be discussed with offerors regarding past performance?

Discussion Topics

What past performance information should be requested?

Information requested under section L should be focused on contracts for similar efforts that have been awarded and in place for at least three months. Similar efforts should be defined by the size, scope, complexity, contract type, etc...

Information concerning past performance by subcontractors should not be requested unless they are a major subcontractor.

It is important to ask for at least two references on each contract. In addition to ensuring that all aspects of the contractor's performance will be discussed, it also ensures that the anonymity of the references can be maintained. FAR 15.306(e)(4) prohibits release of the names of individuals providing reference information about an offeror's past performance.

How should the solicitation aspects regarding past performance be structured?

The solicitation should explain that past performance information that is not similar will be considered when a contractor has no past performance information from contracts for similar efforts.

Information from previously established companies and the key personnel from which newly formed companies and mergers are formed should be used to mitigate the newly formed company and merger not having past performance information. Additionally, if there is no Federal contract information, past performance information should be reviewed from other

sources such as state and local government contracts and private sector contracts and subcontracts.

The RFP section M should identify if the information requested to mitigate a company not having relevant past performance information will be rated lower then relevant past performance information.

The RFP section M should indicate that newly formed companies, which cannot mitigate having no past performance information, shall not be given a rating of favorable or unfavorable. What constitutes a not being given a rating of favorable or unfavorable should be included in the rating plan.

The RFP section M should state that, if the government's attempts at gathering and verifying the offerors referenced past performance information fails, and the offeror has been notified and not been able to correct this problem, the offeror will be not be given a rating of favorable or unfavorable.

The RFP section M must stipulate the relative importance of past performance information.

If corporate experience and past performance are separate evaluation criteria do not ask for the same information under each of these criteria, in order to avoid the potential for double counting the same information. Do not confuse evaluation of past experience with evaluation of past performance.

Make certain that section L explains that offerors shall be defined as business arrangements, and each firm in the business relationship (i.e., joint venture, teaming partners, and major subcontractors) will be evaluated on its past performance.
Section L should include a statement that the government may use past performance information obtained from other than the sources identified by the offeror and that the information obtained will be used for both the responsibility determination and the best value decision.

Since past performance evaluation is essentially an informed judgmental decision of the government, in order for the government's decision to withstand scrutiny, the contract file should contain detailed documentation identifying that the past performance information has been appropriately analyzed and verified by the government.

Attempts at gathering and verifying information from the references on how the contractor performed is the responsibility of the government. Questionnaires followed up by telephone interviews have the most success in getting useful and timely responses from references.

Questionnaires that will be forwarded to reference checks should be provided in the RFP for informational purposes only. This allows offerors to know what is important to the government on this contract and helps offerors in their proposal decisions. The questionnaire should be listed as an attachment in Section J, and Section L should note that it will be used to collect past

performance information. The questionnaire should be short. No more than a page to a page and a half of questions should be asked.

Information that supports an entity's past performance, such as awards of excellence presented to the companies that will be performing the work, should be requested.
Avoid formula driven past performance decisions, as past performance is essentially a subjective best value decision.

How much past performance information should be requested?

Be prudent about the amount of past performance information that is requested. It should be a reasonable amount that does not cause excessive burdens for the contractor and the government. Additionally, FAR 42.1503(e) states that past performance information shall not be retained to provide source selection information for longer than three years after completion of the contract. Therefore, the information requested should not go beyond three years past completion of the contract.

How much weight should be placed on past performance information?

It is recommended that under the evaluation criteria of the RFP, past performance should be given a weighting of 25% or be equal to the most heavily weighted non-cost evaluation factors. However, if knowledge and information about the market place reveal that there is strong reason to believe that there are only a few capable offerors, there is substantially no discrimination among these potential offerors' past performance, the Source Selection Board should consider assigning a lesser weight for past performance. This type of situation is more likely to occur under requirements for complex scientific efforts.

Contractor successful performance of relevant past performance information should be rated higher than a contractor that has no past performance information.

For administrative requirements and the less complex scientific requirements, where there tends to be a greater market of capable offerors, past performance should be a very significant factor in the evaluation criterion.

Contracting activities should not downgrade a contractor for filing protests or claims or not agreeing to use alternative dispute resolution (ADR) techniques. Conversely, contracting activities should not rate a contractor positively for not having filed protests or not having made claims or agreeing to use ADR techniques. However, the quality of a contractor's performance that gave rise to the protest or claim may be considered. In other words, while performance must be considered, a contractor exercising its rights may not.

When and what information can be discussed with offerors regarding past performance?

Past performance information is proprietary source selection information. Therefore, section L should explain that the government will only discuss past performance information directly with

the prospective prime or sub-contractor that is being reviewed. If there is a problem with the past performance entities that have formed business arrangements with the prime contractor, such as subcontractors, joint ventures, and teaming partners, the prime contractor can only be informed that there is a problem with the entity under review. The details of the problem cannot be provided, unless the affected entity agrees.

The offeror should be asked to discuss any major problems encountered on the contracts listed and the corrective actions taken to resolve them.

If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond).

The questions asked of the past performance points of contract should be the same. Inconsistency in questions can lead to the potential issue of unequal evaluation of offerors. However, if there is a concern raised based on the responses to questions, then it may be necessary to hold discussions to resolve the matter.

PART VI ORAL PRESENTATIONS

Background

This topic is a digest of the 1996 Office of Federal Procurement Policy Guidelines For The Use Of Oral Presentations. This digest provides the most salient aspects of these Guidelines.

The use of oral presentations is a technique which provides offerors with an opportunity to present information through verbal means as a substitute for information traditionally provided in written form under the cover of the offeror's proposal. Oral presentations can be used as a substitute for written proposals or can be used to augment written proposals and may occur at any time during the acquisition process. Oral presentations are subject to the same restrictions as written information, regarding timing FAR 15.208 and content FAR 15.306. Its major use has been to permit evaluators to receive information as to the capability of the offeror - generally demonstrating its understanding of the work or describing how the work will be performed - directly from the key members of the offeror's team that will actually perform the work. In a number of cases, the evaluators have conducted the oral presentation in the form of an interview, probing for additional information, posing sample tasks or using other techniques to test the ability of the offeror's team.

Certain types of written proposal information, particularly in the technical and management areas, are costly to prepare and time consuming to evaluate. In addition, oral presentations avoid the use of lengthy written marketing pitches and essays. The use of oral presentations allows for greater communication between the government personnel and the offerors' key personnel and often can be used as essentially a "job interview" of the proposed key personnel. Using oral presentations can have the effect of greatly reducing procurement acquisition lead time and costs associated with the source selection process. These advantages are realized by both government and industry.

A list of the advantages is as follows:

- Can save significant procurement lead time;
- Can improve communication and the exchange of information between government and offerors;
- Can reduce government costs;
- Can reduce offerors' costs and increase competition;
- Can make customers feel more involved in contract selection and award; and,
- Can improve ability to select the most advantageous offer.

There is not one best approach for using oral presentations. There are variations in the approach for oral presentations to be considered by the acquisition team when developing the oral presentation methodology. The acquisition team should consider the following when developing the oral presentation methodology:

- media used to record the presentation;
- restrictions on the extent and nature of material used in the presentation;
- the Government participants; the offeror's presentation team; and,
- the amount of time permitted for the presentation.

Additional concerns to be considered are as follows:

- The influence of presentation mannerisms, as distinguished from technical content, on the evaluators' decisions;
- The failure to allow an effective exchange between evaluators and presenters; and
- In some cases, the redundant effort involved in preparing the same material for both oral and written formats.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.102 (Oral Presentations); FAR 15.208 (Submission, Modification, Revision and Withdrawal of Proposals); FAR 15.306 (Exchanges With Offerors After Receipt of Proposals); FAR 15.307 (Proposal Revisions); and the Office of Federal Procurement Policy Guide For The Use Of Oral Presentations.

Issues/Questions

- What instructions should be provided regarding oral presentations?
- How should oral presentations be prepared for?
- How should the oral presentations be handled?
- How should oral presentations be evaluated?

Discussion Topics

What instructions should be provided regarding oral presentations?

Proposal Preparation Instructions

The instructions governing the oral presentation should encourage the offeror to not develop overly elaborate presentations or presentation material. The instructions for oral presentation should include the following:

- Description of the topics that the offeror must address and the technical and management factors that must be covered;

- Statement concerning the total amount of time that will be available to make the presentation;
- Description of limitations on Government-offeror interaction during, and, if possible after, the presentation;
- Statement whether the presentation will constitute discussions as defined in FAR 15.306(d);
- Statement whether the presentation will encompass price or cost and fee;
- Description and characteristics of the presentation site;
- Rules governing the use of presentation media;
- The anticipated number and types of positions of the Government attendees;
- Description of the format and content of presentation documentation, and their delivery; and
- Statement whether the presentation will be recorded (e.g., videotaped).

The solicitation should require that, as part of the presentation, the offeror will provide a listing of names and position titles of all presenters and copies of all slides and other briefing materials that will actually be used in the presentation. It is preferable that such materials be provided to the evaluation team prior to the presentation to permit the evaluators to familiarize themselves with the information. Materials referenced in a presentation, but not an actual part of the presentation, must not be accepted, or used in, evaluations.

How should oral presentations be prepared for?

Initial Preparation

The order of presenters must be determined. A lottery is most often used to determine the sequence of presentations by offerors. The time between the first and the last presentation should be as short as practicable to minimize any advantage to the later presenters. In addition, oral presentations should be scheduled as soon as practicable after receipt of proposals.

The facility in which the presentation is to occur must be determined. In most cases the facility is one selected and controlled by the buying activity. However, nothing would preclude an oral presentation being given at an offeror's facility.

The selection of a facility can be reduced to the following:

- Make it comfortable for both the presenters and the Government evaluators. The room should be large enough to accommodate all of the participants, the recording equipment, lighting, audio-visual aids, and furniture.
- Make it accessible.
- Make it available, if possible, for inspection by the offerors prior to the time set for the actual presentation.

The solicitation should, to the extent practicable, describe the physical characteristics of the facility and resources available to the offeror. In addition, the solicitation should be clear as to what types of equipment will be available to the offeror for use in the presentation, what equipment, if any, should be provided by the offeror, and any prohibitions regarding equipment types and uses.

Prior to the presentation, the Contracting Officer should review the ground rules of the presentation session with the offeror. Additional matters for discussion include any restrictions on Government-offeror communications, information disclosure rules, documentation requirements, and housekeeping items.

Also, prior to the commencement of the presentation, the contracting officer should remind the Government participants of their responsibilities during and following the presentation. They should be advised that an oral presentation is procurement sensitive and that they may not discuss, within or outside the agency, (except among themselves) anything that occurred or was said at a presentation.

As a general rule, all of the Government evaluators should be present at every presentation. The Contracting Officer must attend and should chair every presentation. In a GAO case the offeror protested that the agency erred in not having the Source Selection Official (SSO) attend the presentation. The GAO stated that they are unaware of any requirement that an SSO attend presentation sessions.

Presentations by the offeror should to be made in person since, through the use of video conferencing a measure of government control of the meeting may be diminished. Accordingly, the submission of video tapes or other forms of media should not be authorized and should be rejected.

In addition, it is strongly recommended that the presenters should be the actual key personnel who will perform or personally direct the work being described, such as project managers, task leaders, and other in-house staff.

There are two tools available to manage the time each offeror is allotted for the oral presentation. First, and most obvious, is the imposition of a firm time limit. Firm time limits for the presentation must be established in the RFP, and each offeror must be allotted the same amount of time. Second, time may be controlled by restricting the amount of presentation material that an offeror may use during the presentation. Agencies used a combination of both a firm time limit and restrictions on information to control the time. There is no single or ideal amount of time to be allotted. The general rule of using the complexity of the procurement requirement to determine the time needed for the oral presentation may not be a reliable indicator. Another factor to consider when determining the proper amount of time is the effect on both the presenters and the evaluation team. The longer the presentation goes on the harder it is on both parties to stay focused on the presentation. Furthermore, by limiting the amount of time available for the presentation, sales pitches and theatrics can be minimized. The length of time spent on each part of the presentation should be left to the offeror's discretion. It is not generally advisable

to limit the time of individual topics or sections within the presentation; that can be the responsibility of the presenter.

How should the oral presentation be handled?

The Presentation

One of the more problematic areas of the oral presentation approach is the nature and extent of communications between the offeror and the Government evaluation team. This is largely due to the strict rules established in regulation regarding communications with offerors during the course of the solicitation process.

The term "oral presentation" is not synonymous with "oral discussions" as defined in Section 15.306 of the Federal Acquisition Regulation. Oral discussions, as envisioned by the FAR, generally consist of verbal communications between the Government and an offeror that provides an opportunity for an offeror to explain, supplement, or enhance written material previously provided to address evaluated deficiencies and significant weaknesses in the proposal, with the end objective being the submission of a revised proposal by the offeror. The FAR prescribes strict controls (see FAR 15.306, 15.306(d), and 15.307) over when, where, and to what extent, the Government can communicate with an offeror regarding its proposal.

This is done in order to ensure fairness in the evaluation process. The result is a very rigid and somewhat unnatural communication process. As such, oral presentations, by their very nature can become problematic because of the concern about inadvertently triggering the rules regarding discussions. As stated earlier, restrictions on communications between the Government and the offeror should be addressed by the Contracting Officer to all parties prior to the commencement of the presentation.

Another significant area of concern is the record of the oral presentation. FAR 15.102(e) states that the Contracting Officer shall maintain a record concerning what the government relied upon to make a source selection decision. The method and level of detail is up to the agency and must be communicated to the offerors prior to commencement of the oral presentation. Some examples of records include videotaping, audio tape recording, a written record, Government notes, and copies of briefing slides or presentation notes. A caution on the use of video- and audio-taping is needed. Since the tape will become part of the official record, it may be available to the public under the Freedom of Information Act. Like a written proposal, the tape must undergo review by both the Government and the offeror whose presentation is being requested, and a redacted version of the tape must be generated. Because of the tape media, this can be both difficult and time consuming.

In a GAO case, a protestor claimed that the presentation/discussion sessions had not been recorded. In this case, the contemporaneous record consists of handwritten notes taken by the agency. The offeror did not provide the agency with any presentation materials during its presentation. The GAO ruled that given that "government notes" are specifically mentioned in FAR 15.102(e) as a permissible method of maintaining a record of oral presentations, and given

the lack of any prejudicial disagreement between the parties as to what was said during the presentation, the protestors complaint provides no basis to challenge the award.

How should the oral presentation be evaluated?

Evaluation

There is no firm rule regarding the most appropriate time to evaluate the presentation. Some agencies have elected to perform the evaluation immediately upon conclusion of each presentation. Other agencies have performed the evaluations of presentations after all of the presentations have been made. If practicable, it is recommended to score the oral presentations immediately after each presentation is made. If the latter approach is chosen, it is recommended that the evaluators should caucus following each presentation to exchange reactions, summarize potential strengths and weaknesses, and verify perceptions and understandings.

PART VII CLARIFICATIONS VERSUS COMMUNICATIONS

Background

Clarifications and Communications are defined in the Federal Acquisition Regulation (FAR) as follows:

Clarifications are limited exchanges between the Government and offerors that may occur when award without discussions is contemplated (see FAR 15.306 (a)).

Communications are exchanges between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range (see FAR 15.306 (b)).

Discussions are negotiations conducted in a competitive acquisition, that take place after establishment of the competitive range (see FAR 15.306(d)).

The difference between what constitutes discussion or clarification has been a prominent problem within government contracting activities. A discussion between the Contracting Officer (CO) and an offeror obligates the CO to conduct discussions with all offerors in the competitive range, however, a request for clarification does not. When a CO communicates with some but not all offerors in the competitive range, other offerors may allege that they have been improperly excluded from discussions and thereby denied an equal opportunity to compete and may protest the source selection.

The CO may enter into communications with offerors who may or may not be included in the competitive range and not be obligated to communicate with the other offerors. The exchange may include critical information pertaining to the acceptability of the proposal or past performance concerns.

The objective of exchanges, including clarifications and communications, is to allow the Government to meet its needs in the most effective, economical and timely manner. However, there are limitations as to how this can be accomplished. Prior to the Clinger-Cohen Act, there were prohibitions on technical leveling and auctioning that have been removed from the FAR. However, there are new prohibitions in FAR 15.306 (e) specifically forbidding: (1) favoring one offeror over another; (2) revealing an offeror's technical solution including unique technology, innovative and unique uses of commercial items, or any other information that would compromise an offeror's intellectual property; (3) revealing the names of individuals proving past performance information, knowingly furnishing source selection information; or (5) revealing an offeror's price without permission. However, the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion. It is also permissible, at the Government's discretion, to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable.

Another important limitation during pre-competitive range exchanges of information is that clarifications and communication shall not provide an opportunity for proposal revisions. If this happens, all other offerors must also be allowed to revise their proposals. This can become especially complicated during oral presentations since an important goal of oral presentations is to provide an opportunity for dialogue among the parties. Since oral proposals generally include a session of questions and answers, care must be taken that the questions asked and the answers received do not modify the oral proposal presented. The CO must anticipate problems, take care to treat all offerors equally and keep records of all such communications.

Clarifications are used to enable the Contracting Officer to clarify certain aspects of proposals in order to proceed to award without discussions. Communications are used to clarify areas of ambiguity in order to determine whether the affected proposal should be included in the competitive range.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.306 (Exchanges with Offerors after Receipt of Proposals); and FAR 52.215-1 (Instructions to Offerors--Competitive Acquisition)

Issues/Questions

- What should clarifications include?
- What should communications be used to accomplish?
- What are the limitations on pre-competitive range communications?
- How are clarifications and communications appropriately used?

Discussion Topics

What should clarifications include?

1. To learn the relevance of past performance information

2. To respond to adverse past performance information if the offeror has not previously had that opportunity

3. To resolve minor or clerical errors such as

- Obvious misplacement of decimal point in proposed price or cost information
- Obviously incorrect prompt payment discount
- Obvious reversal of price f.o.b. destination and f.o.b. origin or
- Obvious error in designation of the product unit

4. Resolve issues of offeror responsibility or acceptability of the proposal as submitted.

The key word in applying clarifications is "limited" communication. Clarifications are permitted to give the offeror an opportunity to make clear and obvious key points about the proposal as originally submitted. The offeror may not revise, expand (by adding new information that enhances the proposal), or amplify its proposal. The intent of clarifications is to remove obvious ambiguity, not to permit the offeror to improve its position by drawing inferences from the Government's questions/information gathering exchanges and using those inferences to shade the meaning of the original proposal so that it becomes more attractive and more beneficial to the Government.

Of course, any opportunity for revision or enhancement must be made available to all offerors with proposals deemed acceptable for inclusion in a competitive range.

Communications are exchanges between the Government and offerors after receipt of proposals with the purpose of establishing a competitive range. Communications are authorized only when the offeror is not clearly in or clearly out of the competitive range. In other words, communications are used to determine whether an offer has a reasonable chance for award, i.e., should be included in the competitive range.

Specifically, communications:

- must be held with offerors whose past performance information is the determining factor that would prevent them from being in the competitive range. Adverse past performance must be addressed if the offeror has not had a prior opportunity to respond
- may be held with other offerors whose exclusion from or inclusion in the competitive range is uncertain.

What should communications be used to accomplish?

- Enhance the Government's understanding of the proposal (again, in order to determine whether to include the proposal in the competitive range):
- May address ambiguities of concern in the proposal (perceived deficiencies, weaknesses, errors, obvious omissions or mistakes)
- May address information relating to relevant experience
- Allow reasonable interpretation of the proposal (but not to enhance or revise it)
- Facilitate the Government's evaluation process

As stated previously, neither clarifications nor communications are permitted to be discussions in the pre-competitive range phase. Once a competitive range has been established, communications will be expanded to include discussions and may also include additional clarifications.

What are the limitations on pre-competitive range communications?

- Cure proposal defects or material omissions.

- Materially alter the technical or cost elements or the proposal .
- Otherwise revise the proposal.

Should any of the above circumstances occur, discussions have ensued. The Contracting Officer must then hold the same level of discussions with all offerors. For all practical purposes, the Contracting Officer has then established a competitive range that consists of all offerors. This could lead to holding discussions with offerors that do not have acceptable proposals and most probably would not be included in the competitive range. Accordingly, it is important not to let pre-competitive range communications stray into discussions.

How are clarifications and communications appropriately used?

Clarifications and communications are effective tools when used appropriately and well documented. They allow some limited exchanges with offerors to facilitate the Government's decisions concerning award without discussions or inclusion in the competitive range. Invocation of either clarifications or communications with one offeror does not require exchanges with all offerors - if they are handled correctly and documented carefully.

Care needs to be taken by the Contracting Officer to ensure that the exchanges are within the limits defined in FAR 15.306 (a) and (b) and that no offeror is allowed to revise its proposal as the result of these types of exchanges.

As with all elements of the source selection/negotiation process, clarifications and communications must be carefully documented by the Contracting Officer to insure that there is no appearance that one offeror is favored over another. The nature and extent of the exchanges needs to be set out clearly for the record.

PART VIII COST OR PRICE ANALYSIS

Background

Probable cost to the Government is a mandatory evaluation factor, FAR 15.404-1(d). Thus, this element must be evaluated in all procurements. There are two aspects of this evaluation. First, the contracting officer must ensure that the contract price, or cost and fee, is fair and reasonable. Second, in cost-reimbursement contracts the contracting officer must determine the probable cost of performance and use that cost in the selection process. The contracting officer shall use cost or price analysis to evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the work. The contracting officer shall document the cost or price evaluation.

The term "cost or pricing data" means all facts that, as of the date of agreement on the price of a contract, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.401 (Definitions); FAR 15.403 (Obtaining Cost or Pricing Data); FAR 15.404-1 (Proposal Analysis Techniques); and FAR 31.201-4 (Determine Allocability)

Issues/Questions

- What is price analysis and when should it be performed?
- What is cost analysis and when should it be performed?

Preferred Approaches

What is price analysis and when should it be performed?

Price Analysis

The contracting officer is required to make a price analysis on every procurement to ensure that the overall price to be included in the contract is fair and reasonable.
In the competitive negotiation process, price analysis is the preferred technique for determining price reasonableness because it permits the contracting officer to make the determination without a detailed analysis of the cost and profit elements of each proposal using cost analysis techniques.

Price analysis is generally based on data obtained from sources other than the prospective contractor. This data is gathered by the Government negotiating team from as many sources as

possible. Generally, to assure that the price being included in the contract is reasonable, a sound price analysis will be based on several different types of data.

The contracting officer is responsible for selecting and using whatever price analysis techniques will ensure a fair and reasonable price. One or more of the following techniques may be used to perform price analysis.

Comparison of proposed prices received in response to the solicitation. In this case competition is relied on to ensure that the costs are fair and reasonable.

Comparison of previously proposed prices and previous Government and commercial contract prices with current proposed prices for the same or similar items, if both the validity and the reasonableness of the previous prices can be established. A determination must be made that ensures that the price that is being compared to the proposed price has been determined to be fair and reasonable, either through presence of adequate price competition or some other manner such as cost or price analysis.

Use of parametric estimating. This analysis tool is used to identify inconsistencies in pricing that require further review. It is a technique used to estimate a particular cost or price by using an established relationship with an independent variable. Steps to follow when using this technique are:

- Define the dependent variable (e.g. cost dollars, hours, and so forth.)
- Select the independent variable to be tested for developing estimates of the dependent variable.
- Collect data concerning the relationship between the dependent and independent variables.
- Explore the relationship between the dependent and independent variables.
- Select the relationship that best predicts the dependent variable.
- Document your findings.

Comparison between competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements.

Comparison of proposed prices with independent Government cost estimates.

Analysis of pricing information provided by the offeror. Sufficient information must be obtained to determine the reasonableness of the proposed price. When there is insufficient information available from other sources, information must be requested from the contractor that is sufficient to determine a fair and reasonable price. Care must be taken to ensure that you request only the required information and not certified cost and pricing.

What is cost analysis and when should it be performed?

Cost Analysis

Cost analysis is used to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency. Cost analysis is: (1) the review and evaluation of the separate cost elements and profit/fee in an offeror's or contractor's proposal (including cost or pricing data or information other than cost or pricing data), and (2) Application of judgment.

A cost analysis must performed anytime that certified cost and pricing data is required as defined in FAR 15.403-(4)(a)(1). A proposal must be analyzed to determine what costs to use in developing your negotiation objective and what price you determine to be fair and reasonable. When using cost analysis to negotiate contracts a price analysis must also performed as it is possible to assure that all of the specific cost elements in a proposal are reasonable and determine that the overall price is not.

In accordance with FAR 15.404-1(d)(2), a cost realism analysis when awarding a cost type contract must be performed. This is a special analysis required primarily to ensure that proposed costs are not unrealistically low. In addition, this analysis provides the foundation for estimating the fee. Furthermore, a cost realism analyses may also be used on competitive fixed-priced incentive contracts or, in exceptional cases, on other competitive fixed-price type contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors proposed costs have resulted in quality or service shortfalls (See FAR 15.404-1(d)(3). Additionally, one of the criteria required for the determination of reasonableness and allocability is the determination that the cost is allocable to the contract. The FAR at 31.201-4 states that " a cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship.

Subject to the foregoing a cost is allocable if it (a) Is incurred specifically for the contract; (b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or (c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown".

Direct Costs: Those costs that are incurred specifically for the contract are identified as direct costs. These costs take the form of material, labor, tooling, subcontract costs and other direct costs. There are two aspects of these costs that must be analyzed, volume and unit price. As an example, the amount of labor hours, rates and skill mix proposed must be analyzed to determine if they are reasonable to perform the contract.

Indirect Costs: Indirect costs are (1) costs that cannot practically be assigned directly to the production or sale of a particular product. In accounting terms such costs are not directly identifiable with a specific cost objective, or (2) direct costs of such minor amount that the costs associated with directly accounting for them exceed the benefit of directly accounting for them.

These costs may be treated as indirect costs provided that the accounting treatment is consistently applied and it produces substantially the same results as treating the cost as a direct cost.

The term indirect cost covers a wide variety of cost categories and the costs involved are not all incurred for the same reasons. A firm may have as few as one or as many as one hundred cost accounts. In general indirect cost accounts fall into two major categories:

Overhead: These are indirect costs incurred primarily to support specific operations. Examples include: material overhead; manufacturing overhead; engineering overhead; field service overhead; and site overhead.

General and Administrative Costs (G&A): These are management, financial, and other expenses related to the general management and administration of the business unit as a whole. These costs may be either incurred by or allocated to the general business unit. Allocation occurs when home office expenses are allocated to a division as a business unit. Examples of G&A costs include; salary and other costs of the executive staff of the corporate or home office; salary and other costs of such staff services as legal, accounting, public relations, and financial offices; selling and marketing expense.

PART X COST/TECH TRADEOFFS UNDER "BEST VALUE" PROCUREMENTS

Background

Under a "Best Value" continuum there is a recognition that the Government always seeks to obtain the best value in negotiated acquisitions using any one, or a combination, of source selection approaches, and that the acquisition should be tailored to the requirement. At one end of this continuum is the low priced technically acceptable strategy, and at the other end is a process by which cost or price, past performance, and technical considerations can be traded off against each other to identify the proposal that provides the Government with the overall best value. Tradeoffs are used when it may be in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.

A best value analysis lends itself to determining the lowest cost alternative. Best value procurements involve tradeoffs between cost, technical and past performance--For example, if the government's requirement needs are to increase efficiency and thereby reduce the agencies operating cost, the purchase of a high end computer at a high price may a better value than a low end computer at a low price in achieving these requirements.

Establishing the evaluation scheme allowing for a cost/technical tradeoff decision allows for a great deal of discretion and the exercising of judgment by the Source Selecting Official (SSO).

Applicable statutes, procurement regulations, or small business regulations

Federal Acquisition Regulation (FAR) 15.101-1 (Tradeoff Process) and FAR 15.308 (Source Selection Decision)

Issues/Questions

- What are the steps in performing a cost/tech tradeoff?
- What documentation is needed for a tradeoff decision?

Discussion Topics

What are the steps in performing a cost/tech tradeoff?

Steps in Performing a Cost/Tech Tradeoff

The Request For Proposal (RFP) should contain language which establishes the procedures that allow award to other than the lowest price offeror or other than the highest technically rated offeror. After establishing all factors to be evaluated and their relative importance, the RFP must, "state whether all evaluation factors other than cost or price, when combined, are significantly

more important than, approximately equal to, or significantly less important than cost or price." See FAR 15.101-1(b)(2).

An evaluation of all the technical and management criteria should be performed in accordance with the evaluation scheme provided for in the RFP. It is important for the source evaluation team to develop written narratives which describe the strengths and weaknesses of each offer as they are important tools in making and documenting a tradeoff decision.

The price the Government will use in making a tradeoff decision should be defined in the RFP. For a fixed price offer, this will usually be the offered price. For a cost reimbursable contract, this may be calculated as a "most probable cost" under cost realism procedures.

If the Government receives an offer which, when evaluated offers both the lowest evaluated price and the highest rated technical/management offer, no tradeoff analysis is required. If however, that is not the case, the SSO should determine whether the value of technical and management differences between proposals justifies paying the cost differential between the proposals. The ability to differentiate meaningfully among the proposals is very important in making this decision. Often an RFP will state that the closer the technical score is, the more important cost will become.

What documentation is needed for a tradeoff decision?

Documentation of Tradeoff Decision

In accordance with FAR 15.308, source selection decision, "The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the SSO, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision".

The agency files should contain documentation which demonstrates that its evaluation of the offerors responses to a Request for Proposals was reasonable and in accordance with the criteria outlined in the RFP. In a protest, given the discretion granted to agencies in conducting best value procurements, disappointed offerors generally will have only two legal bases for challenging an agency's cost/technical tradeoff analysis - first, that the agency's underlying cost and technical evaluations that formed the basis for the cost/technical tradeoff are inconsistent with the terms of the solicitation, and second that the cost/technical tradeoff decision was unreasonable. There is no legal requirement that the agency quantify any cost/technical tradeoffs in dollars. An agency should use whatever evaluation approach (e.g., narrative, quantification) that best its needs. For example, agencies can use narrative explanations of its cost/technical tradeoff so long as it is reasonable and consistent with the criteria identified in the RFP. Some examples of rationale for the business judgments and tradeoffs made by the Source Selection Authority include, but are not limited to, the amount of cost differential, project or service criticality, and potential consequences to the DOE in the event of poor performance. The

determining factors should be described in a clear and convincing manner, providing justification as to how they relate to anticipated contract success.

PART XI AWARD WITHOUT DISCUSSIONS

Background

Part 15 of the FAR allows contracts award without discussions with the offerors if the solicitation states that the Government intends to evaluate proposals and make award without discussions. Clarifications are limited exchanges between the Government and offerors, that may occur without jeopardizing the ability to award without discussions. Additional information on the nature of clarifications versus discussions is presented in subsequent sections.

Applicable statues, procurement regulations, or small business regulations

FAR 15.306(a)(3) (Clarifications and Award Without Discussions), FAR 52.215-1 (Instructions to Offerors - Competitive Acquisition), 10 U.S.C 2305(b)(4)(A)(ii) and 41 U.S.C.253b(d)(1)(B)

Issues/Questions

- What is DOE's position regarding award without discussions?
- Why make an award without discussions?
- What are the guidelines regarding award without discussions?

Discussion Topics

What is DOE's position regarding award without discussions?

Contracting Officers should, to the maximum extent practicable, award contracts without discussions. However, consideration should be given to the nature of the requirement and the evaluation criteria to ensure that it would unlikely that discussions would result in any improvement to proposals.

Why make an award without discussions?

Discussions may add weeks to procurement lead time. The time involved in solicitation preparation, evaluation and source selection tax our limited procurement and program personnel resources. The additional time necessary to conduct negotiations imposes yet another burden on personnel that have many other commitments they must meet.

In most cases, discussions will not enhance the Government's ability to obtain best value. Though it is unlikely that discussion will improve an offerors chances of award, discussion will likely increase offerors costs since, they will need to keep the proposal team in tact in order to address discussion questions as well as prepare a revised proposal.

What are the guidelines regarding award without discussions?

Application of the following guidelines will increase the likelihood of evaluating proposals and making awards without discussions.

Evaluation factors must be specific to the needs of the program and the statement of work in the solicitation as opposed to using generic factors that can be applied to many different types of procurements.

Information that offerors are required to submit for evaluation must be closely tied to the evaluation factors. Solicitation instructions for submission of information must be specific and in sufficient detail so that proposals submitted by responsive offerors will contain all of the information necessary for evaluators to clearly assess, in accordance with the evaluation factors, the offeror's strengths, weaknesses and risks in performance of the prospective contract.

The solicitation should state that any proposed deviation from the terms and conditions in the solicitation may make the offer unacceptable for award without discussions, and that the Government may make an award without discussions to another offeror that did not take exception to the terms and conditions of the solicitation.

The solicitation must state that the Government intends to evaluate proposals and make award without discussions. This language is contained in FAR clause 52.215.1 without alternates. If a solicitation contains such a notice and the Government determines it is necessary to conduct discussions, the rationale for doing so must be documented in the contract file.

PART XII CONTENTS OF AN EVALUATION REPORT

Background

The FAR requires that the evaluation of the relative strengths, deficiencies, and significant weaknesses of a proposal be documented in the contract file. The content of this evaluation should be in the form of a report that definitively and comprehensively reflects the Government's evaluation consistent with the evaluation criteria stated in the solicitation. Furthermore, the report should accurately reflect the deliberations of the Source Evaluation Board or the Technical Evaluation Committee (SEB/TEC), and be consistent with the rating plan. Though the content of the report is consistent for a either a SEB or TEC, the report prepared by the SEB should be significantly more detailed.

The evaluation report outline below is a listing of areas that may be appropriate to address in the evaluation report. The selection and use of these areas must be consistent with the nature of the specific proposals being evaluated and the particular situation of the individual acquisition. Some of these areas may be combined as appropriate. Some of these areas will only be applicable depending on the circumstances of the acquisition, e.g., establishing the competitive range, award without discussions. The subject areas may be used, as appropriate, for both the initial evaluation report (competitive range report) and the final evaluation report. The individual areas may be included in the main body of the report or certain areas may be more appropriate for inclusion as an attachment to the report.

Applicable Regulations

FAR 15.305 (Proposal Evaluation) and FAR 15.308 (Source Selection Decision)

Issues/Questions

- What are the guiding principles for developing an evaluation report?
- What does an evaluation address and what does a sample resemble?

Discussion Topics

What are the guiding principles for developing an evaluation report?

Develop concise and comprehensive documentation that reflects the Government's overall evaluation of proposals.

The evaluation report becomes the official record documenting the logic and rationale used to arrive at the evaluation and ratings.
The evaluation report must as a minimum contain the relative strengths, weaknesses, deficiencies, and other considerations of each proposal evaluated against the stated evaluation criteria contained in the solicitation.

Include scores, adjectival ratings, and relative rankings of offerors in the evaluation report.

The level of detail of the evaluation documentation is dependent on the nature, scope, and complexity of the acquisition. Evaluated strengths, weaknesses, and deficiencies must be addressed in sufficient detail to support the rating or ranking given.

When composing the text for strengths, weaknesses, and deficiencies, include the following aspects: (1) what is proposed; (2) what is the Government's assessment, i.e., good or bad/strong or weak; (3) why is it good or bad, i.e., what is the effect of what is proposed; and (4) how does it relate to the evaluation criteria.

The report should reflect the process used to evaluate proposals (consistent with the rating or source selection plan).

The evaluation report should either incorporate, attach, or reference all relevant evaluation information upon which the panel or board used to arrive at its consensus evaluation, e.g., audits reports, technical evaluation reports, etc.

Develop a comparative assessment of proposals that can be used by the source selection official (SSO) as a basis for making a selection decision.

If discussions were held, address the weaknesses/deficiencies of the initial proposal and how the revised proposal eliminated/did not eliminate the weaknesses/deficiencies.

Provide sufficient information so that the SSO can clearly understand the area being evaluated and how it relates to the stated evaluation criteria.

Provide information that helps the SSO appreciate distinctions among proposals and the relative significance of those distinctions.

Develop documentation which the Government can use as a basis for debriefing unsuccessful offerors.

The report can become either the "script" for the oral debriefing or written excerpts from the report can be provided to individual offerors as a part of a written debriefing.

Consider that the evaluation report may be reviewed by a third party, e.g., GAO or a court, and the report needs to be very definitive as to its conclusions reached and the basis for such conclusions.

What does an evaluation address and what does a sample resemble?

Sample Evaluation Report Outline

Executive Summary

Description of Acquisition and Solicitation

Proposals Received
Summary Evaluation and Ratings

Competitive Range Determination or Award Without Discussions

Special Considerations

Description of Acquisition

Mission Need and Scope of Work

Programmatic Approvals

Funding

Development of Acquisition Strategy

Procurement History

Development of Source List

Evaluation Panel/Board Membership

Name, Functional Title, and Organization

Chronology of Major Events

Description of Request for Proposals (RFP)

Qualification Criteria

Technical Evaluation Criteria, Sub-criteria, and Relative Weights

Business Management Evaluation Criteria, Sub-criteria, and Relative Weights

Cost/Price Evaluation Criteria and Relative Weight

Fee Evaluation Criteria and Relative Weight

Basis for Award

Amendments to RFP

Evaluation Process

Rating/Evaluation Plan

Scoring or Rating Methodology

Use of Committees and Advisors

Preproposal Conference and Site Tour

Date and Place

Number of Firms Attending

Elimination of Proposals Before Initial Ratings

Late Proposal

Not Meet Qualification Criteria

Totally Unacceptable Proposal

Proposal Evaluation

Technical Proposal Evaluation

- Strengths, Weaknesses, and Deficiencies
- Scoring or Rating - Initial and final
- Comparative Assessment Among Proposals

Business Management Proposal Evaluation

- Strengths, Weaknesses, and Deficiencies
- Scoring or Rating - Initial and final
- Comparative Assessment Among Proposals

Past Performance Evaluation

Means of Obtaining Information

Results of Past Performance Information

Comparative Assessment Among Proposals

Cost/Price Evaluation

Audit Results

Comparison to Independent Government Cost Estimate

Probable Cost

Fee Evaluation

Weighted Guidelines Analysis

Comparison with DOE Fee Curves

Assumption of Risk

Effective Range of the Incentive for CPIF Contracts

Other Considerations

Organizational Conflicts of Interest

Foreign Ownership, Control, or Influence

Intellectual Property

Offer and Other Documents

Financial Capability

Responsibility of Prospective Contractors

Special Areas of Concern

Competitive Range Recommendation

Included in Competitive Range Report

Competitive Range Determination

Included in Final Evaluation Report

Discussions with Offerors in the Competitive Range

Principal Areas (weaknesses/deficiencies) Covered During Written or Oral Discussions

Summary of Differences Between Initial and Final Proposals

How the Revised Proposal Affected the Weaknesses/Deficiencies

Award Recommendation

If Requested by the SSO

Signature Page for Evaluators

PART XIII PROPERLY DOCUMENTED RECORD

Background

Proper documentation of the entire Source Selection Process is a critical aspect of source selection that can seriously affect the success of the procurement.

The source selection authority's (SSA) decision shall be based on a comparative assessment of proposals against all source selection criteria in the solicitation. While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA's independent judgment. The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the SSA, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision.

The source selection process requires proper documentation. Proper documentation can greatly assist the SSA in understanding the rationale employed by the evaluation team and give confidence to the SSA that the findings of the Source Evaluation Board (SEB) were consistent with the stated evaluation criteria and rating plan and are reliable. The documentation can also demonstrate to any third-party forum that the evaluation is performed in a fair and honest manner and in a manner consistent with the solicitation. Also, a properly documented record will greatly assist those called on to justify the selection decision.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.308 (Source Selection Decision); FAR 15.102 (Oral Presentations); and 15.305 (Proposal Evaluation)

Issues/Questions

- What documentation should be used to support the selection decision?
- What evidence should be provided regarding proposal evaluations?
- How are oral presentations documented?
- What documentation is necessary regarding electronic communications?

Discussion Topics

What documentation should be used to support the selection decision?

Documentation for the Selection Decision

FAR 15.308 requires that the "documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the [Source Selection Authority], including benefits associated with additional costs.

In ITT Federal Services International Corp., Comp. Gen. Dec. B-283307.2, Nov 3, 1999, the Comptroller General has interpreted this requirement as follows:

> ITT contends that the selection decision document here is inadequate, on its face, to support the cost/technical tradeoff it purports to make. Where a cost/technical tradeoff is made, the selection decision must be documented, and the documentation must include the rationale for any tradeoffs made, "including benefits associated with additional costs." Federal Acquisition Regulation (FAR) sect. 15.308; Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD para. 61 at 5. …The selection decision document here fails to meet the standard set forth in the FAR for explaining the rationale for tradeoffs that lead to incurring of additional costs. As quoted above, the document first concludes that overall the proposals were technically equal, then that CSA's costs were reasonable, and that the quality of CSA's proposal outweighs its higher cost. Not only are these findings inconsistent, but there is no explanation of the benefits associated with the allegedly higher costs of the CSA proposal.

In the above case, the protest was sustained and the decision recommends, in part, that the agency perform a new best value determination.

The Source Evaluation Board (SEB) must bear in mind that while the SSA has a great deal of discretion in making the source selection decision, he/she must first have a full understanding of the evaluations. For this reason the SSA must be presented with sufficient information on each of the competing offerors and their proposals in order to make a comparative analysis and arrive at a rational, fully supportable selection decision. Narrative statements serve as the most important part of the documentation supporting the decision. The selection decision must show the relative differences among proposals and their strengths, weaknesses and risks in terms of the evaluation factors. Each of these is an essential part of providing adequate support for the ultimate selection decision. Narrative statements serve to communicate specific information concerning relative advantages or disadvantages of proposals to the SSA that the rating scheme alone (whether adjectival or numerical) obviously cannot.

Such documentation need not be lengthy, as long as it effectively conveys the basis for the evaluator's assessment.

Proposals receiving the same rating can still have obvious distinctions, requiring an assessment of the offeror's ability to accomplish the task; these distinctions could have a direct impact on the source selection decision.

Preparation of such statements provides an excellent discipline for the evaluators because it forces them to justify their ratings and be consistent with the stated evaluation criteria.

With the high costs for the preparation of a proposal, offerors want to be assured that the evaluation was fair and impartial. Protests often arise when an offeror feels that this was not the case.

The Comptroller General has ruled that an award will not be overturned unless there is no rational basis for the award decision or unless the RFP criteria are not adhered to. See 51 Com. Gen. 272 (1971). Procuring agencies have an obligation to adequately document their source selection decisions so that a reviewing body can determine whether those actions were in fact proper. See KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD

What evidence should be provided regarding proposal evaluations?

Proposal Evaluation

Evaluation decisions must be based on tangible evidence to support an agency's decision. In Amtec Corp., Comp. Gen Dec. B-240647, 91-2 CPD, the Comptroller overturned a marginal technical evaluation because the agency record contained no evidence supporting such a grading. Similarly, in Compuware Corp. GSBCA 9533-P, 88-3 BCA, the board rejected a cost realism evaluation in which the contracting officer refused to accept auditor conclusions. The board commented that the contracting officer's decision was not supported by any evidence. Therefore, it is clear that proposal evaluations conducted in accordance with FAR 15.305 must be appropriately documented in order to withstand scrutiny.

How are oral presentations documented?

Oral Presentations and Documentation

There are numerous instances where the source selection decision was overturned because it lacked a reasoned analysis (e.g., there was no documentation of the relative strengths and weakness of the proposals or not being able to furnish sufficient supporting documentation).

Complicating even further the matter of sufficient documentation is the use of oral presentations. FAR 15.102(e) requires that the CO keep a record of oral presentations, but allows wide discretion as to type and degree of documentation required. This places a greater burden on the SEB to be able to capture the data provided by the proposer. To document the oral presentation,

To document the oral presentation, the SEB can either rely on all offerors presenting a sufficient amount of detailed graphics, the dictation skills of evaluators, or by preserving a record of the oral presentation proceedings through the use of video or audio recording. Remember, where an agency fails to create or retain such documentation, it bears the risk that the GAO will not conclude that the agency had a reasonable basis for its procurement decisions. See American President Lines, B-236834.2, July 20, 1990.

What documentation is necessary regarding electronic communications?

Electronic Record Documentation

Given the need for proper documentation, the advent of the electronic age requires that additional measures be taken to ensure adequacy of the record. Given the requirement for proper documentation, the contract file must still contain the final record. Some offices have been using electronic media for storage of these records. With the rapid changes in information technology, will that media be readable in five or ten years? All critical documents (Source Selection Statements, SEB Reports, approvals, protest decisions, etc.) should still be kept in the official contract file. E-mail correspondence and electronic approvals must still be printed and kept in the official contract file. The electronic age has also revolutionized the way we do business and raises concerns regarding the safeguarding and protecting of procurement sensitive data. When transmitting procurement sensitive data electronically, adequate precautions must be taken to ensure data does not end up in the wrong hands. In those rare cases when sensitive data is transmitted, the use of password is essential.

PART XV FOREIGN OWNERSHIP, CONTROL OR INFLUENCE (FOCI)

Background

Before awarding a contract the performance of which requires access to classified information or a significant quantity of special nuclear material, the Department of Energy (DOE) must insure that the contractor has a Facility Clearance. In deciding whether or not to grant such a Facility Clearance, DOE must determine whether or not the contractor is subject to Foreign Ownership, Control or Influence that could pose an undue risk to the common defense and security.

In addition to these regulatory FOCI situations, the DOE is also prohibited by statute from awarding a DOE contract under a national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract. Such an award can be made only after obtaining a Secretarial waiver in accordance with the statutory provisions.

Before awarding a contract the performance of which requires access to classified information or a significant quantity of special nuclear material, DOE must determine whether or not the contractor possesses a "Facility Clearance." A "Facility Clearance" is an administrative determination that a facility is eligible for access to classified information or special nuclear material. In deciding whether or not to grant a Facility Clearance, DOE must determine whether the contractor is subject to Foreign Ownership, Control or Influence.

Foreign ownership, control, or influence means the situation where the degree of ownership, control, or influence over an offeror by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information or special nuclear material may possibly result.

In order to make this determination, DOE obtains FOCI information from offerors using the solicitation provision at DEAR 952.204-73, Standard Form 328, Certificate Pertaining to Foreign Interests, (and various other documents relating to the company's finances; owners, officers and directors, etc.). Based on the information disclosed by the offeror, and after consulting with the DOE Office of Safeguards and Security, the contracting officer must determine that award of a contract to an offeror will not pose an undue risk to the common defense and security.

In those cases where FOCI is present, and the DOE determines that an undue risk to the common defense and security may exist, the offeror or contractor shall be requested to propose within a prescribed period of time a plan of action to avoid or mitigate the foreign influences by isolation of the foreign interest.

The types of plans that a contractor can propose are: (1) measures which provide for physical or organizational separation of the facility or organizational component containing the classified information or special nuclear material; (2) modification or termination of agreements with foreign interests; diversification or reduction of foreign source income; (3) assignment of

specific security duties and responsibilities to board members or special executive level committees; or (4) any other actions to negate or reduce FOCI to acceptable levels. The plan of action may vary with the type of foreign interest involved, degree of ownership, and information involved so that each plan must be negotiated on a case by case basis.

If the offeror and the DOE cannot negotiate a plan of action that isolates the offeror from FOCI satisfactory to the DOE, then the offeror will not receive a Facility Clearance and shall not be considered for contract award.

National Security Program Contracts

In addition to the general FOCI situations described above, which are governed by regulatory provisions (i.e., DEAR), there is also a special FOCI situation that is governed by statute.

Specifically, 10 U.S.C. § 2536, prohibits the award of a Department of Energy contract under a national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract. (Note that the entity must be controlled by a foreign government for this statute to apply.)

"Entity controlled by a foreign government" means any domestic or foreign organization or corporation that is effectively owned or controlled by a foreign government or any individual acting on behalf of a foreign government. "Effectively owned or controlled" means that a foreign government or an entity controlled by a foreign government has the power, either directly or indirectly, whether exercised or exercisable, to control or influence the election or appointment of the Offeror's officers, directors, partners, regents, trustees, or a majority of the Offeror's board of directors by any means, e.g., ownership, contract, or operation of law. "Proscribed categories of information" include: (1) Top Secret information; (2) Communications Security (COMSEC) information (3) Restricted Data, as defined in the Atomic Energy Act of 1954, as amended; (4) Special Access Program (SAP) information; or, (5) Sensitive Compartmented Information (SCI).

The Secretary of Energy may waive this prohibition, pursuant to 10 U.S.C. 2536(b)(1)(A), if the Secretary determines that waiver is essential to the national security interests of the United States.

The Secretary may also waive this prohibition in the case of a contract awarded for environmental restoration, remediation, or waste management at a Department of Energy facility, if the Secretary determines that the waiver will advance the environmental restoration, remediation, or waste management objectives of the Department and will not harm the national security interests of the United States, and the entity to which the contract is awarded is controlled by a foreign government with which the Secretary is authorized to exchange Restricted Data under section 144c of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)) (10 U.S.C. 2536(b)(1)(B).

Applicable statutes, procurement regulations, or small business regulations

10 U.S.C. § 2536; Executive Order 12829, Jan 6, 1993, National Industrial Security (NISP); National Industrial Security Program Manual, DOD 5220.22-M; Department of Energy Acquisition Regulations (DEAR) 904.70 (Foreign Ownership, Control or Influence over Contractors); DEAR 952.204-2, (Security Clause); DEAR 952.204-73 (Facility Clearance); DEAR 952.204-74 (Foreign Ownership, Control or Influence over Contractors; and Standard Form 328, (Certificate Pertaining to Foreign Interests;

Issues/Questions

What procedures are followed when a contractor requires access to classified information or a significant quantity of special nuclear material?

Discussion Topics

What procedures are followed when a contractor requires access to classified information or a significant quantity of special nuclear material?

The contracting officer should receive a Procurement Request-Authorization (DOE F 4200.33 or equivalent) and Contract Security Classification Specification (CSCS) (DOE F 5634.2) from the procurement request originator.

Upon receipt of these forms, the contracting officer must include the appropriate terms and conditions in the solicitation [DEAR 952.204-73, Facility Clearance], and should state in the solicitation that if an offeror is included in the competitive range, they may be required to complete the FOCI Certificate Pertaining to Foreign Interests, SF 328, which contains questions concerning the degree and extent of foreign ownership and control over the offeror.

Once the contracting officer identifies a competitive range, the Defense Security Service/ Central Verification Activity should be reviewed and the local safeguards and security office should be contacted to determine if the possible offerors have an approved facility clearance.

If an offeror possesses a facility clearance, the contracting officer will send the CSCS (DOE F5634.2) to the local DOE safeguards and security office for approval. Once the local DOE safeguards and security office signs and returns the CSCS to the contracting officer, an award of the contract can be made.

If an offeror in the competitive range does not possess a facility clearance, the contracting officer shall forward a FOCI package to the offeror (and any tier parents, if applicable). This package includes the Certificate Pertaining to Foreign Interests (SF 328).

After obtaining the Certificate Pertaining to Foreign Interests (SF 328) and accompanying documents from an offeror, the contracting officer must review the submission to ensure that the

SF 328 as well as all supporting documentation are attached prior to submitting the package to safeguards and security.

Upon receipt of the complete FOCI package, the contracting officer forwards the FOCI package to safeguards and security for processing.

Upon completion of DOE's review of the offeror's foreign involvement, the local safeguards and security office should provide the contracting officer with written notification of the results of the FOCI review. If the FOCI determination is favorable and the offeror is granted a DOE-approved facility clearance, the local DOE safeguards and security office will sign and return the DOE F 5634.2 (CSCS) to the contracting officer. (If the FOCI determination is unfavorable, the safeguards and security office will attempt to negotiate a plan to negate or mitigate FOCI. If a satisfactory plan cannot be negotiated then the offeror will not receive a Facility Clearance and the offeror shall not be considered for contract award.)

Contract award can be made upon: (1) receipt of notification of a favorable FOCI determination from the local safeguards and security office, (2) receipt of the signed DOE F 5634.2 (CSCS) from the local DOE safeguards and security office, and (3) assurance from the contracting officer that the appropriate security clauses are included in the contract.

It should be noted that if, after contract award, a contractor's FOCI situation changes so that it becomes subject to FOCI for the first time or the extent and nature of FOCI changes, DOE must assess whether those changes will pose an undue risk to the common defense and security.

In making this determination, the Department considers proposals made by the contractor to avoid or mitigate foreign influences. If these foreign influences cannot be avoided or mitigated, the contracting officer may terminate the contract.

The contracting officer may terminate the contract for default if the contractor fails to meet obligations imposed by the FOCI clause (e.g., provide the information required by the clause, or make the clause applicable to subcontractors), or if, in the contracting officer's judgment, the contractor creates a FOCI situation in order to avoid performance or a termination for default. The contracting officer may terminate the contract for convenience if the contractor becomes subject to FOCI and for reasons other than avoidance of performance of the contract, cannot, or chooses not to, avoid or mitigate the FOCI problem. In any event, without an adequate mitigation plan, the contractor's Facility Clearance will be terminated and they can no longer perform work requiring access to classified information or a significant quantity of nuclear material.

PART XVI DEBRIEFINGS

Background

In FAR Part 15 procurements, contracting officers are required to offer debriefings to all unsuccessful offerors. The debriefing is the method by which the offerors obtain information to decide whether to protest and is a possible venue for heading off a protest. Debriefings need to be informative and professionally presented. They should never degenerate into debates over the propriety of the source selection process or the accuracy of the government's evaluation. The general approach to a debriefing should be to provide all required information, satisfy the debriefed offeror's reasonable questions about the procurement, and provide as much information as possible without prejudicing the procurement in the event it must be reopened for any reason. The timing of a debriefing affects both the timeframe for filing a GAO protest and also the time within which a protest will require the protested contract performance to be suspended. Because most of DOE's Part 15 procurements are for services, this guidance is written with services procurements in mind.

When a contract is awarded on a basis other than price alone, unsuccessful offerors, upon their written request, shall be debriefed as soon as possible and furnished the basis for the selection decision and contract award.

However, the debriefing requirements only apply to procurements carried out under FAR Part 15 requirements. There is no requirement for a debriefing for placement of an order under a schedule contract pursuant to FAR Subpart 8.4, for placement of a contract using simplified acquisition procedures under FAR Part 13 (including the test program for certain commercial items in FAR Subpart 13.5), for placement of a task or delivery order under an indefinite delivery contract pursuant to FAR Subpart 16.5, for an contract issued pursuant to the sealed bid procedures of FAR Part 14, or at the time an option is exercised.

The debriefing should provide the unsuccessful offeror with sufficient information to enable him to understand why his proposal was not selected and to enable him to present a better proposal in a future competition. In other words, the information should be of "value" to the unsuccessful offeror.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.503 (Notifications to Unsuccessful Offerors); FAR 15.505 (Preaward Debriefing of Offerors); FAR 15.506 (Postaward Debriefing of Offerors); FAR 15.507 (Debriefing Available When Procurement Reopened); FAR 33.104(c) (Interrelationship of Debriefing and Stay/Suspension of Contract); 4 C.F.R. § 21.2(a)(2); 31 U.S.C. § 3553(d)(4)(B) (Requiring Suspension of Protested Contract Performance if Protest is Filed Within Five Days of Required and Requested Debriefing); and 41 U.S.C. § 253b(e), (f), (g) (Preaward and Postaward Debriefing Requirements).

Issues/Questions

- What should be the contracting officer's strategy?
- When should debriefings be held and how should they be scheduled?
- What is the effect of the debriefing schedule on potential protests?
- What are the special considerations for preaward debriefings?
- What the clocks start when debriefings are conducted?
- What information is to be provided and when should it be provided?
- What information may not be provided?
- Who should attend debriefings?
- What are "Open Book" debriefings?
- What common questions or problems are associated with debriefings?

Discussion Topics

What should be the contracting officer's strategy?

The Contracting Officer's strategy

The contracting officer should plan for the debriefing well before award is made. Based on the particular circumstances of the procurement, the contracting officer should devise a debriefing strategy to provide as much information as the offeror might reasonably request and should prepare for likely offeror questions. Some contracting officers have found it useful to request the offerors to provide any questions in writing a day or so before the debriefing. This gives the agency time to review the questions and provide a more cogent answer to the questions. Even if the offeror provides questions in advance, it should not and cannot be prohibited from posing additional questions at the debriefing. The offeror should come away from the debriefing with an understanding of why its proposal was not selected. Oftentimes there are one or two elements of the offeror's strategy that negatively affected the evaluation and that can be summarized for the offeror's benefit. For example, an offeror might have decided that it understood the government's requirements better than the government and pursued a strategy of offering the government what the offeror believed was best notwithstanding the requirements in the solicitation.

In this instance, it can be helpful to be prepared to review the portion of the solicitation that stated these requirements. Where discussions were held, it can be very helpful to point out to an offeror where the issue that led to its lack of success was raised in discussions.

An understanding of the perspective of a disappointed offeror is sometimes useful in conducting a debriefing. Preparation and submission of a proposal may be a time consuming, costly, and a sometimes emotional exercise for the offeror's proposal team. Nonacceptance of a proposal under such circumstances can produce a degree of emotional and professional trauma in the team members. In response disappointed offerors may react with resentment ("How could I not win?!"), suspicion ("This process must be rigged!"), and anger ("The agency has it in for me!"). As a consequence, many debriefings are not viewed by disappointed offerors as an opportunity

to learn how to improve the next time, but rather as an opportunity to vent, demonstrate the poor judgment of the selecting official and evaluators, and identify a basis to overturn the decision through a, bid protest. Although government personnel frequently respond to this reaction by offering as little information as possible, this is not a desirable strategy for the debriefing. Indeed it is frequently more productive to use the debriefing to discharge the emotion, demonstrate the procedural credibility of the decision, and convince the disappointed offeror that a basis for protest does not exist. Strategies for doing so should be fully considered in preparing for the debriefing.

When should debriefings be held and how should they be scheduled?

The general principle applicable to debriefings is that an unsuccessful offeror should be offered a debriefing soon after DOE determines that the offeror is unsuccessful. The FAR distinguishes between preaward and postaward debriefings, depending on when the debriefing is held. The FAR establishes a clear preference that an offeror excluded from the competitive range be provided with a preaward debriefing, and we address the implications of this choice in the next section. A postaward debriefing should be held as soon as possible after the award.

The optimum schedule has the contracting officer faxing a letter to the unsuccessful offeror on day 0, informing the unsuccessful offeror of its right to request a debriefing within three days and, in the same letter, informing the unsuccessful offerors of the offered date for their debriefings should they choose to request a debriefing. The offered date should optimally be a date between four and eight days after the unsuccessful offeror letter is faxed. An unsuccessful offeror does not have the right to any particular schedule or location for the debriefing. For postaward debriefings, the letter offering the debriefing optimally should be sent to the offeror on the day of award. For preaward debriefings, the letter should be sent as soon as DOE makes a determination that the offeror is no longer under consideration for award.

What is the effect of the debriefing schedule on potential protests?

Effect of the debriefing schedule on potential protests

In a FAR Part 15 procurement, a company cannot pursue a GAO protest on an issue other than a solicitation issue before its debriefing, if that debriefing was "requested and required." GAO will dismiss a protest filed before the debriefing as premature. Therefore, it is generally best to schedule the debriefing very soon after the offeror is no longer under consideration for award.

What are the special considerations for preaward debriefings?

Special considerations for preaward debriefings

If the offeror was excluded from the competitive range, the debriefing generally should be held as a preaward debriefing soon after the offeror is notified of its exclusion from the competitive range. The debriefing may be held as a postaward debriefing based on the CO's decision or the offeror's request, but these choices have different consequences.

If the contracting officer delays the preaward debriefing

The contracting officer has the discretion to delay the debriefing until after award, based on "compelling reasons" that holding a preaward debriefing is not in the best interests of the government. The contracting officer is required to document the rationale for delaying the debriefing. If the government decides to delay the debriefing until after award, the unsuccessful offeror cannot protest until after the debriefing and, if there is a successful protest, the procurement actions after the offeror was excluded may be nullified.

If the offeror requests that the preaward debriefing be delayed

The offeror can request that the government delay a preaward debriefing until after award. In the event that the debriefing is delayed due to the offeror's request, the contracting officer should indicate in writing that debriefing is being postponed at the offeror's request. In the event the offeror requests the government to delay the debriefing from preaward to postaward, GAO generally will not find a protest based on the debriefing to be timely.

What clocks start when debriefings are conducted?

Clocks

Once a "required and requested" debriefing is held, two clocks start to run on the offeror's time for filing a protest. The first clock determines whether GAO will consider the protest. Generally, for a protest to be timely filed at GAO, it must be filed within ten days after the debriefing. If the protester waits until more than ten days after it learned of the basis for its protest and that date is more than ten calendar days after the debriefing, GAO will dismiss the protest as untimely. Please note that protesters can also pursue protests at the Court of Federal Claims, which does not have a ten calendar day time limit for filing protests. The second clock determines whether the agency will have to stay the award of the protested contract or suspend performance on the protested contract. If a protest is filed at GAO and GAO notifies DOE of the protest within either five calendar days after debriefing or ten calendar days after contract award, whichever is later, DOE must suspend performance of the protested contract. If GAO notifies DOE of a protest filed before award is made, DOE must stay the award of the protested contract. In both cases, the stay is in place until GAO decides the protest or until DOE overrides the stay.

What information is to be provided and when should it be provided?

FAR 15.506(d) and 15.505(e) set forth detailed lists of information to be provided and the applicable list provides a fairly good agenda for the debriefing.

Information in advance

Much of this information can be provided in advance of the actual debriefing, either in the unsuccessful offeror letter or in a later written communication prior to the debriefing. It is a

better practice to provide the debriefed offeror with a copy of its own evaluated strengths and weaknesses before the debriefing. This practice saves time for everyone, and prevents disagreement over what was said, gives the offeror a chance to get past any emotional reaction to the strengths and weaknesses in the privacy of its offices, and usually improves the cogency of the questions asked at the debriefing.

Dialogue

Because the debriefing rules require the government to provide reasonable responses to relevant questions about whether source selection procedures were followed, it is virtually impossible to provide a complete debriefing to an offeror without an opportunity for dialogue, either in person or by telephone.

Interpretation of "overall ranking" and "technical rating"

When FAR 15.506(d)(3) refers to providing the "overall ranking of all offerors," it means the ranking when there was a combined ranking including cost/price and technical factors and does not require the CO to provide just the technical rankings or just the cost/price rankings. DOE generally has not performed such rankings in its source selection process, nor are such rankings required. When FAR 15.506(d)(2) refers to providing the "technical rating" of the awardee and of the debriefed offeror, it does not mean that every factor and sub-factor score must be revealed. If a competitive range was drawn and discussions were held, there is no requirement to provide the offeror with its or the awardees pre-discussions scores. There is no requirement to provide the offeror with the awardee's sub-factor scores. Providing more than the required information concerning the awardee's scores can be regrettable if the procurement must be reopened for corrective action, a change in requirements, or some other reason. Moreover, in some instances, providing specific scoring information could amount to a violation of the prohibition against providing point-by-point comparisons between the awardee's and the debriefed offeror's proposals.

Whose ratings should be provided?

In the unlikely and hopefully rare event that the source selection official disagrees with aspects of the technical evaluation committee's report, either with respect to scores or to the strengths and weaknesses, the information that is required to be provided to the offeror is the evaluation on which the selection was based, that is, the source selection official's evaluation.

What information may not be provided?

FAR 15.505(f) and 15.506(e) provide detailed lists of information that must not be provided in the debriefing. The usual item that comes up is the prohibition on providing "point-by-point comparisons of the debriefed offeror's proposal with those of other offerors." For this reason, it is advisable that the government not have the other offerors' proposals or the evaluation of the other offerors in the debriefing room. Some agencies take the position that revealing detailed score

information about the awardee may constitute providing point-by-point comparisons. An exception to these limitations exists in the form of an "open book debriefing" described below.

Who should attend debriefings?

The FAR provides that the contracting officer is in charge of the debriefing and anticipates that he or she will get support from technical and legal personnel as needed. Neither the Source Selection Authority (SSA), nor the SEB Chair, or the individual SEB team members are required to attend. Normally it may be sufficient to have the contracting officer, a technical evaluator (to ensure that communication conveying the technical evaluation are accurate), and counsel to the procurement attend the debriefing. It is a good practice to have counsel present, especially if the offeror indicates it is bringing legal counsel to the debriefing, there are indications that a protest may be filed, or the procurement is significant based on dollar size, complexity, or other sensitivity. On those occasions where the contracting officer does not have the knowledge or expertise to explain the cost evaluation, it is advisable to bring someone who has that knowledge and expertise. Notwithstanding the foregoing, it should be noted that the presence of other critical officials in the source selection process such as the SSA and the SEB chair may aid in the presentation to the disappointed offeror and add to the credibility of the source selection.

These officials are particularly useful in explaining the basis for the selection decision and the results of the SEB's evaluation of the offeror's proposal. As the number and type of participants in the debriefing grows, however, the contracting officer must take particular care in preparing for and controlling the communication. Coordination with counsel is critical.

What are "Open Book" debriefings?

"Open Book" debriefings

In some very large, complex procurements, generally M&O procurements, DOE has used a technique called open book debriefings, in which DOE and all the offerors enter into a confidentiality agreement that permits DOE to reveal more information in the debriefing than is normally permitted. This technique has been extremely successful, but it is properly reserved for very large, complex procurements that do not involve repetitive requirements. If used improperly, this technique may conflict with the FAR and/or result in potential violations of the Trade Secrets Act (which subject the government personnel to personal criminal penalties as well as significant potential fines). Therefore, this technique should only be used after consultation with DOE counsel who can draft the appropriate agreements and ensure that all necessary consents are obtained.

What common questions or problems are associated with debriefings?

Common questions and problems

Do not debate the evaluation or the selection

The job of the debriefer is to provide information to the offeror about the procurement and not to reconsider the evaluation or debate it. This means that it is more important to listen to complaints about the evaluation results than to respond to them. It is especially important not to speculate about what would have happened if the offeror had proposed something different or a lower price.

Be sure the debriefing has a definite conclusion

The debriefing should have a definite conclusion so that the time when the offeror's two protest clocks begin to run is clear. Once DOE has provided the required information and the offeror has finished asking its "relevant questions about whether the source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed," the contracting officer should indicate that the debriefing is concluded. This means that it is strongly ill-advised to tell a protester that "we'll get back to you" on a topic. If necessary, take a short break during the debriefing and seek whatever advice or information or document is needed. A well-prepared debriefing team almost never needs an additional day to provide required information or respond to relevant questions.

Recording the debriefing

The government is not required to record the debriefing nor to permit the debriefed offeror to make an audio or video recording. DOE contracting officers have generally denied offerors' requests to record a debriefing. If the contracting officer considers agreeing to a request to record the debriefing, he or she should insist that two identical recordings be made and one left with the agency. This will avoid disputes over whether the recording was altered in some way. The contracting officer is required to prepare a summary of the debriefing and include it in the contract file.

Even untimely debriefing requests should be accommodated

If an offeror does not request a debriefing in a timely fashion, but later requests a debriefing, the better practice is to provide the debriefing but to be clear that it is an accommodation and not a "requested and required" debriefing. The contracting officer should, however, insist that the request be in writing and should include documentation in the file that the debriefing was not timely requested.

The awardee is also entitled to a debriefing

Although debriefings are commonly provided to unsuccessful offerors, FAR 15.506(a)(1) provides that offerors can request debriefings and does not exclude the awardee.

Debriefings go forward even if there is a protest

Sometimes an offeror will protest or state its intent to protest before the debriefing. This does not affect the offeror's right to a debriefing. In these instances, it is obviously prudent to have counsel present and involved in the debriefing planning.

Take a break

It is generally advisable to take breaks during the debriefing if the government attendees need to caucus concerning a question. Such discussion should take place in a different room and out of the hearing of the offeror. In addition, a break can be useful to permit the offeror to consolidate its questions and recover its composure.

Finally, do not obsess

While the debriefers should make every effort to be accurate during the debriefing, keep in mind that the statements made in a debriefing will virtually never form the basis of a GAO decision to sustain a protest. There are legions of denied protests where the information provided at the debriefing was inaccurate in some way or where the protester claims it was told one thing at the debriefing while the evaluation record shows the opposite. Moreover, GAO will not address the quality of the debriefing in a protest decision.