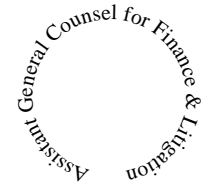




CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation



A LAWYER'S VIEW OF SUBFACTORS

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A LAWYER'S VIEW

by Bruce H. Segal

DISCLOSURE OF SUBFACTORS

The failure of an agency to disclose significant subfactors in a solicitation may result in a sustainable protest. This edition of *A Lawyer's View* discusses the problem and gives trouble shooting advice.

Statute and Regulations

The Competition in Contracting Act of 1984 (CICA) amending 41 U.S.C. 253 requires the inclusion in competitive solicitations other than small purchases of all significant evaluation factors including price and their relative importance. In addition FAR § 15.605(e), the implementing regulation, requires that solicitations disclose any significant subfactors and their relative importance and inform offerors of minimum requirements applying to particular evaluation factors and subfactors that will be considered in the award decision.

FPR § 1-3.802-1, the forerunner of FAR § 15.406 Part IV(c) and FAR §15.605(e) required that RFPs contain information necessary to enable a prospective offeror to prepare a proposal properly and also state the relative importance of cost, technical and other factors for evaluation purposes.

Case Law

CICA and the FAR merely set forth the law as it was interpreted previously by Comptroller General. The goal of the statute and the regulations is to insure equal and intelligent competition, see *Devres, Inc.*, B-224017, December 8, 1986, 65 Comp. Gen.____, 86-2 CPD ¶652, *Serv-Air, Inc.*, B-194717, September 4, 1979, 79-2 CPD ¶176 and *BDM Services Co.*, B-180245, May 9, 1974, 74-1 CPD ¶237, and assure offerors sufficient information to submit intelligent proposals, see 56 Comp. Gen. 188 (1976). If the factors are too broad and general, solicitations will be defective, see 49 Comp. Gen. 229 (1969). The test is whether solicitations adequately inform offerors how agencies will evaluate proposals in making awards.

Subfactors

GAO decisions have consistently held that agencies need not disclose subfactors as long as offerors are advised of the basic criteria and any subcriteria used are merely definitive of the basic criteria, see 56 Comp. Gen. 835 (1977) and 50 Comp. Gen 565 (1971). The GAO also has decided that agencies do not have to identify subfactors comprising the general evaluation criteria so long as they reasonably relate to the stated criteria, see *Coopers & Lybrand*, B-224213, 66 Comp. Gen.____, 87-1 CPD ¶100, 64 Comp. Gen. 245

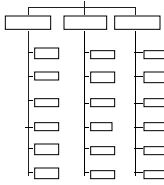
(1985), and *Tidewater Health Evaluation Center*, B-223635.3, November 17, 1986, 86-2 CPD ¶563. As long as offerors are advised of the general criteria and undisclosed subfactors reasonably relate to the stated criteria, offerors should have sufficient information to submit intelligent proposals ensuring equal and intelligent competition.

However, agency failure to disclose significant subfactors precludes offerors from having sufficient information to submit intelligent proposals. The GAO has decided that agencies must disclose all significant subfactors, see 51 Comp. Gen. 153. The General Services Administration Board of Contract Appeals (GSBCA) also has decided that agencies must disclose all significant subfactors in solicitations, and has granted protests where agencies have failed to disclose the significant subfactors, see *Compuware Corporation*, GSBCA No. 8869-P, 87-2 BCA ¶19,781, and *DALFI, Inc.*, GSBCA No. 8755-P, 87-1 BCA 19,552. Both the GAO and the GSBCA determine whether subfactors are significant on a case by case basis; however, the cited cases generally reflect that subfactors are significant when their relative value is

important compared to other subfactors or general evaluation criteria.

Advice

CO's must pay attention and be careful to disclose significant evaluation subfactors in solicitations. A failure to disclose significant subfactors may invite a sustainable protest at the GAO and the GSBCA. Agency procurement personnel always should ask whether the solicitation adequately informs offerors how the agency will evaluate proposals in making awards. If subfactors are insignificant, the agency does not have to disclose them. However, if they are significant, the agency must disclose them .



From the Editor - Bruce Segal is an attorney in the Contract Law Division and has been involved in several protests where the question of factors and subfactors was a potential issue.

☞ Comments, criticisms, and suggestions for future topics are welcome. - Call Jerry Walz at FTS 377-