



CONTRACT LAW DIVISION

Office of Assistant General Counsel for Finance and Litigation



A Lawyer's View of "Informalities and Irregularities"

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"Informalities and Irregularities—Not Minor Considerations"

by

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INTRODUCTION

Consider this: (1) a solicitation whose primary evaluation factor was an offeror's receipt of awards or recognitions (international, national, regional) or Information Technology (IT) certifications; (2) a solicitation (RFP) which advised offerors to include specific information in their proposals which reflected receipt of awards, recognitions or certifications, including the period of time in which awards were to have been received; (3) a solicitation which stated that contract awards would be made without discussions, unless otherwise advised; and (4) the agency's receipt of over 150 proposals, which had to be evaluated within a short period of time.

SOLICITATION AND EVALUATION

Section L of the solicitation gave offerors instructions for proposal preparation, specifying the information to be contained in certain sections. For example, Tab E of the proposal was to include a copy of the actual award, recognition or certification, followed by its corresponding official criteria. In both Sections L and M, the agency advised that award would be made without discussions as defined by Federal Acquisition Regulation (FAR) Part 15. Also set forth in Section M were the sub-criteria for awards, recognitions and certifications, *i.e.* relevancy and currency. With regard to currency, awards were to have been received within the last five years.

Offerors were also required to advise in their proposals whether certifications were underway at the time of proposal submission.

Twenty offerors were disqualified or received low scores for failure to comply in various ways with solicitation instructions. Several offerors failed to provide specific information relative to their receipt of awards and recognitions. One offeror submitted an award that it had received six years earlier. Several offerors failed to provide independent verification of the fact that they had certain IT certifications underway at the time they submitted their proposals.²

PROTESTS

After the awards were made, several offerors filed protests. Two protests alleged that offerors' failures to include specific information relative to receipt of awards, recognitions or certifications could have been corrected as minor informalities or irregularities or waived. In this regard, they asserted that the agency should have obtained information about their recognitions from the proposals of other offerors who had submitted copies of the required information.³ One offeror claimed that even though its award was six years old, it was a minor informality

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² In support of recognitions received, the offeror submitted a letter of recommendation from an official within a bureau of the selecting agency, commending the company on its performance under a particular program. According to the offeror, the *agency's program* had an IT certification underway, with a good number of the offeror's employees participating in the effort. Under the evaluation scheme, letters of recommendation were not ranked as highly as awards or other types of recognitions; and the RFP required *independent* verification of an offeror's steps towards certification.

³ This information concerned inclusion in the particular year's *Washington Technology* "Fast 50." The *Washington Technology* "Fast 50" is compiled annually and is simply a list of up- and-coming IT companies. The protestors claimed that agency evaluation officials could look to offers which provided the list, presumably containing the names of *all* companies recognized in a respective year.



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which should have been waived.⁴ Protestors argued in the alternative that the government could have communicated with them for the purpose of *clarifying* whatever inadequacies were noted in their proposals. Finally, one offeror claimed that had the agency evaluators read one of its letters of recommendation, the agency would have known to inquire about information omitted in the proposal concerning pending IT certifications.

DISCUSSION

Applicable Regulations

FAR § 15.306(a)(1) (2000) defines “clarifications” as “limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated.” That FAR provision goes on to state that offerors may be given the opportunity to clarify certain aspects of their proposals “or to resolve minor or clerical errors.” To understand what is meant by a “minor error”, we must look to FAR § 14.405 (2000), which discusses minor informalities or irregularities in the sealed bid context. Therein, a minor informality or irregularity is described as merely a matter of form, not substance.

It also pertains to some *immaterial defect* in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. (Emphasis added.)

The provision goes on to state that a defect or variation is immaterial “when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired.” The government is then given the option either to allow the offeror to “cure”

the deficiency, or to waive it, whichever is to the government’s advantage.

Considerations for Contracting Officers

The first questions are whether there is a duty on the government’s part to look for errors in proposals and thereafter to make inquiries of the affected offerors. The second question concerns the extent or scope of the error, *i.e.* whether it is a matter of form over substance. The third question is whether these inquiries would amount to “discussions,” thereby violating provisions of the RFP, which reflect anticipation of no discussions.

According to the General Accounting Office (GAO), contracting officers have an affirmative obligation to examine proposals for minor informalities and irregularities and apparent clerical mistakes, situations which may be corrected through clarifications rather than discussions, or waived. *Joint Threat Services*, B-278168, B-278168.2, 98-1 CPD ¶ 18; *International Business Systems, Inc.*, B-270632, B-270632.2, 96-1 CPD ¶ 276. *See PHP Healthcare Corp.; Sisters of Charity of the Incarnate Word*, B-251799, B-251799.2, 93-1 CPD ¶ 366.

The second question, concerning the scope of the error, is a bit more difficult to answer. There can be as many errors in proposals as there are provisions in a solicitation. *See, e.g., Griffy’s Landscape Maintenance, L.L.C. v. United States*, 46 Fed. Cl. 257 (2000) (omission of contact for insurance representative); *Professional Building Concepts, Inc. v. City of Central Falls*, 974 F.2d 1 (1st Cir. 1992), *aff’g.*, 783 F. Supp. 1558 (D.R.I. 1992) (submission of a corporate check for a bid guarantee rather than a certified check); *RGII Technologies, Inc.—Recon. And Protest*, B-278352, B-278352.2, B-278352.3, 98-1 CPD ¶ 130 (submission of copies of oral presentation slides instead of original); *Techsys Corporation*, B-278904, 98-2 CPD ¶ 64 (failure to conform to 150 page limitation for proposals); *Stanger Industries, Inc.*, B-279380, 98-1 CPD ¶ 157 (failure to acknowledge an amendment to the RFP); *Working Alternatives, Inc.*, B-276911, 97-2 CPD ¶ 2 (failure to provide

⁴ This offeror argued that because the RFP was amended a year after the original solicitation was issued, circumstances dictated that the award be considered timely *as of the date of the original RFP* (which contained a five-year time limit), thereby waiving the five-year time limit set out in the amendment.



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information relating to the availability of a facility at the time of award); *Tri-State Government Services, Inc.*, B-277315, B-277315.2, 97-2 CPD ¶ 143 (failure to submit pricing information in prescribed format); *Diverstech Co.*, B-270840, 96-1 CPD ¶ 209 (failure to submit a product demonstration model); *Corporate America Research Associates, Inc.*, B-228579, 88-1 CPD ¶ 160 (failure to provide evidence of employee commitments); *Abt Associates, Inc.*, B-226063, 87-1 CPD ¶ 513 (submission of proposal at only one of two required locations).

The FAR guidance is clear: a defect, error or variation is immaterial where there is a negligible effect on price, quantity, quality or delivery and where the error can be corrected or waived without being prejudicial to other offerors. Thus, in *Griffy's Landscape Maintenance, L.L.C. v. United States, supra*, the Court of Federal Claims held that the plaintiff's failure to include insurance contact information with its offer was a minor irregularity. Not only did the government have a duty to inquire, but also the evidence showed that the government currently had a contract with the plaintiff and could have obtained the information from its own files. In contrast, the Court of Appeals for the First Circuit upheld a federal district court's decision that submission of a corporate check for a bid guarantee, instead of the required certified check, was not a minor informality because the bid guarantee provides the mechanism for securing the bidder's performance and is, therefore, a material element of the solicitation. *Professional Building Concepts, Inc. v. City of Central Falls, supra*.

GAO views the page-limitation cases in a somewhat different light. In these cases, GAO has stated that offerors are required to prepare their proposals within the format limitations set out in the RFP. Offerors assume the risk that pages beyond the limitations will not be considered because excess pages could give an offeror an unfair competitive advantage. *Techsys Corporation, supra*. See *All Star Maintenance, Inc.*, B-244143, 91-2 CPD ¶ 294; *Infotec, Inc.*, B-238980, 90-2 CPD ¶ 58. Further, where an agency has set specific page limits, it is not obligated to ask an

offeror after submission of the proposal to "clarify" its proposal by selecting pages which it wants counted. *Techsys Corporation*, 98-2 CPD ¶ 64, *supra*. GAO has found no duty to clarify under such circumstances because "clarification" would prejudice other offerors whose proposals had to meet the same requirements. *Infotec, Inc., supra*. In essence, failure to follow page limitations is considered more substance than form, probably because the information contained in excess pages is usually material to the acceptability of a proposal. *But see Parmatic Filter Corporation*, 2000 WL 1738748 (Comp. Gen., August 14, 2000) (fact that awardee exceeded page limitation by three pages was neither material nor prejudicial in view of unrestricted discussions with all offerors).

LIKELIHOOD OF SUCCESS

In view of the foregoing analysis, what was the likelihood of success for those protestors who claimed that their failure to include relevant and current information about their awards, recognitions and certifications was a "minor informality or irregularity" which could have been corrected—simply by reviewing other offerors' proposals for the required information? There was no doubt that the proposal preparation instructions were clear, and there was no doubt that the information was material to the acceptability of the proposals. However, were these offerors' omissions clerical errors or errors in judgment? This writer would argue that they were material omissions and that any inquiry regarding the omissions would rise to the level of "discussions" not "clarifications" because of the effect of the omissions on the acceptability of the proposals. Furthermore, to require agency officials to review over 180 other offerors' proposals for information which should have been contained in protestors' proposals is, in the writer's view, much too burdensome, time-consuming and expensive. Yet, reading the facts of *Griffy's Landscaping Maintenance, L.L.C. v. United States*, 46 Fed. Cl. 257, *supra*, it is not certain that where information concerning an offeror is already in the agency's possession (albeit in other offerors' proposals), the Court of Federal Claims would not find an obligation on the government's



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part to inquire about the missing information and correct the proposals.

And what about the protestor whose award, at the time of issuance of the amended RFP, was six years old? "Currency" was one of the evaluation subfactors. Would it have been unfair to downgrade (or eliminate) this protestor's proposal because its award, through no fault of its own, was no longer current? Could the age of the award have been waived as a "minor informality"? This writer would argue that the "currency" of the award was a material criterion of the proposal, in that the agency wanted offerors whose capabilities in the IT arena were current and recently recognized. The writer would liken this case to those where offerors failed to include employment commitments from proposed personnel, which commitments were material for evaluation purposes. *See Corporate American Research Associates, Inc.*, B- 228579, 88-1 CPD ¶ 160.

And what about the offeror whose material information was buried in a letter of recommendation? This writer would have argued that to have allowed the offeror to provide the information concerning the status of its IT certification in the manner required by the RFP would have amounted to "discussions" and been prejudicial to other offerors who followed the proposal preparation instructions. *Id.*

CONCLUSION

There is no firm and fast rule to determine whether an error made in a proposal is a "minor informality or irregularity" which can be corrected through "clarifications" or waived, or is a material element of a proposal, correction of which would be tantamount to "discussions", where discussions were not contemplated. Indeed, no matter which determination an agency makes, or what actions it takes, it is still subject to challenge. *Compare Joint Threat Services*, 98-1 CPD ¶ 18, *supra* (agency challenged for having post-BAFO discussions where it merely clarified with awardee a clerical error in a spreadsheet) *with Working Alternatives, Inc.*, 97-2

CPD ¶ 2, *supra* (protestor asserted that agency should have sought "clarification" of its proposal, even though information omitted was deemed material to the evaluation).

Consequently, determinations of minor informalities and irregularities, errors, variations, etc. take the exercise of considerable judgment in application of the facts to the regulatory and legal standards; and contracting officers must always be mindful of one salient goal: prevention of prejudice to the rights of other parties, including those of the government.