



CONTRACT LAW DIVISION

Office of Assistant General Counsel for Finance and Litigation



A Lawyer's View of Source Selection Documentation

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Prevail in Protests by Preserving Presentations—J & J Maintenance By

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Think back about a year ago. Many of you reading this will remember the “water cooler” dialog on our Listserve about whether or not there was a need to record the proceedings during oral presentations, especially oral proposals in negotiated procurements. As I recall there was quite a division of opinion as to whether it was necessary or even desirable to record these presentations made by offerors. Well, in the quite recent past, the General Accounting Office has weighed in on the topic and it affords all of us in the acquisition community much guidance on the documentation GAO will expect in order to sustain an award selection in the face of a protest. J&J also offers us important GAO advice on other topics—the need to document score assignments in technical evaluations and to provide an adequate best value analysis. But, before we get to those issues, let’s see what the decision teaches about oral presentations.

Just the Facts

In J&J the Army awarded a fixed-price requirements contract to Day & Zimmerman (“D&Z”) to maintain and repair family housing and operate a self-help center at Fort Polk. Naturally, this being the modern age of procurement, the award was to be made on the basis of a best value selection with quality, price and past performance being the selection factors. Quality was comprised of management and technical subfactors, with each being further broken down into the following respective elements: Management—management approach, staffing and qualifications, subcontracting plan and phase-in/phase-out; Technical—resources, quality control/corrective action program and methodology. The solicitation required that the quality portion of each offeror’s proposal would be presented orally with slide accompaniment. The Army contemplated an award without discussions.

Incumbent Protestor J&J was among the six firms that submitted a proposal, and after its oral presentation was last among the four firms deemed acceptable. The Army awarded to D&Z on the basis of initial proposals noting that D&Z’s high score on the orally-presented quality factor was worth the price premium over J&J’s offer.

Presentation Problems

In support of its protest, J&J pointed to areas where D&Z received a higher score despite the fact that one of the evaluators had made favorable comments on J&J’s presentation while other evaluators made less favorable comments about D&Z’s. It also contested the Army’s downgrading of its proposal in other areas contending that these areas were among those specifically addressed during both the presentation and the question and answer period. J&J also pointed to areas where one evaluator downgraded its proposal as a result of a proposed method of performance while other evaluators noted it as a strength and reason to upgrade its score. The record apparently contained no explanation why, despite the favorable comments, the consensus rating failed to reflect these positive impressions. Further, there was additional apparent unexplained disagreement among the evaluators on the merits of J&J’s transition plans.

Finally, looking to the source selection decision, GAO noted that although the decision addressed many of the strengths and weaknesses of D&Z’s proposal, it did not address comparable areas in J&J’s proposal. The only comparison performed between the offerors by the source selection official was between the overall merit scores and the total prices.

GAO Decides

In that J&J’s price was the lowest of the offerors, GAO concluded that even a minor change in J&J’s technical score might have been sufficient to sway the selection its way. In reviewing J&J’s protest, GAO noted that it relies on the FAR-required and agency-provided documentation to review protested source selections and that it cannot meaningfully review agency action where the file lacks adequate



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documentation to support the proposal evaluation and award decision. GAO noted that FAR § 15.305(a) requires agencies to document the contract file with a proposal's relative strengths, deficiencies, significant weaknesses and risks unearthed during the evaluation.

Although FAR § 15.102(e) charges the contracting officer with keeping a record of oral presentations, it seemingly allows the agency wide discretion as to the type and degree of documentation required. Thus, among other methods the Government may document the presentation through video or audio taping, transcription, Government notes, copies of slides or an offeror's presentation notes. By maintaining copies of the evaluator's notes and offerors' briefing slides, the Government in J&J seemingly met the FAR requirements.

However, when GAO reviewed the protest record, it discovered that the slides and notes failed to present sufficient information to reach a conclusion that oral presentation evaluation was conducted reasonably and fairly. In looking at the slides, GAO found that in most instances the slides merely provided an outline of the material presumably presented. They consisted mainly of general headings and failed to reveal in any significant way what was presented during the presentation or, for that matter, during the follow-up question and answer session. When it looked at the evaluator's notes, GAO discovered, not surprisingly, that they were not summaries of the presentation but consisted largely of sketchy, selective comments with little or no elaboration or even a description of that part of the oral presentation content that was being commented on. GAO could only conclude, despite the fact that the FAR documentation requirements were seemingly adhered to, that the record of the oral presentations was far too superficial to be able to judge whether J&J's protest was merited.

Searching for a means to uphold the agency decision, GAO looked at the consensus evaluation and could not uncover any material that would show how the evaluators reconciled their divergent opinions on particular facets of the presentation nor on how they

achieved a consensus rating for any particular element. In fact, no such record existed. Thus, GAO had no difficulty in dismissing the Army's defense that J&J merely agreed with its evaluation and that the award should not be disturbed.

Nor could GAO uphold the award by looking to the source selection decision because that decision performed only half of a best value analysis—judging the strengths and weaknesses of D&Z's proposal—failing to perform a comparable analysis for the other offerors. Thus, the “best value” tradeoff made by the source selection official, which compared total scores and prices, did not present a rationale for the award sufficient to justify the decision.

Having looked at the entire process employed by the Army in making the award, GAO felt that it had no choice but to uphold the process because the record did not present evidence adequate to justify the source selection reached.

Lessons to be Learned

What can we in the Commerce contracting community take away from this significant decision?

First, although the FAR gives great latitude to the agency as to how it will make a record of oral presentations, unless we want to rely on all of the offerors presenting a sufficient amount of detail in their graphic presentation, or we want to rely on the stenographic skills of our evaluators, the only reliable way of preserving a record of the oral presentation proceedings is through the use of video or audio recording. If you don't do this you proceed with great peril.

If individual evaluator notes are preserved and a consensus means of scoring is employed, then there should be some meaningful record of the consensus meeting showing how consensus was reached and how any significant shift in an evaluator's score required to achieve consensus was justified.

Best value source selections cannot consist of simply adding up the scores, comparing them and determining a winner. The decision must show a



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reasoned tradeoff by delving behind the scores and comparing the relative advantages and disadvantages that each offered means of performance will provide the Government.

With these simple, but essential, adages in mind,
happy source selection!

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A Lawyer's View is a periodic publication of the Contract Law Division designed to provide practical advice to the Department's procurement officers. Comments, criticisms and suggestions for future topics are welcome. —Call Jerry Walz at 202-482-1122, or via email at jerry.walz@mail.doc.gov