

ALERT

A Bad Day for Proposal Consultants-GAO Finds Agency May Reasonably Prohibit Use of Consultants for Proposal Preparation Purposes

April 1, 2015

In an interesting decision that could significantly affect how companies prepare proposals, the Government Accountability Office (GAO) ruled that it was not unduly restrictive of competition for an agency to include in a solicitation a provision that prohibits the use of consultants for proposal preparation purposes-specifically, the preparation of sample task order responses. This decision opens the door for other agencies similarly to bar the use of proposal consultants in future solicitations-a result that might prove burdensome for both smaller government contractors that lack the in-house resources necessary to prepare significant proposals, and larger government contractors that rely on consultants to supplement their in-house proposal preparation resources.

On March 31, 2015, GAO issued its public decision in *Advanced Communication Cabling, Inc.*, B-410898.2 (Mar. 25, 2015). In this pre-award protest of a Department of Veterans Affairs (VA) solicitation, Advanced Communication challenged the reasonableness of a clause expressly prohibiting offerors from using consultants to assist them in preparing their sample task responses and requiring offerors to certify that their sample task responses were prepared only by themselves and their subcontractors. The solicitation provided that the agency would not consider proposals that did not include the certification or that provided false certifications. Advanced Communications argued that this prohibition was improper because, among other reasons, it might force a small business to subcontract with a large business to complete its proposal, potentially calling into

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question the small business's size status, and otherwise was not needed to meet any minimum need of the agency.

In response to Advanced Communication's protest, the agency argued that the solicitation provision was reasonable, because it helped ensure that the responses received by the agency would reflect the technical abilities of the offerors and their subcontractors, and not those of outside experts who would not be involved in performing the contract. The agency went on to argue that this restriction would reduce the risk of unsuccessful performance because it made it more likely that the agency's technical evaluation would be based on the knowledge and abilities of the individuals who would actually be involved in performing under an awarded contract. The agency further noted that, in its experience, the use of consultants to prepare sample task responses has resulted in the agency receiving identical responses from multiple offerors, despite the fact that the offerors' teams were comprised of entirely different members.

GAO found the agency's rationale for its inclusion of the clause reasonable, explaining that because the fundamental purpose underlying the sample task order's requirement is to gauge an offeror's ability to successfully perform the contract, it was reasonable to require that the sample task responses be prepared by the firms proposed to perform the contract, as opposed to outside consultants who have not been identified as members of the offeror's team. GAO likened the prohibition to an agency's decision to consider only the experience and past performance of contractors with which the agency will have contractual privity. GAO noted that, in such cases, it had found that the government's desire to reduce the risk of unsuccessful performance was rationally achieved by restricting its consideration of experience and past performance to the firms contractually obligated to meet the agency's requirements. Thus, while GAO agreed with Advanced Communication's observation that the provision at issue did not guarantee that the same individuals who prepare the sample task responses will also perform under the contract, GAO still found the provision reasonable as it eliminated the possibility that an offeror will submit sample task responses that do not reflect its own technical ability because the responses were prepared by an outside consultant. Lastly, while GAO recognized that this prohibition might burden small contractors more than large contractors, this fact alone was not enough to find the clause unreasonable when it was necessary to meet a legitimate agency need-in this case, attempting to reduce the risk of unsuccessful contract performance.

How other agencies react to GAO's decision in *Advanced Communication* could lead to a significant impact on proposal preparation, particularly in response to solicitations involving sample tasks. Critics of the procurement process have commented over the years that source selections are often based more on who is a better proposal writer than who has the ability to actually perform the work. The VA in this procurement apparently wanted to address this concern. We need to watch this space to see if other agencies follow suit.