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NEWSLETTER

New 'Advisory Down Select' Evaluation Approach Alters Contractors' Protest Calculus

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We notice a recent uptick in agencies employing an unusual evaluation method – the "advisory down select" – that places offerors in an awkward position when deciding whether, and when, to protest. Given its increasing frequency – particularly in U.S. Department of Health and Human Services (HHS) and U.S. Department of Homeland Security (DHS) procurements – this article is a brief guide for contractors participating in an advisory down select competition. We outline the evaluation method, explain its counterintuitive impact on protest rights, and flag a few considerations that can mitigate contractors' risks or, at a minimum, allow them to make informed business judgments before proceeding with this type of competition.

Federal Acquisition Regulation (FAR) 15.202 grants agencies the authority to employ an advisory down select to winnow the field of proposals that an agency must fully evaluate. Here's how it works: The solicitation requires offerors to submit proposals in multiple phases (usually two). After an initial proposal and evaluation phase, the agency advises each offeror whether the agency thinks that offeror is a viable competitor. But, unlike in a procurement where the agency establishes a competitive range, *all offerors have the option to continue to the next phase of the procurement*, even the offerors notified by the agency that they are unlikely to receive the award.

If you are an offeror that disagrees with the agency's Phase I evaluation of your proposal, can you protest? The answer is generally "no." Key here is that the agency has provided the offeror the option to continue in the competition. Importantly, the lower-rated offerors have not been *excluded* from the competition, and a disappointed bidder only has standing to protest if it submitted a complete proposal. Electing to drop out after Phase I would thus generally

Authors

J. Ryan Frazee
Of Counsel
202.719.3751
jfrazee@wiley.law

Cara L. Sizemore
Partner
202.719.4192
csizemore@wiley.law

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mean forfeiting the right to protest a flawed evaluation. This is in contrast to other "competitive range" protests in which an offeror has been excluded from the competitive range *by the agency* and has no additional chance at success. After all, although an advisory down select offeror may have received adverse information about their Phase I evaluation with which they may disagree, a protest challenging that evaluation would almost always be premature, because the procurement is still ongoing and any offeror could still, in theory, win the competition – even one that received an adverse outlook after the initial phase.

Even putting aside the procedural hurdles of filing a protest, offerors in these competitions frequently lack enough information to even be able to develop protest grounds. When providing a notice that an offeror is unlikely to be a "viable competitor" after the initial phase, agencies are supposed to provide "the general basis for that opinion." FAR 15.202(b). The recent solicitations we've seen frame it as a benefit to contractors – so they do not throw good money after bad investing in further proposal efforts in a competition they are unlikely to win. But that notional benefit depends on whether the agency provides enough feedback to allow offerors to make an informed decision about whether to proceed. In practice, we've seen the level of detail provided in the "advisory" notice vary significantly, and not always provide an offeror with meaningful insight into why its proposal was comparatively weak. While some contracting officers provide information akin to a detailed debriefing, others have merely advised offerors that they are unlikely to receive the award because their proposal was not among the most highly rated.

So what are offerors to do when they receive notice that they are unlikely to be a viable competitor? An adverse Phase I notice is an obvious decision point for contractors, and it carries significant cost implications. As discussed above, protesting a flawed Phase I evaluation at the U.S. Government Accountability Office (GAO) would likely be dismissed as premature and therefore may turn out to be a waste of time and money. And preserving those protest rights by proceeding to the next Phase can require a significant investment in proposal effort for the subsequent phase(s), at a point where you already know that you are so far behind your competition in the eyes of the agency. The scenario can be all the more frustrating when the Phase I notice lacks enough information to meaningfully assess the agency's decision. It is a veritable "prisoner's dilemma" straight out of a game theory book.

As mentioned, the solicitations we've seen typically cast this process as being for the contractor's benefit. But given all the foregoing challenges, this evaluation method has the obvious effect, intended or not, of dissuading protests. And for the skeptics, it can also lead to questions about whether an offeror has been treated fairly or been evaluated accurately in the preliminary phase of the competition, with little recourse. The agency can provide enough information to compel an offeror to not continue into subsequent phases (which would have preserved the right to protest), but refrain from taking the step of eliminating an offeror from the competition (which would have caused the right to protest to ripen).

Unfortunately for offerors, although this evaluation method has been a tool available to agencies since it was formally introduced in 1997 as part of the FAR Part 15 rewrite, it appears that its use has skyrocketed in the last few years. A quick review of GAO protest decisions discussing advisory down selects reveals that, of the 18 protests (as of the date of this article) involving this evaluation method, only one predated 2020. *See Kathpal Techs., Inc.; Computer & Hi-Tech Mgmt., Inc.*, B-283137.3 (Dec. 30, 1999). This suggests that it is only

recently that agencies have leaned into using this evaluation method.

Against this evaluation landscape, what can contractors do to preserve their rights and mitigate the risks of participating in a competition with this evaluation scheme? The best course of action is going to depend on your specific circumstances and a given competition, but there are a few steps to take and options to consider.

Study the solicitation and know your risks. The solicitation always sets the rules, and one obvious thing to be attuned to is whether the evaluation will use an advisory down select or not. Anecdotally, this appears to be more common in HHS or DHS procurements. Contractors experiencing concerns with advisory down selects often don't seek counsel until after an adverse Phase I evaluation. At that point, offerors have already invested resources in a partial proposal, but it is also often too late to push the agency to change or clarify the evaluation scheme, and still too early to actually protest the evaluation. Recognizing early on the consequences of an advisory down select before preparing a proposal can help you decide whether the reward is worth the risk, or if it's a better idea to take action beforehand (a few are discussed below) to put yourself in a better position after Phase I.

Another key factor is assessing the evaluation phases and their relative resource-investment and evaluation weight. The FAR does not prescribe any specific approach to how the phases must be delineated or weighted. We're aware of Phase I submissions that involve little more than oral presentations or proofs of concept, with more robust and important submissions to follow; yet, in others, Phase I includes the most important evaluation criteria. Obviously, the calculus for proceeding to the next phase in the face of an adverse Phase I evaluation changes if you are behind the competition in the former scenario or the latter.

Leverage pre-proposal dialogue with the agency. We noted earlier that the level of evaluation detail after Phase I varies greatly from competition to competition. But the FAR states that the agency should at least provide the "general basis" for its opinion that an offeror should not proceed. In our view, that should require an agency to provide more than a generic statement that an offeror is not among the highest rated proposals, which is a fact evident from the recommendation itself. Just as a solicitation must provide sufficient information to allow contractors to make an informed decision about whether to submit a proposal, an agency that is a fair partner should meet the same obligation after a Phase I evaluation and recommendation to proceed or not.

Contractors have the opportunity to push the agency for an adequate explanation. Through the solicitation's Q&A process before proposal submission, contractors should seek clarity on the level of information that the agency intends to provide after Phase I. Most solicitations we've seen state that debriefings will not be provided after Phase I. That's fine, but the agency should be able to provide offerors with an understanding of what feedback the agency will provide after Phase I – particularly if the advisory down select procedure is framed as a benefit to the contractor (which it commonly is). There is little-to-no benefit to contractors being advised that they are not a viable competitor, without also learning the basis for the agency's view.

Consider a protest. If dialogue with the procurement team is unsuccessful, elevating the issue through either an agency-level protest or even a GAO protest under the right circumstances might provide better results. Agency protests are disfavored by some, based on skepticism that an agency's review of its own procurement decision will change the outcome. But there are some benefits to such an approach. Even if a pre-award protest doesn't lead to an overhaul in the evaluation methodology, it may lead the agency to give more information about how it intends the process to work, including by committing to provide a certain level of detail when it advises offerors of the results of its Phase I evaluation. In addition, although not required, some agencies may be willing to consider an agency-level protest following a negative Phase I evaluation.

Conclusion

It remains to be seen whether advisory down select evaluations will become a more regular occurrence, and if their use will extend to other agencies. But because this evaluation scheme affects protest rights and its use is increasing, contractors should be aware of it, as well as actions they can take to better assess and mitigate their risks when proceeding with a competition employing this evaluation methodology.