THE GOVERNMENT CONTRACTOR®

THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 58, No. 25 **June 29, 2016**

FOCUS

¶ 229

FEATURE COMMENT: GAO's Confusing Treatment Of Prejudice Resulting From Deviations From Solicitation Requirements

Government Accountability Office bid protest decisions reflect two parallel lines of analysis addressing prejudice in protests where an agency awarded a contract to an offeror whose proposal deviated from a material solicitation requirement. One line of decisions applies a straightforward rule—often without much, if any, discussion of prejudice—holding that an offer failing to conform to a material solicitation requirement is technically unacceptable and cannot form the basis for award. A second line of decisions, on the other hand, imposes a specific burden on the protester to prove prejudice, requiring it to show that it would have submitted a different offer that would have had a reasonable possibility of being selected for award had it known that the requirement would be waived. This article discusses how these two lines of authority have played out recently at GAO, without any acknowledgment of the conflicting lines of decisions. The article also suggests that GAO should reconcile the scope and applicability of these decisions to avoid confusion and to ensure that procuring agencies and offerors have clear guidance on when an agency may accept a proposal that fails to conform to the request for proposals' requirements.

***Per Se* Prejudice Resulting from Deviation**—The first line of GAO decisions dealing with deviations from solicitation requirements establishes what might be a called a *per se* prejudice standard where GAO apparently assumes prejudice from the fact that the agency made award to an ineligible offeror due to the awardee's failure to comply with a material requirement in the solicitation. Although GAO has not explicitly characterized the prejudice as "*per se*," many of these decisions barely discuss the prejudice requirement when declaring the awardee's proposal "ineligible" for award. Thus, the key facet of these decisions is the apparent assumption that prejudice exists.

An example of this line of decisions is GAO's decision in *Paradigm Techs., Inc.*, Comp. Gen. Dec. B-409221.2 et al., 2014 CPD ¶ 257. There, Paradigm Technologies protested the award of a task order for strategic planning and financial support services. During a re-evaluation of proposals, the eventual awardee had informed the agency that the awardee's proposed "Contract Program Manager" was no longer available. Because discussions had closed and the agency was not accepting revised proposals, this meant that the awardee did not propose a Contract Program Manager—a position required by the RFP and designated as a "key person." Although the agency assessed a weakness (not a deficiency) for this omission, it still awarded a task order contract to this company. GAO sustained the protest, finding that the proposal of a Contract Program Manager was a "material solicitation requirement" and that "[the agency] should have either rejected [the awardee's] proposal as technically unacceptable for failing to meet a material requirement or reopened discussions to permit the firm to correct this deficiency." Id.

In *Paradigm Technologies*, GAO never asked how the agency's waiver of this requirement to identify a manager would have impacted the competitive position of the protester's proposal or whether the protester would have made changes to its proposal if it had known of this waiver. In fact, although GAO's opinion never uses the word "prejudice," it appears to have assumed prejudice in the protester's favor based on the "technically unacceptable" proposal submitted by the awardee.

In another example, GAO followed this same principle in a protest of a request for quotations for telecommunications services in *Bahrain Telecom-*

munications Co., B.S.C., Comp. Gen. Dec. B-407682.2, 2013 CPD ¶ 71; 55 GC ¶ 116. There, GAO sustained a protest based on allegations that the awardee's proposal took exception to material solicitation requirements regarding service restoration time. Without using the term "prejudice" or evaluating how the alleged waiver would have impacted the protester's proposal, GAO recommended that the agency either reevaluate the awardee's proposal to determine whether it complies with the agency's requirements expressly set forth in the solicitation or resolicit new proposals if the express requirements in the solicitation do not reflect the agency's actual needs.

This line of decisions often includes broad, unqualified statements regarding the impact of a proposal's failure to conform to material requirements, such as this one: "It is a fundamental principle in a negotiated procurement that a proposal that fails to conform to a material solicitation requirement is technically unacceptable and cannot form the basis for award." See *Paradigm Techs, Inc*., 2014 CPD ¶ 257. In theory, therefore, GAO does not expressly consider or evaluate prejudice because the awardee should have been ineligible for award.

Despite a Deviation, Protester Must Demonstrate Prejudice—In other recent decisions, GAO has required protesters to establish prejudice resulting from the awardee's non-compliant proposal, often without addressing the above decisions establishing a *per se* prejudice standard. In this second line of decisions, GAO imposes a burden on the protester to demonstrate that it would have changed its proposal if it had known that the agency would waive the solicitation requirement.

This line of decisions is demonstrated by GAO's decision in *Orion Tech., Inc.*, Comp. Gen. Dec. B-406769, 2012 CPD ¶ 268; 54 GC ¶ 326. There, like *Paradigm Technologies*, the alleged non-compliance involved the awardee's key personnel—the awardee's proposal had failed to include required information pertaining to key personnel. GAO found that the agency waived the requirement for this information, and stated that in protests where an agency waives a "requirement" (without terming it a "material" requirement), the protest will be sustained only if the protester is prejudiced.

By imposing this prejudice burden on the protester, this line of GAO decisions departs from the first line of decisions, stating that "prejudice does not mean that, had the agency failed to waive the requirement, the awardee would have been unsuccessful." *Orion Tech., Inc.*, 2012 CPD ¶ 268. Instead, this line of decisions explains that "the pertinent question is whether the protester would have submitted a different offer that would have had a reasonable possibility of being selected for award had it known that the requirement would be waived." In protests subject to GAO protective orders, which protect against disclosure of the offerors' competitive information, this prejudice standard may present some unique challenges because counsel may not be able to discuss with clients a specific deviation by the awardee or the requirements relaxed by the agency.

Although some GAO decisions suggest that the materiality of the terms at issue might be a deciding factor for whether a proposal is technically unacceptable, other decisions do not make this distinction. In *Penn Parking, Inc.*, Comp. Gen. Dec. B-412280.2, 2016 CPD ¶ 60, for example, GAO recently found that even if the waived solicitation requirement was material, the protester was still required to prove prejudice:

> Moreover, even where an agency arguably may have relaxed a material solicitation requirement, the protester must still show that it was prejudiced by the agency's actions. . . . In order to demonstrate unfair competitive prejudice from a waiver or relaxation of the terms and conditions of an RFP, a protester must show that it would have altered its proposal to its competitive advantage had it been given the opportunity to respond to the altered requirements.

In reaching this conclusion, this decision never harmonizes the separate line of authority that finds prejudice where an agency makes an award on the basis of a technically unacceptable proposal.

To confuse the standards even further, some GAO decisions cite both standards in addressing proposals that failed to conform to the material solicitation requirements. In December 2015, GAO issued a decision in *Intelsat Gen. Corp.*, Comp. Gen. Dec. B-412097 et al., 2016 CPD ¶ 30; 58 GC ¶ 64 (Note), in which it found that an awardee's failure to provide certain documents relating to its proposed satellite bandwidths left it unable to satisfy material solicitation requirements for satellite coverage. In discussing prejudice to the protester, GAO then relied on both the *per se* and competitive prejudice standards, stating that "[f]irst, we find that the agency improperly awarded the contract on the basis of a proposal that materially failed to comply with the RFP." GAO then invoked the com-

petitive prejudice standard, and while GAO ultimately found that the protester had established competitive prejudice, the decision continues to confuse the burden of proof applicable to protests challenging a failure to conform to a solicitation requirement. GAO's decision in *Intelsat* suggests that these are alternative bases on which to demonstrate prejudice.

Making Sense of the Two Lines of GAO Decisions—GAO should undertake an effort to clarify the purpose and scope of these two lines of decisions. Based on recent GAO decisions, there is a lack of clear guidance available to either contracting agencies or disappointed offerors to evaluate the circumstances under which an agency may accept a proposal that fails to conform to the requirements of a solicitation. Although GAO might have had an underlying rationale when these two lines of authorities first emerged, any distinction between the two appears to have been lost in practice over the past few years. Indeed, most GAO decisions typically ignore the fact that there is a divergence in these decisions and, seemingly, apply different rules in similar protests. As a result, without this clear guidance, offerors cannot make an assessment of the likelihood of success of any protest grounds based on waiver or be assured that they are competing on a fair and equal basis against common requirements.

In reconciling these two lines of authority, "materiality" of the terms at issue should be a key consideration, essentially those terms impacting the offeror's commitment to meet the needs of the agency and to comply with the terms of the contract. GAO decisional law defines "material" terms as "those which affect the price, quantity, quality, or delivery of the goods or services being provided." *Bluehorse*, Comp. Gen. Dec. B-412494, 2016, 2016 CPD ¶ 64. For example, in *The Boeing Company*, Comp. Gen. Dec. B-311344 et. al., 2008 CPD ¶ 114, GAO sustained the protest after finding that the awardee's proposal was ineligible for award because it had failed to commit to a material term—a contractual two-year timeframe to provide product support services. In rebutting the agency's attempt to argue that the two-year requirement was not material, GAO noted that agency officials had repeatedly raised the issue in discussions and other officials had characterized the two-year commitment as "an important requirement" without which the agency's needs would not be met. If GAO intends to convey that prejudice is assumed, and need not be proven, with material deviations, then GAO should consider clarifying this in its decisions.

In other decisions, such as *Penn Parking* and *Orion Technology*, where the alleged deviation did not take issue with a material term or undercut the offeror's commitment to perform, GAO should consider clarifying that a protester must demonstrate competitive prejudice resulting from the waiver of a non-material solicitation requirement and that, in these cases, prejudice would not be presumed. Reconciling this case law—with a clear definition of material terms that cannot be waived without notice—would provide more consistency in GAO's decisions and possibly avoid lengthy protests of procurements where, for example, the agency accepted non-material deviations from the solicitation. Protesters, the protest bar, and agencies would likely benefit from this increased predictability in preparing proposals in response to RFPs and in considering protests involving deviations from solicitation requirements.

✦

This Feature Comment was written for The Government Contractor by* Michael Navarre, Sharon Larkin *and* Paul Hurst, *who are members of Steptoe & Johnson LLP's Government Contracts Practice Group in Washington, D.C.

