



ACQUISITION DIRECTIONS™ Research Response

Date: April 23, 2001

Client: USDA ARS PPD POLICY BRANCH

Subject: RELEASABLE INFORMATION TO VENDORS DURING DEBRIEFINGS.

Client Question:

During recent debriefings on our procurements for operations and maintenance (O&M) support services at various ARS Research Centers, unsuccessful offerors have requested that we release source selection information/analysis which forms the basis for the source selection decision, including the evaluation/analysis of all offers. We have not released such information, as we did not want to divulge competitors' strengths and weaknesses. However, the requests to release this source selection information continue. An unsuccessful offeror on a recent O&M procurement gave us the enclosed information, which was given to them during a debriefing on a NASA source selection.

I would like ASI's advice as to what source selection information may be released to unsuccessful offerors during a debriefing. I think the format outlining Cube's strengths and weaknesses, which is included in the enclosed package, is a good one, and we will use a similar format for future debriefings. I am concerned, however, about releasing the narrative analysis of other companies' offers. If it is appropriate to release this type of information, should we, as I believe we should, notify other offerors of this?

Acquisition Solutions' Response:

We're glad you asked. Don't ever do something just because another agency does it, and especially not if only a contractor tells you another agency did it. The other agency may not be right, and the contractor may be (intentionally or unintentionally) misleading you. Check the statutes and regulations and make the decision for yourself.

The release of procurement and source selection information is a very delicate issue. We will provide you with some background and general information herein, but note that discussion and coordination with your legal counsel is recommended.

FAR 3.104-3 defines "Source selection information" as follows:

"Source selection information" means any of the following information which is prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:



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- (1) Bid prices submitted in response to a Federal agency invitation for bids, or lists of those bid prices before bid opening.
- (2) Proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices.
- (3) Source selection plans.
- (4) Technical evaluation plans.
- (5) Technical evaluations of proposals.
- (6) Cost or price evaluations of proposals.
- (7) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.
- (8) Rankings of bids, proposals, or competitors.
- (9) Reports and evaluations of source selection panels, boards, or advisory councils.
- (10) Other information marked as "Source Selection Information -- See FAR 3.104" based on a case-by-case determination by the head of the agency or designee, or the contracting officer, that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

FAR 3.104-5 stipulates “Except as specifically provided for in this subsection, no person or other entity may disclose contractor bid or proposal information or source selection information to any person other than a person authorized, in accordance with applicable agency regulations or procedures, by the head of the agency or designee, or the contracting officer, to receive such information. Contractor bid or proposal information and source selection information shall be protected from unauthorized disclosure in accordance with 14.401, and 15.207, applicable law, and agency regulations.”

Clearly, then, you cannot release technical and price evaluations or reports of source selections panels. Certainly, you can provide the evaluation of an offeror’s proposal **to that offeror**, but you cannot release the evaluations of other offerors’ proposals. The contractor has a right to know how its proposal was evaluated, to know some information about the successful proposal and basis for award, but *not* to know how the proposals of all its competitors were evaluated.

FAR 15.506 address post-award debriefing of offerors. Although offerors may ask for it and certainly would love to gain insight into their competitor’s proposals, the FAR prohibits point-by-point comparisons of the proposal with those of the other offerors. In fact, FAR 15.506 includes a list of what shall be included, at a minimum, in a debriefing:



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At a minimum, the debriefing information shall include --

- (1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;
- (2) The overall evaluated cost or price (including unit prices), and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;
- (3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;
- (4) A summary of the rationale for award;
- (5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and
- (6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

In our experience, agencies do not typically “rank” all offerors. Acquisitions are typically awarded on a “best value” basis. Agencies may “rate” or “score” technical evaluations (e.g., Offeror A: 95 points, Offeror B: 93 points, Offeror C: 90 points), then make a more objective best value determination, considering technical, price, past performance, risk, responsibility, etc. While agencies typically identify the contractor that represents the best value, they do not typically “rank” the remaining offerors (i.e., second best value, third best value, etc.)

The debriefing shall not reveal any information prohibited from disclosure by FAR 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C. 552). FAR 24.202 reads as follows:

24.202 -- Prohibitions.

- (a) A proposal in the possession or control of the Government, submitted in response to a competitive solicitation, shall not be made available to any person under the Freedom of Information Act. This prohibition does not apply to a proposal, or any part of a proposal, that is --
 - (1) In the possession or control of NASA or the Coast Guard; or
 - (2) Set forth or incorporated by reference in a contract between the Government and the contractor that submitted the proposal. (See 10 U.S.C. 2305(g) and 41 U.S.C. 253b(m).)



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(b) No agency shall disclose any information obtained pursuant to 15.403-3(b) that is exempt from disclosure under the Freedom of Information Act. (See 10 U.S.C. 2306a(d)(2)(C) and 41 U.S.C. 254b(d)(2)(C).)

(c) A dispute resolution communication that is between a neutral person and a party to alternative dispute resolution proceedings, and that may not be disclosed under 5 U.S.C. 574, is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552(b)(3)).

Note that (a)(1) above may indicate that NASA and Coast Guard may have unique statutory authority under which the source selection information was released. Especially in such a case, just because NASA released information does not mean you should or even can!

Your thought about notifying offerors prior to release of information stems from the Freedom of Information Act (FOIA) and Executive Order 12600. In general, the Act requires that agencies make information available to the public. However, it cites several exemptions. The two exemptions most frequently utilized in the acquisition field are (b)(4) and (b)(5), as follows:

(b) This section does not apply to matters that are --

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

Exemption b(5) applies to inter- and intra-agency memoranda which are deliberative in nature. This exemption is appropriate for internal documents which are part of the decision-making process and contain subjective evaluations, opinions and recommendations. Source selection evaluation memoranda will generally fall into this category.

Executive Order 12600,¹ issued in 1987, requires agencies to notify submitters of confidential information that information has been requested *if* the Government intends to release some or all of the information requested. The submitters (usually offerors or contractors, in the case of acquisition) then may request that the information not be released and must cite the reason for such a request.

FAR Subpart 24.2 addresses the Freedom of Information Act as it relates to procurement. Section 24.203 states:

¹ Executive Order 12600 is viewable on the internet at <http://www.nara.gov/fedreg/codific/eos/e12600.html>



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Contracting officers may receive requests for records that may be exempted from mandatory public disclosure. The exemptions most often applicable are those relating to classified information, to trade secrets and confidential commercial or financial information, to interagency or intra-agency memoranda, or to personal and medical information pertaining to an individual. Since these requests often involve complex issues requiring an in-depth knowledge of a large and increasing body of court rulings and policy guidance, contracting officers are cautioned to comply with the implementing regulations of their agency and to obtain necessary guidance from the agency officials having Freedom of Information Act responsibility.

We couldn't agree more. If you are uncertain as to what can be released in a debriefing or under the authority of the Freedom of Information Act, consult with your agency's FOIA Office (or FOIA Officer) and/or legal counsel.

Conclusion:

It is not unusual for offerors to request more information than they are entitled to. Our advice: Become intimately familiar with the FAR regulations regarding debriefings and release of Source Selection Information, as well as Freedom of Information Act (FOIA) requirements. In debriefings, provide information as to the strengths and weaknesses of the debriefed offeror, but do not give out any information about other offerors. The goal is to provide the offeror enough information so that it can improve its proposals in future dealings with the government – not to provide information about its competitors. While you can provide information that does not identify the other offerors (e.g., “there were 7 offerors, ranging in technical score from 70 to 95”), do not provide the names of other offerors or any information as to what they proposed or the strengths and weaknesses of their proposals.

The release of information relating to source selections is a sensitive issue. If uncertain as to what can and cannot be released, consult with your legal counsel.

Note: This Research Response is provided as part of the Acquisition Directions™ on-call research, information, and advisory service. The information and opinions in this document are based on professional research of available information using sources deemed reliable. If your question involves legal issues, you may wish to consult an attorney for legal advice based on your particular situation.