



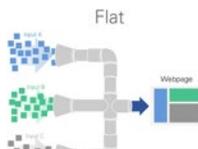
EXECUTIVE summary

Fall 2014 | Volume 21, Issue 4

This Issue's Theme: **Time Capsule – A Look Back at 2014, and a Look Ahead to 2015**

Inside:

- 2 APMP-NCA – a Look Back and a Look Ahead
- 5 What Proposal Graphic Trends Are You Seeing?
- 8 Capture and Proposal Innovations: The Year That Was and the Year Ahead
- 10 Strengthen Tomorrow's Workforce TODAY!
- 11 A Lawyer's Look Back at 2014, and a Look Ahead to 2015
- 13 An Agile Retrospective
- 15 The Biggest Proposal Trend this Year and Next Year and the Year After Next Year? Tough TO Competition
- 17 APMP-NCA & APMP International Upcoming Events
- 20 APMP-NCA 2014 Corporate Partners





A Lawyer's Look Back at 2014, and a Look Ahead to 2015

by Shlomo D. Katz, Counsel, Brown Rudnick LLP

The year that is drawing to a close has been a busy one for Government procurement policy makers. President Obama, in particular, has been hard at work, issuing half-a-dozen Executive Orders about who is eligible to win and perform government contracts and what contract costs the Government will reimburse. Do you prohibit employees from discussing their compensation with each other? Not if you want to remain eligible for contracts. Did you spend money either encouraging or (more likely, if you are an employer) discouraging union activities? Not on the government's nickel! Did you inform workers of their labor rights, and, if you are construction contractor, enter into multi-employer collective bargaining agreements? If not, you may be in trouble. For that matter, if you've violated any labor laws in the last five years, you may also be on the Government's blacklist.

The coming year promises to be equally busy. However, none of these new policy matters are immediately relevant to the work of proposal professionals. Even business development folks aren't so concerned with a company's labor record; that's for the HR folks and lawyers to figure out. So, what happened in the law that would interest people who write and design proposals? Not too much is new, but lots is important.



Among other things, proposal professionals can continue to improve their skills by keeping an eye on bid protest decisions. In the year that is ending, the overwhelming majority of protests have continually been denied. But, when agencies blundered, the Government Accountability Office (GAO) did not shy away from telling them so and from calling for a do-over of proposal evaluations or even for new proposals.

Here is a sampling of GAO protests that were decided in 2014, together with takeaways to help you avoid some of the same pitfalls:

In *Logistics Network, Inc.* (B-408995, January 6, 2014), GAO held

that the agency reasonably rejected an offeror's response to brand name or equal solicitation because the offeror provided insufficient information to evaluate the offered products. GAO found that the offeror had said its products were "equal" but that its product information consisted almost entirely of text taken from solicitation and images that appeared on the brand name manufacturer's website. Lessons learned: While brand name or equal solicitations are rare, an offeror's obligation to justify its offer and to provide adequate information is a constant. Also, don't ever misrepresent your offering by using someone else's literature.

In Solers Inc. (B-409079, January 27, 2014), GAO sustained a challenge to the realism analysis of the awardee's proposed price/cost because the record did not demonstrate that the agency's evaluation was reasonable. Likewise, GAO sustained a challenge to the evaluation of the protester's technical approach because the contemporaneous record did not support the agency's explanation for its assessment of proposal merits. Lessons learned: There's little that offerors can do if agencies fail to dot their i's and cross their t's in an evaluation. But, a shabby evaluation is sometimes the result of a carelessly-written proposal. We don't know, but maybe the reason the agency's cost realism analysis was inadequately documented was that the offeror's cost proposal was inadequately documented. Make sure that your proposals contain all of the information that the Government needs to conduct a thorough, defensible evaluation of both your technical and cost volumes.

Another lesson: If you are on the losing end of the procurement and your debriefing suggests that the government did not properly consider the technical merits of your proposal, consider protesting. If the agency seems not to have understood your proposal and it's not because you left information out, the agency may have trouble defending its evaluation to GAO. But, don't protest if you merely disagree

with the agency's well-reasoned evaluation or if you didn't bother to answer the RFP's questions.

In McGoldrick Construction Services Corporation (B-409252.2, March 28, 2014), GAO found that an agency used an unstated evaluation criterion when it assessed a significant weakness in the protester's proposal. Apparently the protestor was marked down for not including a quality control feature that wasn't required by the RFP. Lessons learned: Just as you are obligated to comply with the solicitation, so is the Government. If it doesn't, you have rights. But, while the Government should not penalize offerors for not providing what wasn't requested, the Government is often permitted to give offerors extra credit for exceeding the solicitation's requirements. Keep those enhancements coming, but make sure to explain in your proposal what benefits the government will receive, especially if there is a cost or price premium involved.

In Marathon Medical Corporation (B-408052 June 4, 2013), GAO agreed that the agency had held unequal discussions by allowing the awardee, but not the protester, to submit information to demonstrate that its proposal was acceptable. Lessons learned: Offerors like to have an inside track with the evaluators, but it's not always a good thing. In this

particular case, the agency probably did not intend to show favoritism; it just made a mistake. That mistake meant that the agency had to re-do at least part of the procurement. In an extreme case, where procurement personnel intentionally give one offeror preferential treatment or inside information, someone could go to jail. It has happened.

Space precludes me from listing many more interesting cases and lessons learned. Here's the main takeaway: When you compose your New Year's resolutions a few short months from now, resolve to read each solicitation, respond to each requirement in a way that gives the agency enough information to justify the highest possible rating, make sure to explain how your cost or price is realistic and reasonable if that is requested by the solicitation, and comply with all applicable laws.

That way we won't read about you when we look back at 2015.

Shlomo D. Katz is Counsel in the Washington, DC office of the international law firm of Brown Rudnick LLP, a Corporate Sponsor of APMP-NCA. Shlomo specializes in all aspects of Government contracting and is a regular presenter at chapter events. If you have any questions about the topic of this article or other proposal or contracting issues, please contact Shlomo at 202.536-1753 or skatz@brownrudnick.com.