E-3.1 Evaluation Activities

Proposal Evaluation

Evaluations shall either use separate technical/risk rating process in the DoD Source Selection Procedures (SSP), section 3.1.2.1, and applying the descriptions in the DoD SSP Table 2A Technical Rating Method; or the combined technical/risk rating process in the DoD Source Selection Procedures, section 3.1.2.2, and applying the descriptions in DoD SSP Table 3 Combined Technical/Risk Rating Method, consider all examples in DoD SSP Table 2A and considerations for application of risk evaluation applicable to the definitions in DoD SSP Table 2B.

Data rights cannot be a factor or subfactor. However, offerors may be granted one or more strengths related to data rights for a give factor or subfactor. Further, the Government cannot require the offeror to relinquish its data rights beyond Government's statutory entitlement. The Government may not assign a weakness or deficiency due to a lack of proposed data rights above the minimum statutory entitlement.

Strength Examples:

1) Delivering technical data with license rights that facilitate future competitive procurement;

2) Delivering items that are available in the commercial market that can be procured by other contractors in a future competitive procurement (even without providing detailed technical information on these commercially available items); and/or

3) Delivering a Product Support/Sustainment Strategy that includes Government purpose rights (licensing technical data to alternate contractors who will be able to participate in future competitive procurements).

Evaluation Considerations

When assessing the proposed data rights, consider the following:

1. The Government is entitled to an "unlimited rights license" or an "unrestricted rights license" to form, fit, and function data; and data necessary for operation, maintenance, installation, and training, other than Detailed Manufacturing and Process Data (under DFARS 252.227-7013(b)(1) and DFARS 252.227-7015(b)(1)). Furthermore, the Government is entitled to an "unlimited rights" license for studies, analyses, and test data produced for the contract (when the testing was specified as an element of performance) that relate to non-commercial items, components, and processes. Thus, the Government should review and validate the offeror's data and software rights assertions, in coordination with the program's attorney advisor, to ensure that the offeror's proposal reflects at least the license rights to which the Government is entitled. (Note: For more detailed information, refer to the Army Data and Rights Guide http://www.acq.osd.mil/dpap/cpic/cp/docs/Army_Data_and_Data_Rights_Guide_1st_Edition_4_Aug_2015.pdf)

2. Negotiate data rights while still in a competitive environment. These negotiations will likely require the Contracting Officer to open discussions unless the solicitation provides another methodology. Although data rights cannot be a factor or subfactor, discussions/negotiations can be opened to negotiate any element of a solicitation or proposal (see sample language for Sections L&M to incorporate data rights as a possible strength in the evaluation). Note: Certain Associated

License Rights will be granted by standard DFARS clauses. Additional Associated License Rights may be applicable negotiated Special License Agreement or commercial license agreement. However, the data delivery requirements must be specified, case-by-case, in each individual contract, and data deliverables must be clearly identified by CLINs and CDRLs that are traceable to the PWS. Deferring the discussion of data deliverables will likely put the Government at a disadvantage, however, it is an option (see DFARS 252.227-7027 Deferred Ordering of Technical Data or Computer Software). If there are no data deliverables, the Government cannot exercise its data rights. The data rights and data deliverables should be negotiated at the same time. The IP Strategy should continuously be updated to forecast future sustainment needs so Government can obtain competitive pricing for future activities.) The negotiated rights shall be passed down to the subcontractor(s).

3. Ensure the solicitation requires the proposal to include the supporting information necessary for the Government to validate contractor's ability to provide any proposed data rights. For example:

a. The offeror's proposal shall demonstrate the ability to grant license rights for technical data and computer software necessary for depot maintenance, if applicable.

b. Identify the software developer/owner. Determine if the offeror wholly owns the rights necessary to make, use, sell, or offer them for sale. Is there a third party software developer/owner?

c. Determine if the offeror proposed third-party and/or utilizes open source software. Will any of the third-party software be open source?

4. With the assistance of a cognizant IP attorney, the Government should conduct research to verify IP and data rights assertions made by the offeror. If the Government has reason to believe that the offeror incorrectly asserted that an item was developed exclusively at private expense, the Government may audit the offeror's accounts with the assistance of the Defense Contracting Audit Agency (DCAA). (NOTE: The Contracting Officer should engage with DCAA as early in the process in the procurement planning process as possible to determine DCAA's availability to assist.)

Parent topic: CHAPTER 3 EVALUATION AND DECISION PROCESS