
CONTRACTOR RESPONSIBILITY DETERMINATIONS

- [Sample checklist](#) (page 14)
- [Resources and links to references](#) (page 19)

One definition of an ‘experienced’ buyer might be someone who has been around long enough to imagine everything that can go wrong in the contracting process and who takes steps to avoid or mitigate problems before they arise.

1. INTRODUCTION

- A. Prior to making an award, buyers must evaluate the performance risks, and determine that there is a reasonable expectation that the selected contractor can & will adequately perform the contract from an administrative perspective as well as a technical perspective.
 - i. Technical and price sections of a proposal are generally considered separately. But the proposal does not stand alone. We must also evaluate the contractor who submitted the proposal and will be performing the work.*
- B. The evaluation of a contractor’s administrative situation and business capability to perform is generally considered a “responsibility determination”.
- C. The scope and complexity of the responsibility evaluation must be commensurate with the complexity and risks involved with the intended contract and sufficient in order for the buyer to make a positive determination. This checklist is intended to assist buyers in making a responsibility determination by providing suggested evaluation factors, references and resources.
- D. While it may seem obvious – selecting a responsible contractor does not happen by accident. Every offeror wants the contract – but some may not deserve it. Even worse, some contractors may not realize they are not qualified or adequately prepared to perform.
- E. Depending on the risks involved with the proposed contract, the responsibility determination may have to be quite rigorous and may even include the use of a 3rd party due-diligence evaluation contractor, plant visit, or a formal responsibility evaluation team.
- F. It is the buyer’s job to see the big picture, look at all the facts, circumstances and **potential** problems before awarding a contract.
- G. A comprehensive responsibility review protects both the buyer and the contractor from entering in to a contract doomed to failure..

2. REGULATORY SUPPORT

NOTE: We shouldn’t need a regulation to remind us of our responsibility, but we might need the regulation to support our decision, particularly if it involves disqualifying an offeror.

- A. DOE Acquisition Guide 9.4 *Contractor Responsibility Determinations*
- B. DOE Policy Flash 2012-30 issued in response to a DOE-IG report
 - i. *COs not documenting reviews of past performance... CO's were not always conducting responsibility determinations properly*
- C. FAR 9.103 (EXCERPT)

(a) Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.

(b) No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. **In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.** If the prospective contractor is a small business concern, the contracting officer shall comply with Subpart 19.6, Certificates of Competency and Determinations of Responsibility. (If Section 8(a) of the Small Business Act (15 U.S.C. 637) applies, see Subpart 19.8.)

(c) The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest offer. A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.

3. RESPONSIBILITY VS RESPONSIVENESS DETERMINATIONS

- A. Compliance with solicitation technical and administrative requirements is generally a responsiveness determination and usually would happen long before responsibility factors are considered. Those criteria tend to be fact-based, easily verifiable and not subjective. Thus a non-responsive offer will not meet our needs and is not considered for award regardless of how qualified the offeror is. Example:
 - i. *Failure to have an NQA-1 program as required by the solicitation renders the proposal non-responsive and will no longer be considered for award.*
- B. However, in some cases, the same criteria –even if not a mandatory requirement - could be considered during a responsibility determination.
 - i. *In a non-QA-related solicitation, the fact that the offeror maintains a compliant NQA-1 program for other work could be a positive demonstration of the offeror's business commitment and acumen.*
- C. Occasionally the two determinations could also cross paths.

- i. If an otherwise highly qualified and responsible supplier is determined to be non-responsive, that could be an indicator that there are flaws in the specification or evaluation process.*
- D. Depending upon the nature and scope of the requirements, issues of responsiveness (e.g. missing a bid bond) may overlap with responsibility criteria. As a practical matter, a buyer's decision is more defensible if the rejection is non-responsive (a statement of fact about the proposal), rather than non-responsible (a matter of opinion about the offeror's business situation).
 - i. The proposal is considered non-responsive to sections 2, 5, 7 of the solicitation. Offeror does not have the requisite QA program, is unable to supply the required material and does not have the equipment to test the product as required. [these are yes/no questions and not really subject to argument]*
 - Vs.*
 - ii. The offeror failed to demonstrate that their accounting system could correctly and accurately account for the work proposed on the contract. [the buyer and the contractor disagree which invites further argument]*
- E. Contractor responsibility determinations are conducted as a means of ensuring that the responsive offers are legitimate and based on sound business judgment by businesses who can reasonable by expected to perform successfully. The higher the value, greater the risks of performance, or disparity between offers- the greater the need for an in-depth responsibility determination.
 - i. Procurements that are critical to the company's mission may require extensive contractor reviews as would a procurement in which a low offer is significantly lower than those of the competition. A very low offer may indicate that the offeror lacks sound business judgment.*
- F. Responsibility reviews should be as broad as need based on the scope, complexity, risk, etc. associated with the action. Buyers may identify and emphasize the evaluation of certain criteria deemed critical depending upon the nature and scope of the proposed contract.
 - i. A responsibility determination for a management or information technology consulting contract may emphasize a contractor's past performance, resumes of project team members, etc., while a commodity award may focus on the firm's capacity to produce and/or supply the commodity. Purchasing something that is already in a contractor's inventory is significantly less risky than purchasing something the contractor will have to spend months fabricating.*
- G. Each contract award must be considered on a case-by-case basis after a comprehensive weighing of all factors. An unfavorable determination in any one evaluation area may or may not result in a non-responsibility, depending on the nature of the transgression and of

the contract. At the bottom line, after considering all of the factors, the buyer must decide with reasonable assurance that the proposed contractor will be able to successfully perform.

- H. The potential impact of failure is a compelling factor in the analysis and review. If the contractor fails to perform, or only partially performs, a legal remedy might still leave the buyer damaged. A bad or poorly formed contract or a contract with an irresponsible supplier is often a much worse problem than no contract at all.
- i. A construction job which is only half finished might have already used much of the buyer's funding leaving little left for reprocurement [and the legal battle to recover against the original contractor]. If the argument ends up in court, it is often likely the contractor can demonstrate at least some culpability by the buyer's personnel, defects in the specification or changes in site conditions which would preclude the buyer from recovering full damages.*
 - ii. It should also be noted, that a half-finished contract is often not attractive to other potential offerors. Most would rather not start with someone else's half finished work or assume risks or problems that already resulted in failure of a competitor. Thus regardless of the legal remedy available – failure of a contract is usually much more painful than the effort required to do the up-front work required to ensure success.*

Important Win-Win negotiation position: Both the Buyer and the Contractor want to have a successful contract. Thus the common enemy is a contract which the contractor cannot perform. Both parties should be able to agree; the worst outcome of a contract negotiation is a 'bad' contract. This thought should help direct negotiation objectives and discussions towards ensuring success and avoiding failure.

4. LINES OF INQUIRY – TYPICAL EXAMPLES

- A. Does the contractor have Financial Impairments to performance? That is, has something happened in the past, or is happening now, that could affect the execution of the contract.
- i. A review of the contractor's accounting system, financial statements, SEC filings, credit reporting records indicate that the contractor has sufficient financial stability and resources to successfully fund performance of the contract and maintain positive cash flow based on the expected production and contract payment schedules.*
 - ii. There are no open liens, lawsuits, unfunded judgment obligations nor public records showing payment problems to suppliers or workers.*
- B. Are there Financial Impediments which could affect performance? Is there something that could happen in the future that may hinder a companies' ability to financially perform the contract.
- i. A review of contractor's financial records indicates that the contractor has sufficient assets and credit to support performance of this contract based on the estimated cash flow required to procurement raw materials, and make payroll for the*

estimated fabrication period. The estimated investment by the contractor – before the contract will start generating positive cash flow is \$X for y months.

- ii. For this type of contract which requires detailed cost accounting, the contractor's accounting systems have demonstrated the ability on previous contracts of similar type, complexity and scope to track and report costs and to keep adequate records.*

Important fact for buyers to gather: For this contract, under these circumstances, how much will it cost the contractor to perform this contract? How can we say the contractor has sufficient financial resources if we can't estimate how much it will cost?

- C. Is the contract capable of performing the requirements?
 - i. The contractor has previously supplied items of services of this size and scope under this type of contract with similar performance and administrative requirements.*
 - ii. The contractor has a management and supervisory staff experienced in contracts of this size and complexity. Facilities and resources sufficient to perform this contract are in place or under binding retainer and ready to start work as required to complete the contract as specified. Union agreements, business licenses, State and Federal IDs and insurance policies are in place and will not expire during the term of the contract.*

- D. Performance risks extend beyond those directly associated with the contractor. Buyers must also consider the risks to their business if the contract is issued. These risks could include collateral publicity damage if the contractor has problems.
 - i. The selected contractor has a satisfactory record of business integrity and ethics; A search of public forums, along with Federal, State and local government web sites has not revealed any known scandals, indictments or public postings accusing the contractor of bribery, corruption or illegal activity.*
 - ii. The contractor's record of environmental, sustainability and human rights performance is unblemished. A search of EPA, OSHA, UN and watchdog organizations has not revealed any negative posting about the contractor.*

- E. Identified weaknesses have been adequately explored, analyzed and –if a decision is made to proceed- adequate mitigation plans are in place. This could include additional oversight, monitoring, negotiated changes in performance or payment requirements and/or changes to the contract which protect the buyer's interest in case of failure or problems.
 - i. Based on an analysis of the large investment required to obtain raw materials and the contractor's otherwise responsive proposal and responsibility determination, a change was negotiated to the contract in which the buyer will procure the raw materials and provide those to the contractor for fabrication. In exchange the contractor has provided additional consideration to the buyer in the form of a price reduction, and improved delivery schedule. In order to protect the buyer's interests, only a small portion of the raw material will be provided and fabricated at any one*

time. In addition, the contractor has agreed to allow the buyer to review contractor's financial condition at reasonable intervals.

- ii. The adequacy and successful implementation of a mitigation plan is of paramount importance. More often than not, buyers end up accommodating responsibility weaknesses (or their own inadequate analysis) and awarding contracts for expediency reasons. In those situations, as long as the mitigation plan is adequate for the perceived challenges, the contract can be successful.*
- iii. Contingency planning and mitigation plans are useful tools for many contract situations – not just in the obvious case of a questionable supplier. A process which questions what can go wrong and then accommodates the possibilities with contingency planning is a reasonable business practice. This “thinking ahead” strategy takes practice and persistence to develop. In simple form, this is like having a first aid kit at the workplace. Example: placing the software source code in an escrow holding location or obtaining digital copies of all drawings – in advance.*

5. SOLICITATIONS

Note: Negotiating the best possible contract starts at the solicitation. How the solicitation is structured, the information shared between buyers and contractors and the pre-award discussions form the foundation of a successful contract. The worst thing buyers and contractors can do is to enter in to an agreement that is likely to fail. By giving offerors an opportunity to prove they can be successful we are avoiding a contract which is likely to fail. Read more about creative negotiations in this article:

www.mltweb.com/tools/articles/details.htm .

- A. Offerors deserve every chance to demonstrate their competence and ability to fulfill contract requirements. Competent contractors usually welcome the opportunity to explain their qualifications and expertise.

Negotiation tip: Giving the contractor a chance to describe qualifications and abilities is much more likely to get a positive response than a ‘demand that contractors prove they can do the work’. It might be an indication of weakness if a contractor wants to spend more time talking about how bad the competition is, rather than describing its own skills and abilities.

- B. Anticipating the breadth and depth of a responsibility determination should be done at the time a solicitation is being prepared. Solicitation and draft contract documents should include submittal requirements and compliance statements appropriate to address responsibility issues and if needed, ensure continued compliance during contract performance.
 - i. Contractor must not be on the EPA list of polluting companies and must remain off of the EPA polluting company list during performance of any resulting contract.
{...or else what???*

- C. Depending on the nature and scope of the procurement, Buyers may require the offeror to detail the specific nature of its relationships with other companies; to provide the names and addresses of key personnel, and to identify past ownership positions or officer status these personnel have had with other companies over the past five years. Responsibility review may then be applicable to those firms as well.
- i. A wholly owned subsidiary of a parent company with serious ethical and environmental compliance issues – could likely be considered a performance risk.*
- D. Buyers may detail specific responsibility requirements and may add additional criteria to the procurement reflecting special contract requirements. In all cases, these standards must be rational, and based on demonstrated needs. Requirements should not be used to artificially limit competition.
- i. Contractor must identify the key individuals who will be assigned to the contract and responsible for performance. Proposals must include resume's experience descriptions and a signed statement that the individual understands the nature of the contract and believes they are qualified to perform. Key individuals will be identified in the contract and may not be replaced without concurrence by the Buyer. Loss or replacement of a key individual without the Buyer's concurrence in advance will result in a \$5K reduction in the contract price and/or may be considered a material breach of the contract by the buyer.*
- E. If a company has previously found a contractor to be non-responsible, or has knowledge of a contractor's past violations, convictions, non-performance, etc., the buyer may still provide the contractor with an opportunity to submit a proposal and then consider the issue of responsibility on a contract-by-contract basis.
- i. Include specific solicitation requirements for the contractor to respond to previous issues. In order to be considered for award, contractor must provide rationale sufficient to demonstrate that previous performance problems have been resolved. These issues may also be raised during negotiations. Ask questions like; "Since you failed to deliver as promised on the last order – why should we believe your delivery promise this time?"*
 - ii. If the issue is critical, consider adding mitigation language to the contract; reduction in price, premium shipping, no charge cancellation, etc.*
- F. Appropriate submittal requirements should be included in the solicitation process to allow contractors to demonstrate their qualifications and provide a basis for making an informed determination. Important: this could also include requirements added or reworded to mitigate concerns raised on previous contracts. Example: contractor must provide a copy of the existing permit – in lieu of obtaining a permit subsequent to award.
- i. Solicitation and proposal requirements may also be used to mitigate concerns about specific contractors or elements of the acquisition. Example: provide evidence that*

you have properly analyzed product availability and can make the promised delivery. Failure to provide adequate assurance that the proposed lead time is accurate would be grounds to question the integrity of the proposal.

Caution: *Changing the contract type to fixed price or negotiating a payment retainage may not be sufficient to mitigate the risks of contracting with a nonresponsible contractor. That is a contractor who performs poorly or does not finish the job, might have used up available time and resources to the point the buyer is in an untenable position. Even though costs might be recovered in a lawsuit, the impact of the contract failure or delays in reprocurement are onerous and may preclude contract termination.*

G. Qualification criteria and responsibility questions should generally be separated from the technical, performance and pricing parts of the solicitation. This not only affords more flexibility in the evaluation process, but also highlights the important of the qualification and responsibility information to the contractor. Additionally, for both the contractor and the buyer different groups of people may be involved in preparation and evaluation of each proposal section.

i. Proposal Section D: Offeror's qualification and experience. If this section is empty or only consists of a pre-printed brochure, it will be an obvious weakness to everyone that is involved in the process, including supplier personnel preparing the proposal.

H. Pre-Qualification

i. Complex actions may be handled by using a two-step process, in which prospective offerors are afforded the opportunity to submit qualification documents for evaluation before the solicitation. Use the pre-qualification phase to filter the list of prospective contractors who are subsequently afforded the opportunity to submit proposals. Having an NQA-1 program is one example of criteria that can be demonstrated in advance and may take some additional time or effort to review.

ii. Caution: Just because a contractor appears qualified to submit a proposal, once the details of the solicitation are known, other potential problems could arise. A QA program or business license could expire during an extended solicitation process.

6. MANDATORY REQUIREMENTS

- A. Certain conditions must be met by prospective contractors, regardless of any additional evaluation factors unique to the procurement action. These factors should generally be considered go/no-go. Contractors should be afforded a reasonable opportunity to comply and/or correct minor inconsistencies – but an award should not be made prior to successful resolution of all mandatory issues.
- B. Legal identification of the contractor and principal agents is the start of a mandatory responsibility determination. Inconsistencies or omissions in the information provided, while not conclusive, should be reconciled before proceeding with any further activity. Legal

identification and competency for the contracting parties and key personnel involved is not optional.

- C. Structure a solicitation to prominently list all of the mandatory requirements. Review all of the contract terms and responsibility drivers for those which can be verified and would be considered mandatory. Ideally if those can be specified separately, then it might preclude an offeror from spending a lot of time submitting a proposal which will be dismissed, or even worse, a buyer from missing a compliance issue until after award.
 - i. Issues in this category could include, licenses, environmental compliance, background checks for workers, foreign ownership etc.*

7. ADDITIONAL DRIVERS

- A. In addition to FAR part 9 quoted above and general business information, there are a number of other FAR and Federal requirements relating to contractors that are appropriate to consider in a responsibility determination. Some of those requirements may be Federal Law and thus applicable to the action regardless if they are specifically called out in the solicitation and contract. Other requirement may need to be overtly included in the solicitation and contract. In some cases specific requirement flowdown may also require unique submittals and/or compliance reviews.
- B. In some situations mandatory requirement compliance on a previous transaction may be considered as part of a responsibility determination prior to award of subsequent actions. E
 - i. A contractor who fails to comply with SCA or DBA requirements in one action may be considered not sufficiently responsible to receive subsequent awards which will invoke the DBA or SCA.*
- C. Bonds. In our workshop “Selecting a Responsible Contractor”, we briefly discussed contractor bonds. It sounds like a complex issue, but if I think about bonds as a type of insurance policy, it’s easier for me to understand. Basically, the contractor purchases a bond “insurance policy” from a bonding company (surety) that identifies me “the buyer” as the payee. Bonds are purchased for specific risks (e.g. the contractor will not finish the contract) and pay out in accordance with the terms of the bonding agreement.

Of course the devil is in the details and there are many questions to ask.

- a. When should I request a bond?
 - i. Some public and federal agencies are required by law to get bonds. Some organizations require bonds for large, complex or risky jobs. Some types of contracting activity make bonds more important. Buyers might want the added protection of a bond when working with a new or inexperienced contractor or a contractor with whom we have had previous performance problems.
- b. What type of bond should I get?

- i. There are a number of different types of bonds, just like there are many types of insurance.
 - ii. We can request a “Bid Bond” – that is a bond which ensures a bidder in a public bidding environment, will accept the contract at his bid price even after he finds out that other bidders were at much higher prices.
 - iii. A more common bond, is a “Performance Bond”, ensuring that the contractor will finish the job. Here is a good article explaining bonds.
<http://www.attny.com/gci32djd.html>.
 - iv. The Federal Government generally requires a specific type of bond on construction contracts: Miller Act Bond.
 - c. By far the most common means of satisfying federal bonding requirements is a bond issued by a corporate surety.
 - i. The Department of the Treasury maintains a list of corporate sureties approved to issue bonds for Federal Projects, [Treasury Department Circular 570](#). The circular also is posted in the Treasury’s Web site at <http://www.ustreas.gov/>. Contracting officers are prohibited from accepting surety bonds issued by corporate sureties not listed in the Treasury Circular
 - d. How much will it cost?
 - i. The size and type of contract will influence the price a seller has to pay for a bond. Also the bonding company (Surety) will consider the contractor’s size, experience and the risks involved in the contract. However, the bonding business is a competitive environment and sellers can shop around for a good bonding company and a good price for the bond.
 - ii. Obviously, sellers will include the cost of a required bond, in their pricing structure so the buyer ends up paying for it. However, that might be a good thing. Since the buyer is going to end up paying for it anyhow, you have to seriously question why a seller would refuse to obtain a bond.
 - e. How do I know the bond is going to protect me?
 - i. A bond is a legal contract, and just like any complex legal agreement, advice of legal counsel is advised.
 - ii. That being said, there are a number of standard bond format forms in common use. The American Institute of Architects publishes standard bond forms and using one of those forms for a commercial contract is probably a safe start.
<http://www.nasbp.org/aiabondforms/welcome/>
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 - f. Federal Acquisition Regulations (FAR) part 28 describes bonding requirements for the government and government contractors along with standard forms (SF25 and SF25A).
 - i. FAR: <http://www.acquisition.gov/far/current/html/FARTOCP28.html>
 - ii. GSA standard forms: <http://www.gsa.gov/portal/forms/type/SF>
 - g. How do we identify bonding companies and find more information? Here’s a start:
 - i. U.S. Treasury Department list of bonding companies.
<https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570.htm>
 - ii. National Association of Surety Bond Producers:
<http://www.nasbp.org/NASBP/Home>

- iii. A Google search for “surety company” will give you a long list of sureties.

8. DOCUMENTATION

- A. A determination that the selected contractor is responsible for the type of contract contemplated must be documented as part of the award commensurate with the scope, complexity, value and risks of the action. Failing to find that a contractor is responsible or negotiate an acceptable mitigation plan should result in determining the contractor ineligible for award.
 - i. Since a determination of non-responsibility can sometimes be a judgment, contractors should, in those cases, be afforded the opportunity to address and resolve the concern. Certain problems, such as a contractor’s failure to pay taxes, may be readily resolved and corrective action by the contractor may result in the contractor being deemed responsible.*
- B. In addition to documenting that an appropriate level of due-diligence was performed, there could be contractual and legal ramifications arise that may have to be supported. These may range from audit risks up to and including criminal prosecution. File documentation should be sufficient to show the elements that were analyzed, and the rationale used for making the decision and for some types of determinations, include evidence of compliance (e.g. a QA manual, or EPA permits). On high-risk and high-value actions consider that the supporting analysis may have to meet legal evidence guidelines.
- C. Not all adverse information may be sufficient to result in a non-responsibility determination; and in some cases a company may need to contract with a contractor even if there are strong indications of non-responsibility. In such cases, Buyers must document in the Procurement Record the rationale for continuation of award.
 - i. As part of the agreement to proceed, buyers may modify the proposed contract to require additional monitoring of the contractor’s performance or may wish to award based on a contractor certification that it is in compliance, or will comply, with any specific responsibility conditions imposed by the company under the contract terms. The resulting contract might also be modified to include early termination language, surety bonds, contract monitoring provisions, partial awards, etc.*
- D. Explain responsibility determinations and analysis with rationale that is clear, complete and convincing. Don’t open the door for someone to subsequently ask “why” or argue that the rationale was weak. GAO case rulings seem to lean in favor of the buyer’s decision as long as it is adequately documented as opposed to the automatic loss when buyer fails to include documentation.
 - i. Rationale for making a determination, mitigating circumstances and analysis documented in the file makes it easier for an auditor, reviewer, or the “court”*

to decide the buyer exercised due diligence.
(even if there are disagreements about the conclusions).

ii. From a negotiation perspective – consider it this way...

If, after reading the file documentation, it looks like you have done your homework, then as an auditor, it's a lot more effort for me to challenge your analysis and assertions.

9. EXAMPLES & SAMPLE LANGUAGE (in no particular order)

- A. *Contractor must provide sufficient information with the proposal to demonstrate a thorough understanding of the scope of work and contractor's ability to successfully perform the contract as proposed.*
- B. *Contractor failed to demonstrate an understanding of the work in detail sufficient to determine that contractor had a sound bases for the proposal and necessary business judgment to successfully perform the contract.*
- C. *Contractor must provide a detailed description of the equipment and personnel available to perform this contract on award.*
- D. GAO Protest Decision B-406625

i. A god description of a price realism analysis – not the same as establishing the price to be reasonable]

In this regard, with respect to the price realism analysis, the RFP provided that the agency could: [r]eject any proposal, at any time during the evaluation, which is unrealistic in terms of performance commitments or based on unrealistically high or low price. Such proposals may be deemed to reflect a lack of technical competence, a lack of understanding of the requirements, an inability to perceive the complexity of the requirement, or a lack of sound business judgment.

[I like that “lack of sound business judgment as one of the possible conclusions]

ii. [comment from the judge about the difference between price reasonableness and price realism]

The RFP at some points appears to conflate price reasonableness and price realism. Before awarding a fixed-price contract, an agency is required to determine that the price offered is fair and reasonable. Federal Acquisition Regulation (FAR) § 15.402(a). An agency's concern in making a price reasonableness determination focuses primarily on whether the offered prices are higher than warranted. See McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 9. Although not required, an agency may also provide in the solicitation for a price realism analysis in a solicitation for the award of a fixed-price contract for the purpose of assessing whether an offeror's price reflects an understanding of the contract requirements or the risk inherent in an offeror's approach. Grove Resource Solutions, Inc., B-296228, B-296228.2, July 1, 2005, 2005 CPD ¶ 133 at 4-5. In general, a

price realism determination focuses on whether an offeror's prices are too low. See, e.g., Vital Link, Inc., B-405123, Aug. 26, 2011, 2011 CPD ¶ 233 at 6.

Further, the Evaluation Notice did not require EMR to raise its labor rates, but instead simply directed that "[t]he offeror shall verify that the prices are what it intended to propose or make adjustments as necessary and provide the revised prices in response to the Evaluation Notice." Id.

iii. [Good words to use in our file memos!]

The fundamental purpose of discussions is to afford offerors the opportunity to improve their proposals "to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation." FAR § 5.306(d); see Gulf Copper Ship Repair, Inc.

iv. [Good description about the purpose of discussions]

B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6. In discussions, an agency is required to discuss with each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. In addition, the contracting officer also is encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. FAR § 15.306(d)(3).

- E. GAO B-405940, Veterans Contracting Group, Inc., January 12, 2012
<http://www.gao.gov/products/B-405940>

Veterans Contracting Group, Inc. (VCG), of Mamaroneck, New York, protests the rejection of its bid and the award of a contract to Regiment Construction Corp., of Elizabeth, New Jersey, under invitation for bids (IFB) No. VA-243-11-IB-0284, issued by the Department of Veterans Affairs (VA), to replace a chiller at the VA's New York Harbor Medical Center. VCG contends that the agency improperly rejected its bid.

We sustain the protest - the **Buyer lost**.

In this case, the buyer lost in part because the file and subsequent correspondence failed to specifically identify sections of the specification that caused an offer to be rejected. As the GAO reviewer put it "the record is **remarkably** absent..."

Lesson: When making a determination of responsiveness, be specific. Show exactly what part of the specification or requirement the offer does not meet. Instead of "...the offered equipment does not meet specs..." be more specific. Example: "Specification section 2.6

requires contractor to provide chemicals in a Klein bottle however contractor proposed on page 38 to use mason jars."

Here is a revealing paragraph from the decision (pretty easy to see why the buyer lost):

Next, we turn to VCG's contention that the VA improperly rejected its bid for the Trane chiller and the R-123 refrigerant as not meeting the specifications in the IFB. The record is remarkably absent of any rationale to support the agency's arguments in this regard. The contemporaneous record contends vaguely that cut sheets for the Trane chiller were "questionable" and that the R-123 refrigerant associated with the Trane chiller did not meet the specifications of the IFB, without any explanation of what was questionable or what specifications were not met. During the development of the protest, we sought explanation from the agency, and the agency merely repeated that the bid was "lacking and thus, nonresponsive" and "failed to meet the criteria established by the agency in its IFB." Contracting Officer's Statement at 2; Supp. AR at 1. Despite multiple opportunities, the agency has not explained why VCG's proposal failed to meet the IFB's requirements, which of the 384 pages of specifications and drawings were not met, or what in the 14 pages of documentation describing the chiller model VCG included in its bid was questionable. Without support for its conclusions, we cannot find that the agency acted reasonably in rejecting VCG's bid.

F. GAO Case B-406990, Kollsman Inc., Oct 2012

DIGEST

Protest challenging the evaluation of the awardee's past performance as providing "substantial confidence" is sustained where the record does not support the reasonableness of this rating.

offerors who provided acceptable product samples were then evaluated considering the following factors: technical, past performance and price, with technical being significantly more important than past performance. Each offeror's past performance was evaluated to determine the relevancy of its referenced prior contracts, and was assessed as "relevant" or "not relevant." The agency then determined how well the contractor performed on each contract and assigned a past performance confidence rating.² Although price was not a weighted evaluation factor, the RFP stated that price would become increasingly important with "the degree of equality of the proposals in relation to the other factors on which selection [was] to be based, or when the price [was] so significantly high as to diminish the value of the technical superiority to the Government." RFP at 79.

² The possible past performance confidence ratings were substantial confidence, satisfactory confidence, limited confidence, no confidence and unknown confidence.

Kollsman also contends that the agency's evaluation of L-3's past performance was unreasonable and undocumented. Specifically, Kollsman contends that L-3's past performance rating of "substantial confidence" was not warranted given L-3's documented negative past performance on the predecessor HLM I contract.

The source selection decision did not discuss the past performance evaluation except to report the substantial confidence ratings and report that both proposals received the same adjectival rating. AR, Tab 4, Source Selection Decision, at 3.

We note that the agency and intervenor argue that the contract specialist's undocumented analysis of L-3's past performance by the contract specialist was reviewed by the contracting officer and the source selection official, who acquiesced in his analysis in making the source selection decision. However, the agency can produce no documentary evidence of the review by the contracting officer and the source selection official, except the source selection decision document prepared by the source selection decision, which states that "[t]he remaining subfactors of the technical factor and past performance all received the same adjectival rating." Tr. at 42. Given the lack of documentation and support for the substantial confidence rating, we find no basis to conclude that the agency reasonably evaluated L-3's past performance.¹³

G. Court of Appeals case; Navy vs Orlosky

<http://www.uscfc.uscourts.gov/sites/default/files/CMILLER.OrloskyCorrectCpy.pdf>

We've talked about Contract Specialists needing to make positive, supportable and documented determinations. There is also another factor to consider – the Contract Specialist should be able to explain clearly what those decisions were and why.

Sadly we've all had flakey vendors. But in the other hand.....

- i. These remarks are in the opinion of the claims court... about the Navy and their Buyer.
 1. "For their part the Navy witnesses were marginal, at best. At one point the court was constrained to advise defense counsel that the Navy's (now fortuitously retired) Contract Manager, Mr. Smith, was showing himself insufficiently coherent to be allowed to continue to testify."
 2. "This proposal was largely a waste of time for plaintiff—another hoop through which plaintiff leapt due to the incompetence of the Navy's San Nicolas Island personnel."

CONTRACTOR RESPONSIBILITY CHECKLIST

Use the following generic template as a starting point to develop a checklist appropriate for each contract action. Update, add or delete items based on the risks and complexity of the planned action. Based on the circumstances surrounding this action, errors, omissions or problems with the following items will be considered indicators that additional reviews or information should be requested before making an award.

1. SOLICITATION WORDS

- A. Buyer reserves the right to reject any or all proposals and/or eliminate any contractor from further consideration for award.
- B. Contractor shall submit information sufficient to demonstrate a full understanding of the anticipated scope and the capability to successfully perform as proposed.
- C. The contractor, principles and agents must be disclosed and identified sufficiently with the proposal to allow verification that they are not currently listed on any government prohibited contractor list
- D. Inconsistencies or irregularities in the contractor's business information or the identification of contractor or its principles in any government or regulatory agency list of contractors violating environmental safety, human rights or other laws and international standards of business conduct, may be considered sufficient reason to disqualify offeror for award. Disclosure, explanation and mitigating circumstances should be provided with the proposal as the buyer may elect not to allow subsequent explanation before disqualifying the offeror.
- E. Identify the person authorized to explain the offeror's proposal, compliance with solicitation requirements and negotiate and accept a resulting contract.
- F. Identify the person(s) who will be responsible for supervising contractor's personnel while on Buyer's site or in Buyer's facilities. Include name title and phone number.
- G.

2. WARNING FLAGS – issues suggesting additional review or explanation

Item	O.K.? Y/N	Criteria	Comments
1.		Business Name	Contractor name and address matches license and registration information and records in various systems searched.
2.		Ownership and parent company	Ownership is disclosed and not in conflict with expectations or special requirements of the contract
3.		DUNS Number	Unable or unwilling to obtain or supply a DUNS number matching the business information
4.		Federal employer id no. (FEIN):	Contractor has FEIN and can supply it for tax reporting purposes.
5.		Primary Place of Business	Valid business address located where expected
6.		Business license and permits.	New, recently updated or out-of-date
7.		Previous Contract Compliance	Contractor does not have a record of contract issues and has performed successfully w/out incident
8.		Key personnel	Appropriate business knowledge, certifications, experience
9.		Appearance	Does the appearance of the contractor’s personnel, facility, equipment, etc. match what would be expected for this type of business in this area.
10.		Conflict of Interest personal and organizational (OCI)	Personnel or business circumstances which could indicate a conflict of interest
11.		Liens & holds	Is there evidence of liens, holds and labor problems?
12.		Tax laws	Are there records of tax filing problems including Federal taxes, State Taxes, unemployment and payroll taxes
13.		Environmental Laws	Are there records of environmental consent orders, fines or citations
14.		Human Rights	Is the contractor, parent company or principle personnel identified in Federal and International human rights violators or watch list
15.		Ethics	Are there public records, postings or news articles of ethics concerns or violations., Look for Publications, postings, blogs or other publically available information
16.		Export Controls	Is the contractor, parent company or principle personnel identified on the U.S. list of countries precluded form doing business or with export controls?
17.		Government Suspension or debarment from the contracting process	Contractor and key personnel are not identified in Federal, state and local web sites as debarred or precluded from doing business with the government.
18.		Health and worker safety violations	OSHA, State and Federal Occupational Safety Review
19.		Subcontractor payment problems	Is there information indicating that subcontractors and suppliers are not paid on time.
20.		Back-door selling	Do the contractor’s personnel relay on back-door selling without first taking proper channels of communication.
21.		Business Experience	Has the company been in business commensurate with the type of experience and work required
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3. MANDATORY CRITERIA – *items unique to the action or process*

Item	O.K.? Y/N	Criteria	Comments
1.		Affirmative action for workers with disabilities	FAR 52.222-36
2.		Ant kickback compliance	FAR 52.203-7
3.		Appropriate business and other licenses	
4.		Buy American Act Compliance	FAR 52.225-1
5.		Combating Trafficking in Persons	FAR 52.222-50
6.		Conflict of Interest, personal and organizational (OCI)	Certification required,
7.		Controlled Substance Abuse Policy	
8.		Convict Labor -policy	FAR 52.222-3
9.		Copeland Act (kickbacks)	FAR 52.222-10
10.		Covenant Against Contingent Fees	FAR 52.203-5
11.		Davis Bacon Act (DBA) compliance	FAR 52.222-6
12.		EEO	Executive Order 11246, FAR 52.222-26
13.		EEO – Veterans	FAR 52.222-35
14.		Employment Eligibility Verification & I-9 verification process	FAR 52.222-54, and U.S. Citizenship & Immigration Service
15.		EPA list of violating companies	
16.		Ethics Policy	FAR part 3
17.		Government Suspension or debarment from the contracting process	www.sam.gov FAR 52.209-6
18.		Gratuities & Brides policy	FAR 52.203-3
19.		Licenses & permits	
20.		M/WBE, Small Business Status, Disadvantaged Business Status	www.sba.gov
21.		Previous Contract Compliance	Contractor does not have a record of contract issues
22.		SCA	FAR 52.222-41
23.		Segregated Facilities	FAR 52.222-21
24.		Signed Representations and Certifications	www.sam.gov or company specific
25.		Walsh Healy	FAR 52.222-20
26.		Walsh-Healy Public Contracts	52.222-20
27.		Whistleblower	DEAR 952.203-70
28.		Workman’s comp insurance	
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5. FINANCIAL & BUSINESS OPERATIONS

Item	O.K.? Y/N	Criteria/Evaluation	Comments
1.		3 rd party business references	
2.		Accounting System Review	Accounting system adequate to support the type of contract contemplated and the data provided as part of the proposal or change order process
3.		Bankruptcy/Reorganization Filings	
4.		Bonding Capacity	
5.		CAS compliance	
6.		Contract Suspension or Termination for cause	
7.		Credit Rating	
8.		Criminal Investigation or Indictments	
9.		Criminal Judgments/Convictions	
10.		DCAA audit reports	
11.		Financial Statements to show assets, liabilities, etc.	
12.		Insurance Coverage	
13.		Legal basis to support scope of the contract and potential risks	International contracts. Example: product liability
14.		Liabilities exceed assets	
15.		Liens or lawsuits	Web search for business name and keywords such as lawsuit, judgment, civil fine,
16.		Previous contract terminations/breach of contract/debarments	
17.		SEC 10K	
18.		SOX audit reports	SOX compliance audits are required of all publically traded companies
19.		Subcontractors for major portions of the work	
20.		Surety or Bonding company	
21.		Type of Business (Corporation, Partnership, Etc.)	
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6. OPERATIONAL & SAFETY CRITERIA

Item	O.K.? Y/N	Criteria	Comments
1.		Safety	Contractor is not listed on DOL site of workers comp or safety violators
2.		Personnel	Contractor is not listed on EEO violators
3.		Equipment and Facilities	Equipment & tooling appropriate for the production methods proposed
4.		Risk management	Has the contractor identified and mitigated significant risks in performance?
5.		Intellectual property controls both internal at the contractor	Use when contractor will possess buyer's intellectual property or supply product subject to copyright or patent infringement
6.		Key Personnel	Are key personnel appropriate and available to support performance?
7.		Performance plans -	How does the contractor intend to get the work done in the allocated time and within the proposed price?
8.		Personnel resources and expertise appropriate for the work to be done	Do the personnel who will be performing the work have the requisite training, certifications, qualifications, licenses, experience?
9.		Property Management and Control system and facilities	If contractor will be responsible for controlling and safeguarding buyers' equipment and materials are appropriate processes in place.
10.		Raw materials and supply sources	
11.		Subcontractors and subcontract personnel	Committed resources, retainers, flowdown language
12.		Supervisory personnel available for assignment	
13.		Union or labor issues, contract expiration or negotiation problems.	Collective bargaining agreements
14.		Packaging & Shipping Performance	Products arrive undamaged
15.		Intellectual property	Are there issues or concerns which need to be reviewed to protect buyer's intellectual property and rights?4
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CONTRACTOR RESPONSIBILITY RESOURCES & REFERENCES

1. Contract Responsibility Presentation Slides`
 - A. www.mltweb.com/tools/articles/resp_checklist_slides.pdf

General Business Information & Status

2. Better Business Bureau
 - A. www.BBB.com
 - B. <http://www.bbb.org/us/Find-Business-Reviews/>
3. Dunn & Bradstreet
 - A. <http://www.dandb.com/>
4. Contractor Watchdog websites:
 - A. <http://www.contractormisconduct.org/index.cfm>
5. Federal Contractor Registration, Excluded Parties and Small Business representation
 - A. www.sam.gov
6. SEC filings at Edgar
 - A. <http://www.sec.gov/edgar/searchedgar/webusers.htm>
7. U.S. DOL National Pre-award registry- Contractor EEO compliance reviews
 - A. https://ofccp.dol-esa.gov/preaward/pa_reg.html
8. Procurement Technical Assistance organization
 - A. <http://washingtonptac.org/>
9. Washington State list of debarred contractors
 - A. www.lni.wa.gov/TradesLicensing/PrevWage/AwardingAgencies/DebarredContractors/
10. Washington State Revenue – lookup registered businesses
 - A. <http://dor.wa.gov/content/doingbusiness/registermybusiness/brd/>

Safety Information

11. OSHA Data, regulatory compliance search
 - A. <https://www.osha.gov/pls/imis/establishment.html>
12. Federal Motor Carrier Safety Report
 - A. <http://www.fmcsa.dot.gov/safety-security/sites/company-safety.htm>
 - B. DOT Hotline for HAZMAT shipments
13. Washington State Business Information - Labor & Industries – lookup contractors & workers comp violators
 - A. <http://www.lni.wa.gov/TradesLicensing/Contractors/HireCon/default.asp>
14. Washington State Labor Department - accident rate & workers comp coverage
 - A. <http://www.lni.wa.gov/TradesLicensing/Contractors/HireCon/Uninsured/default.asp>

Environmental Compliance

15. EPA list of polluting companies. ECHO Enforcement and Compliance History ONLINE
 - A. <http://www.epa-echo.gov/echo/index.html>

Past Performance

16. Federal Government lawsuits or filings
 - A. <http://www.justice.gov/>
17. Federal Contractor Misconduct Database
 - A. www.contractormisconduct.org/
18. Government Accountability Office bid protests and legal action
 - A. <http://www.gao.gov/legal/index.html>
19. Labor Department Appeals
 - A. <http://webapps.dol.gov/appeals/search/search.htm>
20. SEC Foreign Corrupt Practices cases
 - A. <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>
21. Treasury Department - Financial Crimes Enforcement Network
 - A. <http://www.fincen.gov/>
22. Treasury Department - Financial Sanctions lists
 - A. <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>
 - B. <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>

International Business

23. CIA World Fact Book
 - A. <https://www.cia.gov/library/publications/the-world-factbook/index.html>
24. Commerce Department – Denied Persons Lists
 - A. <http://www.bis.doc.gov/dpl/default.shtm>
25. Commerce Department – Bureau of Industry & Security sanctions lists
 - A. <http://www.bis.doc.gov/complianceand enforcement/liststocheck.htm>
26. Export.GOV – U.S. export information and resources
 - A. <http://export.gov/>
27. Immigration Office - Employment eligibility Verification
 - A. <http://www.uscis.gov/i-9>
 - B. <http://www.dhs.gov/e-verify>
28. State Department – Directorate of Defense Trade Controls
 - A. <http://www.pmdtdc.state.gov/>
29. United Nations
 - A. [United Nations Anti-Corruption Web Site](#)
 - B. [Fighting Corruption in the Supply Chain](#), guide
 - C. [Human Rights – business case studies](#)

Resources, 3rd Party

30. Business Risk International
 - A. <http://www.businessrisksinternational.com.au/>
31. Due-Diligence or Business Intelligence contactor
 - A. <http://www.cbintel.com/duediligence.htm>
 - B. <http://www.experian.com/public-sector/contractor-risk-assessment.html>
32. Defense Acquisition University - guidebooks and handbooks
 - A. <https://dap.dau.mil/aphome/das/Lists/Guidebooks%20and%20Handbooks/All.aspx?gtag=All&gggroup=alp>
33. FAR clauses - section 4.12
 - A. www.acquisition.gov/far/current/html/Subpart%204_12.html#wp1073662
 - B. www.y12.doe.gov/library/forms/procurement.php
34. Forensic Accounting Companies
 - A. <http://www.paacpas.com/home>
35. How to Read a Financial Statement –
 - A. <http://www.sec.gov/investor/pubs/begfinstmtguide.htm>
 - B. <http://www.terry.uga.edu/~akefalas/courses/mirrors.htm>
36. Society of Quality Assurance – QA resources and links
 - A. www.sqa.org
37. Representation and Certification form (examples & samples)
 - A. www.fsd.gov/app/answers/detail/a_id/593/~what-are-representations-and-certifications%3F
 - B. www.gsa.gov/portal/getFormFormatPortalData?mediaId=29589
 - C. www.gsa.gov/portal/getFormFormatPortalData?mediaId=29585
 - D. [CHPRC Representations and Certifications SP-16](http://www.chprc.gov/representations-and-certifications/SP-16)
 - E. www.ogs.state.ny.us/procurecounc/pdfdoc/Bestpractice.pdf
 - F. www.nrel.gov/business_opportunities/.../section1_011_exhibit_a.doc

Search Online Tips:

38. Use BING as well as Google
 - A. Contractor name; use quotation marks if more than one word
 - B. Add specific search terms : +”violation”, +”lawsuit” +”bankruptcy” +”court ruling”
 - C. Key personnel by name ; e.g. "Joseph J. Hazelwood“
 - D. Business address, phone number, license number, DUNS number, etc.
 - E. Search government web sites by = SITE:*.gov +keyword -
39. Web Site
 - A. Verify Web site ownership
 - i. <http://www.internic.net/whois.html>
 - B. Check for website fraud
 - i. www.fraudwatchinternational.com/
 - ii. www.fraudwatchinternational.com/phishing-fraud/phishing-web-site-methods/