DISPARATE TREATMENT IN EVALUATION OF OFFERS

By Richard D. Lieberman, Consultant & Retired Attorney

It is a fundamental principle of government procurement that agencies must evaluate proposals on a common basis and in accordance with the terms of the solicitation. Agencies may not engage in disparate (unequal) treatment of offerors in their evaluation. On this subject, the Federal Acquisition Regulation ("FAR") states that "[c]ontracting officers are responsible for ensuring performance of all necessary actions for effective contracting [and] shall [] [e]nsure that contractors receive impartial, fair, and equitable treatment. FAR 1.602-2. In a recent decision, the Government Accountability Office ("GAO") again held that an agency engaged in disparate treatment of offerors' past performance and sustained the protest. *CSR, Inc.,* B-413973, Jan. 13, 2017, 2017 WL 816541. Before discussing *CSR,* the following are a few examples of how agencies have treated offerors disparately:

- Disparate evaluation of two offeror's plans for testing cables. *Tribalco, LLC,* B-414120, Feb. 21, 2017, 2017 WL 816542.

- Disparate treatment of past performance (agency did not consider one offeror's adverse performance on a project because the agency concluded that it did not satisfy the RFP's relevancy criteria, while simultaneously considering protester's adverse performance on a project that did not satisfy the RFP's relevancy criteria). *Halbert Const. Co., Inc.,* B-413213, Sept. 8, 2016, 2016 CPD ¶ 254.

- Disparate treatment in evaluation (in evaluating one offer, the agency was expansive, resolving doubts in favor of one offeror, but in evaluating another offeror, the agency read proposals narrowly and applied a more exacting standard that required affirmative representations within the four corners of the proposal.) *Arctic Slope Missions Servs.,* B-410992, Jan. 8, 2016, 2016 CPD ¶ 39.

- Agency sought out and considered additional information for at least two other offerors, but unreasonably refused to consider information in its possession regarding the protester. *Logistics Mgt. Int'l, Inc.*, B-411015.4, Nov. 20, 2015, 2015 CPD ¶ 356.

- Agency evaluated the protester's optional labor rates as exceptionally low, but without reasonable explanation did not similarly evaluate as exceptionally low the awardee's lower-priced optional labor rates. *Cubic Applications, Inc.*, B-411305, July 9, 2015, B-411305, 2015 CPD ¶ 218

In *CSR, Inc.,* the Department of Justice sought performance measurement services under federal supply service schedule contracts. In conducting past performance evaluations (one of the evaluation factors), the agency considered Contractor Performance Assessment Reports ("CPARs"), as well as other projects identified in the quotations. The agency asserted that it limited its CPARS to only specific projects identified in the quotes, however, for the awardee, it considered CPARS for projects *not* specifically referenced in its quotation. In CSR's case, the agency failed to consider CPARS for projects that were *not* specifically referenced in CSR's

quotation. The GAO noted that "if the agency wanted to consider relevant CPARs for other than the projects referenced for [the awardee], it was then required to do the same for CSR (or any other vendor)."

The takeaway: Contractors should consider any disparate treatment that has occurred when they receive a debriefing. To the extent there is disparate treatment, and it is prejudicial, an offeror should consider a protest.