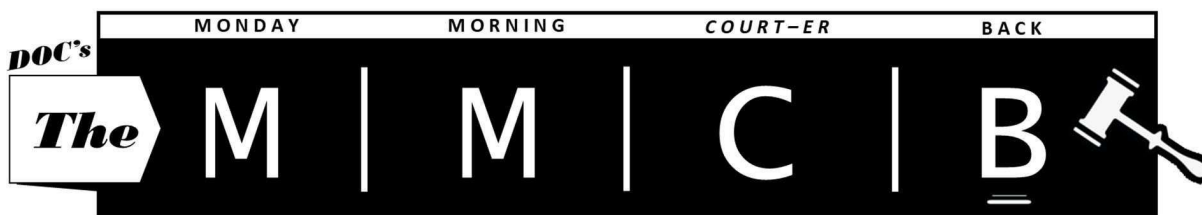


From: The LAB @ DOC
Subject: MMCB Vol. 19 – Can you Protest an Advisory Down-Select Notification? Dec 2021



Welcome to MMCB Volume 19. Today's GAO decision shows how a team handled a vendor request for additional information on the evaluation of their Phase 1 quote after receiving their advisory down-select notification.

Matter of: SparkSoft Corporation
File: [B-420156; B-420156.2](#)
Link: <https://www.gao.gov/products/b-420156%2Cb-420156.2>
Date: November 15, 2021

Advisory Down-Selects



No matter what part of the FAR you're in, down-selects can help streamline the submission and evaluation process. Down-selects (advisory or firm) were the most used innovative procurement technique in PIL projects from FY15 through FY22, being used 82% of time. When using an advisory down-select, the Contracting Officer sends email notifications advising vendors whether to proceed or not to proceed to the next phase. But what happens if a vendor requests additional information beyond what is stated in the advisory notification? Do we have to provide it?

Let's review this GAO decision to find out! In this case, the Department of Health and Human Services (HHS) Center for Medicare and Medicaid Services (CMS) issued a solicitation for website quality control that used an advisory down-select in a FAR 16.505(b) procurement. When SparkSoft was advised not to proceed, they requested additional information on their Phase 1 evaluation.

Overview

SparkSoft filed a pre-award protest after receipt of its Phase 1 advisory notification, below is the primary protest ground, but keep reading to find out what happened which includes some highlights and analysis.

"Protest arguing that the agency failed to provide adequate information about the evaluation of protester's quotation at stage one of the competition is..."

To our knowledge, this is the first time a vendor has filed a protest challenging the information contained in an advisory down-select notification. This is important because it provides a lens to how the GAO views the advisory down-select notification process. While these decisions are unique to each procurement, this one embodies the same exact process and verbiage the PIL Boot Camp Workbook recommends in its advisory down-select notifications so in that context it DOES not completely stand alone.

*For the purposes of this analysis, the terms proposals and quotes are synonymous, as are the terms phase and stage.

Background

It is important to understand the phased approach that CMS included in its solicitation:

"The solicitation advised vendors that quotations would be evaluated in two stages. In the first stage, vendors were to submit their quotations addressing only the relevant experience factor. After the stage one evaluations were completed, the contracting officer would advise vendors found to have qualified relevant experience to participate in stage two. If, based on the information submitted at stage one, the agency found the vendor was "unlikely to be a competitor," the contracting officer would notify the vendor of such and the basis for that opinion. The solicitation refers to this notification as the "advisory down-select." The solicitation stated the agency intended this process to minimize development costs for vendors that had little or no chance of receiving award. Those vendors notified as part of the advisory down-select, however, were allowed to participate in stage two if they so desired. Vendors that intended to participate in stage two were required to inform the contracting officer of such within three business days after receipt of the advisory down-select notification."

In the second stage, vendors would address the remaining evaluation factors (i.e., those factors other than relevant experience). Award would be made to the responsible vendor whose quotation--from both stage one and stage two--provided the best overall value to the government, considering price and non-price (technical) evaluation factors.

After evaluating Phase 1 quotations, CMS informed SparkSoft that ***"the agency did not recommend that SparkSoft proceed to the next stage of the procurement."***

How did the vendor respond to the advisory notice?



After receiving its advisory notification recommending they not proceed, SparkSoft opted to participate in Phase 2. In its email to CMS, they complained that the information provided in the advisory notification was not sufficient and requested CMS to *"halt the evaluation process."*

"On August 27, Sparksoft sent an email, notifying the agency that the firm intended to participate in stage two of the procurement. In that notification, the protester complained that the agency had not provided sufficient information about the evaluation of its stage one quotation and requested the agency "halt [the] evaluation process" until Sparksoft received the information it requested regarding the agency's stage one evaluation of its quotation. Sparksoft also pointed out what it believed were inconsistencies within the solicitation and requested an extension of time to submit its stage two quotation.

How did the agency respond to the request for additional information?



Here, the vendor had already informed the agency they intended to proceed to the next phase of the solicitation. The agency advised SparkSoft that *"because the firm had elected to continue to stage two of the competition, a more detailed debriefing regarding the evaluation could not be provided."* That is a good response by CMS – and we'd recommend that type of response in general. However, in that same email the agency revealed that Sparksoft's Phase 1 evaluation was assigned a rating of unacceptable as its relevant experience was "unqualified". This is the flag on the play!

Perhaps CMS felt that level of transparency would allay a protest from Sparksoft, but it could very well have been the catalyst. **We recommend against providing any ratings or rationale from Phase 1 evaluation in an advisory down-select notification.**

"On August 31, the agency acknowledged receipt of Sparksoft's notice of intent to participate in stage two of the procurement. In that communication, the agency informed Sparksoft that because the firm had elected to continue to stage two of the competition, a more detailed debriefing regarding the evaluation of Sparksoft's stage one quotation could not be provided at the point. The agency, however, did inform Sparksoft that its stage one quotation had been assigned a rating of unacceptable and that the agency found its relevant experience to be "unqualified." The agency also notified Sparksoft that the submission deadline for stage two quotations had been extended to September 15 for all vendors, and that the agency had not identified any inconsistencies in the solicitation. In response, Sparksoft sent an email later that day, requesting additional information as to why the agency found the firm's stage one quotation "unqualified." The agency did not respond to this request for additional information. On September 14, prior to the deadline for the submission stage two quotations, Sparksoft filed this protest with our Office

What did the GAO have to say?

The vendor specifically protested that the agency did not provide enough information for it to make an informed decision regarding the advisory notification.

The protester raises a number of arguments objecting to the agency's action here. By way of example, Sparksoft contends that the agency's failure to provide it with additional information is preventing it from making an "informed choice" as to whether the firm should expend additional resources to proceed to stage two. Sparksoft also contends that the agency's actions (or inaction) prevent it from ever challenging the basis for the agency's unacceptable rating under the relevant experience factor. Underlying its objections to the agency's actions, is the firm's belief that the agency was obligated to "justify" its rating of Sparksoft's quotation as unacceptable because of statements in the solicitation about the purpose of the two-stage advisory notification process.

But the GAO was NOT persuaded.

We find that this allegation fails to clearly state a legally sufficient ground of protest to establish the likelihood that the agency in this case violated applicable procurement laws or regulations. Here, the solicitation clearly advised vendors that they would be informed after stage one whether they would be a viable competitor and the basis for that conclusion. The agency's notification to Sparksoft on August 25 informed the firm that it had been assigned a rating that resulted in a recommendation to not move forward to stage two, and that the agency deemed it was unlikely the firm would be a viable competitor. The protester's argument here fails to state a legally sufficient basis of protest and is akin to a challenge to the adequacy of a debriefing under a FAR part 15 procurement, which we have repeatedly said, we do not review because debriefings are procedural matters that do not affect the validity of an award.

Furthermore, the GAO found that the RFQ was clear, and the protest failed to state a valid basis of protest.

Finally, Sparksoft's assertion that the agency's actions prevent it from ever challenging the basis for the agency's unacceptable rating under the relevant experience factor also fails to state a valid basis of protest. Here, the solicitation stated that task order award will be based on evaluations of quotations from stage one and stage two. The RFQ clearly explained that any firm notified after stage one that it would not be a viable competitor in stage two was still eligible to continue in the procurement, i.e., was not automatically eliminated from the competition. Therefore, firms--such as Sparksoft--that elect to participate in stage two

of the procurement would have an opportunity to challenge the agency's evaluation of its quotation under both stages once an award has been made. Any challenges to the evaluation of Sparksoft's quotation at this time would be premature as the procurement is ongoing.

Conclusion



The GAO stated the “argument here fails to state a legally sufficient basis of protest and is akin to a challenge to the adequacy of a debriefing under FAR Part 15,” which the GAO has consistently said they do not review because it they are procedural matters that do not affect the validity of an award. Also, GAO notes that the vendor would have the opportunity to challenge the agency's evaluation under both stages after award has been made. Thus, the vendor protesting their Phase 1 evaluation is premature and ultimately was **dismissed**.

In sum, Sparksoft's arguments challenging the reasonableness of the agency's actions in connection with the information provided regarding the firm's stage one evaluation are dismissed as premature or failing to state factually and legally sufficient bases of protest

The protest is dismissed.

Last Word

This decision reinforces the advisory down-select process, especially as it relates to the actual notification. We recommend providing a general statement that the vendor is not advised to proceed because they were not among the most highly rated offerors, as well as a recitation of the evaluation factors and their order of importance. We do NOT recommend providing the vendor with either its adjectival rating or noteworthy observations. This decision shows us that we do not need to be afraid of a protest during the advisory down-select process. To the subject question of “Can you Protest an Advisory Down-Select Notification?,” the answer is YES. BUT it will most certainly be dismissed 😊.



This volume was originally authored in December 2021 and refreshed in March 2025.

*Disclaimer: The information contained in this MMCB is merely an opinion of the author and does not constitute formal legal or policy guidance of any kind.

