

**From:** The LAB @ DOC  
**Subject :** MMCB Vol. 25 - The Use of Permissive Language, July 2023



Welcome to MMCB Volume 25! This edition illustrates how and why to use of permissive language, i.e., *weasel words*, in solicitations. We highly recommend flexible language like “*may, could, intends,*” et al., in solicitations vs. mandatory language.

**Matter of:** Leidos Inc.; Booz Allen Hamilton Inc.  
**File:** [B-421524, B-421524.2, B-421524.3, B-421524.4, B-421524.5](#)  
**Link:** <https://www.gao.gov/products/b-421524%2Cb-421524.2%2Cb-421524.3%2Cb-421524.4%2Cb-421524.5>  
**Date:** June 20, 2023

On August 5, 2022, the Department of the Treasury issued an RFQ with a **\$2B** estimate (single-award blanket purchase agreement) under the Federal Supply Schedule (FSS) procedures of FAR subpart 8.4, to vendors holding GSA multiple-award schedule contracts with special item number 518210C (cloud and cloud-related information technology professional services).

Evaluation factors were listed in descending order of importance and the non-price factors when combined were significantly more important than price: (1) demonstrated corporate experience; (2) technical and management approach; (3) sample tasks; and (4) price. Phase one consisted of factor 1 while Phase two consisted of an oral briefing to cover factors 2 and 3 with price as factor 4 but not assigned a rating.

Here is how the awardee (SAIC) compared to the two protesters (Leidos and Booz Allen).

	Leidos	Booz Allen	SAIC
Demonstrated Corporate Experience	High Confidence	Some Confidence	Some Confidence
Technical/Mgmt. Approach	Some Confidence	Some Confidence	High Confidence
Sample Tasks	Some Confidence	Some Confidence	Some Confidence
Total Evaluated Price	\$1,513,561,029	\$1,262,894,169	\$1,372,783,673

\*Innovative procurement techniques included: advisory down-selects, confidence ratings, draft solicitation, on-the-spot consensus evaluations, oral briefing w/ interactive dialogue, select best-suited then negotiate, and streamlined documentation.



The protesters challenged the 1) requirement for a price realism evaluation, 2) technical evaluation, and 3) best-value tradeoff documentation. All grounds were denied by the GAO.

While there is certainly mention of many [innovative procurement techniques](#), those techniques are not the topic of *this* MMCB. The decision also provides a robust discussion on all aspects of a price realism evaluation, so I suggest reading the first half of the decision if you'd like to learn more. There is also great coverage on confidence ratings and corresponding documentation, with some discussion of disparate treatment, unstated evaluation criteria, and the general weighting of the evaluation criteria. But all those are not the topic *today*.

The focus on *this* MMCB is on how the team used **permissive language** throughout its solicitation to remain flexible and afford itself options during the evaluation and documentation phase of the procurement process. Of note, this project (TCloud) had an innovation coach assigned, and overall had a most excellent acquisition team: an extremely competent Contracting Officer who was innovating for the first time, a very knowledgeable yet trusting procurement attorney, and a very engaged and skilled evaluation and support team. The solicitation and evaluation documents were not borne overnight. These documents were thoughtfully developed as a team, consisting of sprint chats, JAM sessions, and group trainings, resulting in informed decisions being made at each step of the planning process. Hats off to the TCloud team!

### Permissive Language



Since the initial offerings of the DHS PIL Boot Camps, they always framed this discussion as using “weasel words” in our solicitations. This means using words and phrases like: “*The Government may consider...The Government intends to...approximately...The Government may eliminate.*” All these phrases could easily be mandatory with the replacement of words like “*shall, must, will,*” et al. You can see more examples here:

<https://www.lawinsider.com/clause/mandatory-and-permissive>.

Too often mandatory language gets us into **trouble** and restricts our ability to make thoughtful decisions when it really matters, during evaluations *after* issuance of a solicitation. While we are primarily discussing permissive language in solicitations, your evaluation plans and evaluation reports should also be mindful to use permissive language wherever possible. **There is just no reason for the Government to attempt to handcuff itself in an evaluation plan.**

Now back to *THIS* bid protest decision.

The protestor claims that the RFQ **required** a price realism evaluation and the agency disagreed. The GAO shares several examples of permissive language from the price evaluation section of the RFQ, but I read all 21 pages so you wouldn't have to, and below are quoted examples of permissive language throughout that price evaluation section of the RFQ.

The Government will use techniques **such as, but not limited to,** price analysis and/or price realism to establish a fair and reasonable price for TCloud.

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The Government **may eliminate** a [vendor] whose price is inconsistent with its technical volume or that does not demonstrate a reasonable pricing approach.

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The price evaluation **may include** an evaluation of the [vendor's] price for the purpose of assessing the risk inherent in the [vendor's] approach. Quotes may be determined unacceptable if they are...

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Quotes that are unrealistic in terms of technical approach or price **may be reflective** of an inherent risk, lack of competence and/or indicative of failure to comprehend the complexity and risks associated with the solicitation requirements and **may result** in a determination of unacceptability. in the respective factor.

[Vendors] are cautioned that a rating of 'Low Confidence' in any single factor **may result** in the [vendor's] quote being rated unacceptable overall and **may impact** the overall evaluation of the [vendor's] submission.

The Government may not make an award to any [vendor] with a low confidence rating in any area.

What great examples of permissive language! The protestor offered their own interpretation of why a price realism evaluation was required, but the GAO concluded it was not reasonable and would require reading certain passages in a vacuum rather than reading it as part of the holistic RFQ (this is a very common GAO statement).



The quotes below really hammer home the concept of permissive language as allowing the Government to maintain **discretion** throughout the evaluation of quotes.

The solicitation stated that the agency could use techniques "such as, but not limited to, price analysis and/or price realism" for the purpose of establishing "fair and reasonable pricing," which simply indicated that the agency had **discretion on whether to use price realism** as one such technique

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We find that the context of this paragraph refers to the **potential analyses** the agency might use in its price evaluation, but **does not require the agency to conduct** a price realism evaluation. While--as Leidos points out--the RFQ stated that prices would be evaluated to determine if they reflected a clear understanding of the requirements, this statement **did not obligate the agency to conduct** a price realism evaluation.

If that isn't enough, below are two entire paragraphs that really expound on the thought process behind the GAO's decision (the Government maintaining discretion throughout).

The second paragraph complements the first. Where the first paragraph described the evaluation, the second described possible outcomes of that evaluation. When read in context, the second paragraph discussed the **possibility of elimination** due to inconsistencies between a price and technical volume or unreasonable pricing. However, this paragraph used **permissive language--the agency "may eliminate" a vendor--and nothing in this paragraph otherwise required the agency to conduct a price realism evaluation.**

As to the fourth paragraph, assuming for the sake of argument that it provided for a price realism evaluation as argued by the protestor, we find that the use of the word **"may" in the first sentence gave the agency discretion to evaluate quotations**--and to find quotations unacceptable--for certain risks presented by offered prices. This **permissive language** is consistent with the other two relevant paragraphs discussed above, **both of which maintain the agency's discretion in deciding how to conduct its price analysis.** Thus, when read together, we conclude that nothing in this section of the RFQ required the agency to conduct a price realism evaluation.

Below is the final point made by the GAO, which further supports the entire concept of permissive language as it was used throughout the RFQ (in more sections than just price).

The language cited by Leidos puts vendors on notice of various possibilities, one being that a quotation **may be eliminated** on the basis of price realism. **Logically**, this would only occur if the Treasury **exercised its discretion and chose** to perform a price realism evaluation in the first place. **Moreover, the continued use of permissive language supports a finding that nothing in this section of the RFQ affirmatively commits the agency to evaluating quotations for price realism.**

## KEY POINTS

Please, please, please consider using **permissive language** throughout your next evaluation plan, solicitation, and evaluation report(s). Permissive language allows for discretion, flexibility, and reduces overall risk; there are no real downsides when using it vs. using mandatory language.

I will leave you with this notional example of permissive vs. mandatory language in an evaluation report and consider which passage is 1) more likely to offend the vendor thus increasing the likelihood of a challenge and 2) may be harder to defend *if* challenged.

Permissive	Mandatory
The vendor's response does <b><i>not adequately address</i></b> the question of cloud migration. The response includes a cursory response to the question only, use cases <b><i>do not provide enough detail</i></b> about the actual cloud modernization or cloud migration, or outline why a particular approach was chosen.	The vendor's response <b><i>did not address</i></b> the question of cloud migration. The response offered <b><i>no detail</i></b> about the actual cloud modernization or cloud migration or outline why a particular approach was chosen.

Even if we believe the mandatory version to be true, we can write it using permissive language if there is even a modicum of doubt within the evaluation team of claiming such absolute findings.

**This volume was originally authored in July 2023 and refreshed in March 2025.**

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

