

MEMORANDUM FOR AMSMI-GC-AL-A/Diane Beam

SUBJECT: Request for Legal Opinion Regarding "Offer/Proposal" versus "Other information"

1. Reference the following:

- a. "Offer" is the same as "proposal" (FAR 52-215-5)
- b. "Offer" is response to a solicitation that, if

accepted, would bind the offeror to perform the resultant contract (FAR 2.101)

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2. I am interested in pursuing a concept whereby a distinction may be made with regard to an "offer/proposal" versus "other information"; the combination of which comprise a response to a competitive solicitation. This concept would be utilized by including a special provision in the solicitation as follows:

a. (1) OFFER (PROPOSAL) Each offeror must submit an offer (proposal). The offer shall consist of the following items: (1) Standard Form 33, with blocks 12 through 18 completed by the offeror; (2) RFP Section B, the schedule of items and prices, with the offeror's proposed prices inserted in the appropriate blank spaces; and (3) RFP Section K, certifications, representations, and other statements, completed by the offeror. The submission of these items to the Government will constitute the offeror's promise to comply with the terms and conditions of the RFP, which include the statement of work, at the proposed prices.

(2) with the exception of clarifications (FAR 15-601) and corrections of mistakes (FAR 15.601), communication with offerors and resulting revisions of the offer (if any) regarding the above shall be considered discussions as defined at FAR 15.601 and 15.610.

b. (1) OTHER INFORMATION. Each offeror must submit other information as defined in the "Instructions for Submission" of Offer/Proposal and Other Information". This information will not constitute a part of an offer and will not become a part of any contract resulting from this solicitation, unless the government and an offeror agree to make it a part of an offer through discussions.

(2) communication with offerors and any resulting revisions submitted by offerors shall not be considered discussions as defined by FAR 15.601 and 15.610.

Information as set forth at L. "Instructions for Submission"

3. The items listed in a.(1) offer/Proposal above should be modified in cases where it is determined that other items should be made part of the resulting contract (such as key personnel).

4. The purpose of this proposed concept is to streamline the process by allowing communication with Offerors regarding those aspects of a response to a solicitation which are not "binding promises" and which will not become part of the resulting contract. For the most part this information concerns the offeror's capability to perform the required effort (**i.e.**, past performance, sample tasks, management plans, technical approach, etc.).

S. I will note that there are currently communications other than clarifications and correction of mistakes that do NJ fall under the rules of discussions. Some of these include site visits, discussions with OCAA auditors and pre-award surveys.

I would like to have your opinion in time to incorporate into the upcoming solicitation for the Command Analysis Directorate.

If this is not possible, I still would be very much interested in pursuing this concept for future actions.

7. Please call the undersigned at 2-7404 if you have any questions.

Ch, Mission Service Support Branch

DANA E. HOLMES

MEMORANDUM FOR AMSMI-AC-CFH/ Dana Holmes

SUBJECT: Request for Legal Opinion Regarding "Offer/Proposal" versus "Other Information"

PROPOSED CONCEPT: A distinction may be made between an "offer/proposal" and "other information" to allow communications with offerors concerning, and revisions to, "other information" that are not considered discussions. (The "offer" is: Standard Form 33 with Blocks 12 through 18 completed; RFP Section B, the schedule of items and prices, with proposed prices inserted; RFP Section K, certifications and representations, and other statements, which will constitute the offeror's promise to comply with the terms and conditions of the RFP, which include the statement of work, at the proposed prices. The "other information" will not constitute a part of the offer and will not become a part of any contract resulting from the RFP, unless it is agreed to make it a part of the offer through discussions; it primarily concerns the offeror's capability to perform the required effort--past performance, sample tasks, management plans, technical approach, etc.)

1. The proposed concept, which distinguishes between an "offer/proposal" and "other information" for the purpose of allowing communications with offerors regarding "other information" and revisions to this "information" which are not considered to be discussions, is not

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consistent with the current Federal Acquisition Regulation (FAR) and its supplements. This primarily is because of the way that "discussion" currently is defined. According to FAR § 15.601, "discussion" includes communication between the Government and an offeror that "involves information essential for determining the acceptability of the proposal" (emphasis added.).

2. Both the FAR and the Army FAR Supplement (AFARS) clearly indicate that the technical, cost, and past performance information are necessary for determining the acceptability of a proposal. ( FAR @ 15.605(a) addresses "the factors and subfactors that will be considered in evaluating proposals" (Emphasis added.), and FAR § 15.605(b)(1)(ii) requires evaluation of past performance for all solicitations with an estimated value in excess of: \$ 1,000,000 if issued on or after I July 1995; \$500,000 if issued on or after I July 1997; and \$100,000 if issued on or after I January 1999. FAR § 15.605 0 provides that in awarding a cost-reimbursement proposal, "[t]he primary consideration should be which offeror can perform the contract in a manner most advantageous to the Government, as determined by evaluation of proposals ..." (Emphasis added.). FAR § 15.608 (a)(3) addresses technical evaluation based on either "ensuring that the proposal meets the minimum requirements in the solicitation or an "[a]nalysis of the technically

acceptable and unacceptable proposals..." (Emphasis added.). FAR\_ 15.610(c)(5) recognizes that, as a result of discussions, the offeror may submit "... cost or price, technical, or other revisions to its proposal..."(Emphasis added.). AFARS§ 15.608 (a)(2)(i) provides that "...a comparative analysis of past performance records [discriminates] between otherwise acceptable offers" (Emphasis added.) Because communication regarding this information "involves information essential for determine the acceptability of a proposal," it is, by definition, discussion.

3. Note also that in (b) of the clause at FAR S 52.215-13, entitled "Preparation of the Offer," is  
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the requirement that "[e]ach offeror shall furnish h the information required by the solicitation ' n.  
lThis appears to indicate that the offer and, therefore, the proposal, is any 'information' **ion**  
required by the solicitation. (See FAR § 52.215-5, referenced in the Memorandum from AMSMI-  
AC-CFH, which states that "' [offeror means 'proposal' in negotiation."")

4. Based upon the above, it is the opinion of this office that it is inconsistent with the FAR and FAR supplements, as currently written, to make a distinction between the "proposal" and "other information" to allow communications with offerors, and resulting revisions, to not be considered as discussion. However, articles which address ideas similar to the proposed concept have done so primarily in discussing the draft of the FAR Part 15 "rewrite." Therefore, the concept may be considered again when the revisions to Part 15 of the FAR are issued.

Diane V. Beam  
Attorney Advisor