

MEANINGFUL DISCUSSIONS

Discussion of offerors' proposals for meeting the Government's needs provides at the same time one of the greatest opportunities and one of the most dangerous pitfalls for the Government in negotiated procurements. The FAR currently directs contracting officers to conduct discussions with all responsible offerors whose proposals are within the competitive range. (FAR 15.610(b)) The proposed FAR Part 15 rewrite (as revised, 62 F.R. 26640-82, May 14, 1997) provides more complicated guidance. (Prop. FAR 15.406) Neither version uses the adjective "meaningful" in connection with discussions or communications; that concept has been developed piecemeal in a long series of decisions of the General Accounting Office (GAO). This memorandum summarizes what must be discussed, what cannot be discussed, what may be discussed but does not have to be, and what the future may hold.

"Discussion" is defined at FAR 15.601 to mean—

Any oral or written communication between the Government and an offeror (other than communications conducted for the purpose of minor clarification), whether or not initiated by the Government, that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal.

According to the GAO, although discussions need not be all-encompassing, an agency is required to point out weaknesses or deficiencies in a proposal as specifically as practical considerations permit so that the agency leads the offeror into areas of its proposal which require amplification or correction.

Up to a point, the FAR is clear on what the contracting officer must discuss with an offeror. (FAR 15.610(c)) He or she must advise of proposal deficiencies so that the offeror has an opportunity to satisfy the Government's requirements. (Para. (c)(2)) In addition, the contracting officer must try to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal (para. (c)(3)), and any suspected mistakes. (Para. (c)(4)), also FAR 15.607) The contracting officer must give the offeror a reasonable opportunity to submit proposal revisions resulting from the discussions (para. (c)(5)), and, finally, discuss past performance information on which the offeror has not had a previous opportunity to comment. (Para. (c)(6)) It goes without saying that a written record of all discussions must be prepared.

If a proposal contains no deficiencies, does the Government have to discuss negative aspects of the proposal that do not rise to the level of deficiencies, e.g., weaknesses? First, it is necessary to give some thought to what is meant by this term. As commonly used, a weakness is normally understood to be something less serious than a deficiency. The weak item in a proposal does meet the Government's minimum requirement, if only just barely, but it does not meet it very well. A weakness is often referred to as a risk or disadvantage. The difficulty for the evaluator or negotiator is that a weakness, or a combination of them, can result in nonselection of a proposal. Sometimes the term is used as if it were a synonym for deficiency; even the GAO seems to do this. If a particular weakness may result in the offer not being selected for award, the Government must discuss it at least briefly.

The FAR states what may not be discussed with greater clarity. Government personnel may not engage in technical leveling, i.e., helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussion (FAR 15.610(d)) (this prohibited practice of "leveling" has been defined by the GAO as "coaching"); technical transfusion, i.e., disclosure of

technical information pertaining to a proposal that results in improvement of a competing proposal (FAR 15.610(e)(1)); or auction techniques, i.e., indicating to an offeror a price or cost it must meet, or advising of its price standing relative to another offeror, or generally providing information about others' prices. (FAR 15.610(e)(2)) Other limitations exist. For example, in resolving suspected mistakes in an offeror's proposal, Government personnel must do so without disclosing information about other proposals or about the evaluation process. (FAR 15.610(c)(4)) Also, names of individuals providing past performance information may not be disclosed. (FAR 15.610(c)(6))

Much more challenging is the large gray area of subjects that may be discussed but do not have to be. The FAR says little about this. "The content and extent of the discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition." (FAR 15.610(b)) Also, "it is permissible to inform an offeror that its cost or price is considered by the Government to be too high or unrealistic." (FAR 15.610(e)(2)(ii))

What if a proposal is considered acceptable and is within the competitive range, but contains several weaknesses, none of which by itself is sufficiently significant to require discussion? Under certain circumstances, it may be within the Contracting Officer's discretion to choose not to discuss these weaknesses. We strongly believe, however, that discussion of weaknesses, particularly those deemed to be significant, is the best practice. When some combination of weaknesses causes the offer to be found unacceptable, those weaknesses must be discussed.

Of course, all offerors must be treated the same. A weakness or other doubtful area that is discussed with one, must be discussed with all others to whom it is applicable. Such areas need not be discussed with offerors to whom they do not apply. That may seem obvious but has often led to misunderstanding and claims of favoritism.

What about the situation in which a proposal meets all requirements, and not only has no deficiencies, but also no weaknesses or disadvantages, and no other negative characteristics, and is merely less good than another proposal? Certainly, the Government does not have to discuss what is right with a proposal, even if that proposal is viewed with comparatively less favor than another. With a proposal of such quality, there may be nothing that the contracting officer is permitted to discuss.

Unlike the current FAR, the proposed FAR Part 15 Rewrite makes extensive use of the broad term "communications," preserving the term "discussions" for one narrow class of communications. Communications are—

all interchanges after receipt of proposals between the Government and an offeror, including discussions conducted after the competitive range is established.

(Prop. FAR 15.001) Three categories of communications with offerors are recognized: those taking place in conjunction with award without discussions (Prop. FAR 15.406(a)), those conducted prior to establishment of the competitive range (Prop. FAR 15.406(b)), and those taking place after the establishment of the competitive range (Prop. FAR 15.406(d)). The scope of the first two categories is narrow. The last category constitutes discussions, "tailored to each offeror's proposal," which, as under the present FAR, the contracting officer must conduct with each offeror within the competitive range. (Prop. FAR 15.406(d)(1)) The present FAR only allows a very narrow category of communications before establishment of the competitive range which it calls "clarifications". (FAR 15.607(a)) Under the proposed Rewrite, discussions are—

negotiations that occur after establishment of the competitive range that may, at the contracting officer's discretion, result in the offeror being allowed to revise

its proposal. (Prop. FAR 15.001. See Prop. FAR 15.407 for discussion of proposal revisions.)

Under the proposed Rewrite, after establishing the competitive range, the contracting officer must—

indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as, cost, price, performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered to enhance materially the proposal's potential for award. (Prop. FAR 15.406(d)(3)) The Rewrite does provide a definition for "weakness", including "significant weakness", as well as an expanded definition for "deficiency." (Prop. FAR 15.401)

The latter term now means—

a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.

(Id.) A weakness is "a flaw that increases the risk of unsuccessful contract performance. A 'significant weakness' is a flaw that appreciably increases" that risk. (Id.)

With its clear direction concerning discussion of weaknesses, the proposed Rewrite represents a definite improvement over the present FAR.

In addition, before establishment of the competitive range, the Government must hold discussions for the limited purpose of addressing "adverse past performance information on which the offeror has not previously had an opportunity to comment." (Prop. FAR 15.406(b)(4))

Under the proposed Rewrite, Government personnel "shall not engage in conduct" that "favors one offeror over another." (Prop. FAR 15.406(e)(1)) Moreover, the Government's representatives are prohibited from engaging in what is presently known as technical transfusion, although that term is not used. (Prop. FAR 15.406(e)(2)) No mention is made of technical leveling. Also, Government personnel cannot reveal an offeror's price without that offeror's permission. (Prop. FAR 15.406(e)(3)) As in the present FAR (15.610(c)(6)), names of individuals providing past performance information may not be revealed.

The guidance regarding items which may be discussed with an offeror, but do not have to be, is complicated. Two categories of communications are recognized, those before and those after establishment of the competitive range. Communications before the competitive range is established may "only be held with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain." (Prop. FAR 15.406(b)(1)) Under this proposed rule, communications may be conducted "to enhance Government understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the Government's evaluation process," or for "addressing issues that must be explored to determine whether a proposal should be placed in the competitive range." An offeror will not be allowed to revise its proposal as a result of such communications. (Prop. FAR 15.406(b)(2), (3)) Communications after establishment of the competitive range are a matter of contracting officer judgment. When a solicitation has "stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums," the Government may "negotiate with offerors for increased performance beyond" the minimums. As for offerors who have exceeded mandatory minimums, "the Government may suggest . . . that their proposals would be more competitive if the excesses were removed and the offered price decreased." (Prop. FAR 15.406(d)(3)) In prohibiting revelation of an offeror's price without

permission, the Rewrite advises, “the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion.” (Prop. FAR 15.406(e)(3)) “It is also permissible . . . to indicate to all offerors the cost or price that the Government’s price analysis, market research, and other reviews have identified as reasonable.” (Prop. FAR 15.406(e)(3))

Under the Rewrite, after establishment of the competitive range and commencement of discussions, if an offeror in the competitive range “is no longer considered to be among the most highly rated offerors,” that offeror may be eliminated from the competitive range “whether or not all material aspects of the proposal have been discussed, or the offeror has been afforded an opportunity to submit a proposal revision.” (Prop. FAR 15.407(a))

The exact meaning of some of the proposed new provisions, and the limits of Government authority thereunder are not entirely clear. We can do no more than speculate how they may be implemented, and how the GAO may interpret them. The FAR 15 Rewrite has been extensively revised once and is not yet in final form. Acquisition personnel must be alert for further changes, and for the opportunities and challenges they may present.

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