

## IMPROPER AGENCY DISCUSSIONS AND MIS-EVALUATION OF PAST PERFORMANCE

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Agencies continue to make errors in the way they handle discussions with offerors in the competitive range. Recently, in *Language Select LLP*, B-415097, Nov. 14, 2014, the Government Accountability Office (“GAO”) sustained a protest because the agency had improperly labeled a discussion question as a simple request for a clarification, thereby resulting in unequal discussions. The agency also mis-evaluated an offeror’s past performance.

Before discussing *Language Select*, it may be worthwhile to restate the rules and typical mistakes in discussions, both of which were set forth in a blog titled “Six Recurring Agency Mistakes in Discussions” (Feb. 12, 2016), as follows:

### Rules on Discussions

**Clarifications** are limited exchanges, between the Government and offerors, that may occur where offerors are given the opportunity to clarify certain aspects of proposals. FAR 15.306(a). Clarifications cannot be used to cure proposal deficiencies or material omissions, or materially alter the technical or cost elements of the proposal, or otherwise revise the proposal.

**Discussions** (negotiations) are exchanges between the Government and offerors in the competitive range, that are undertaken with the intent of allowing the offeror to revise its proposal. Discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. [FAR 15.306\(d\)](#).

**Final Proposal revisions:** At the conclusion of discussions, every offeror in the competitive range must be given an opportunity to submit a final proposal revision. FAR 15.307.

### Recurring agency mistakes:

1. Agencies must conduct *meaningful* discussions.
2. Agencies may not conduct *misleading* discussions.
3. Agencies must conduct discussions equally for *all contractors in the competitive range*.
4. Agencies may not label communications with offerors as “*clarifications*” when they are really *discussions*.
5. Agencies may not conduct discussions with only *one offeror*.
6. Agencies must permit offerors to submit a *final proposal revision* after discussions.

*Language Select* involved the issuance of a Federal Supply Schedule (“FSS”) blanket purchase agreement (“BPA”) by the Social Security Administration for worldwide telephone interpreter services. The first point to note was that this competition among FSS vendors was governed by Federal Acquisition Regulation (“FAR”) Subpart 8.4, rather than FAR Part 15, and therefore was subject to more streamlined standards. However, the GAO noted that it looked to the standards in FAR Part 15 (negotiated procurement) even under the streamlined standards, in order to determine if the procurement was fair and equitable. Accordingly, the decisions interpreting discussions in FAR Part 15 applied to this protest.

The procurement was a best value procurement under using three evaluation factors: corporate experience, past performance and evaluated price. The issue involving discussions arose when the agency requested that the eventual awardee, Cyracom, explain its use of a “redacted” (name deleted) contractor in the performance of orders under the BPA. The redacted contractor was not identified or discussed in Cyracom’s quotation, but all of its past performance references identified it as the firm being reviewed. The GAO rejected the agency’s characterization of these requests as “clarifications” and stated that they were actually “discussions” which permitted Cyracom to modify its offer. GAO stated:

Where an agency observes apparent affiliation between companies but lacks evidence establishing the nature of the relationship...the potential for variations ... between two affiliated companies means that it is not reasonable for that agency to simply infer that the relationship will affect contract performance or even to accept an offeror’s general representation that the performance of an affiliated company—positive or negative—should be attributed to that offeror...[B]efore the agency can properly attribute the past performance of an affiliate to an offeror, it generally must have a factual basis showing the planned relationship between the companies on the contract at issue...the agency cannot simply attribute the affiliate’s past performance to the offeror.

The GAO concluded that the agency’s request about the redacted affiliate permitted Cyracom to provide information essential to the determination of whether the redacted affiliate would provide resources and meaningful involvement in this BPA, and whether its past performance could be attributed to Cyracom. This was not a simple clarification--it represented discussions that provided Cyracom an opportunity to revise its quotation (which is the “acid test” of whether discussions were held). Therefore, the agency was required to give other vendors an equivalent opportunity to revise their quotes, which it did not provide, resulting in an unfair competition.

But more than just improper discussions were involved. GAO examined the documents to see if the past performance of the redacted affiliate could really be attributed to Cyracom. GAO concluded that there was insufficient evidence to conclude that the resources of the redacted affiliate would be used in BPA performance or that it was meaningfully involved, so its past performance could not be attributed to Cyracom, as the agency did.

The GAO recommended that the agency hold discussions with all vendors that had a reasonable chance to win award, request revised quotations, and then evaluate them and make a new source selection decision.

The takeaway: Once again, agencies have confused clarifications (which do not involve a change in the proposal or quote), with discussions, where an offeror is permitted to change or revise its proposal or quote. When one offeror is given such a chance to change its quote, all offerors in the competitive range must be given the same chance. Finally, the opinion demonstrates the importance of any offeror's explaining in its proposal exactly how an affiliate (the redacted affiliate) would be involved in the performance of the contract, if you want the affiliate's past performance to be considered in the source selection.

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