

WRITTEN FINAL PROPOSAL REVISIONS ARE NOT REQUIRED IN COMPETITIONS FOR TASK ORDERS

Copyright Richard D. Lieberman, Consultant and Retired attorney

In a recent bid protest decision, the Government Accountability Office (“GAO”) made clear that when agencies conduct competitions for task orders among holders of a multiple award contract, final proposal revisions (“FPR”) are not required, as they would be for a “normal” Federal Acquisition Regulation (“FAR”) Part 15 procurements. These task order competitions are held under the less stringent FAR Part 16 requirements. *SSI, B-413486 et. al*, Nov. 3, 2016.

The protester here, Mid Atlantic Professionals, Inc., d/b/a SSI, was one of several multiple awardees for language, regional expertise and cultural instruction for Special Forces. The Agency (U.S. Special Operations Command) held discussions with both of the offerors. The agency found that SSI had adequately addressed the 11 issues that were identified in its proposal, and did not request a final proposal revision. The other offeror, YSG, was requested to submit a new resume for one position, and was given 5 days to do so.

SSI argued that the agency improperly failed to conduct discussions in accordance with FAR Part 15 by failing to request FPRs from all offerors and provide a common cutoff date for offerors. This is required by FAR 15.307(b), which states:

At the conclusion of discussions, each offeror still in the competitive range shall be given an opportunity to submit a final proposal revision. The contracting officer is required to establish a common cut-off date only for receipt of final proposal revisions. Requests for final proposal revisions shall advise offerors that the final proposal revisions shall be in writing and that the Government intends to make award without obtaining further revisions.

GAO disagreed that FAR Part 15 applied to this task order competition. The GAO noted that FAR 16.505 requires agencies to provide awardees of a multiple award contract a fair opportunity to be considered for each order, but specifically states that “the policies in [FAR] Subpart 15.3 do not apply to the ordering process.” FAR 16.505(b)(1)(ii). Therefore, FAR 16.505 explicitly holds inapplicable the requirements of FAR 15.307(b). The only thing that is required is that agencies provide a “fair opportunity”—there is no requirement in Part 16 of the FAR that agencies solicit written FPRs after holding discussions. The GAO also noted that it could find no requirement fundamental to fair discussions that would necessitate giving offerors the opportunity to submit written FPRs, nor was there anything unreasonable about accepting an additional key personnel resume from one offeror after conducting discussions.

The GAO denied SSI’s protest because it concluded that offerors were treated fairly in this competition—particularly since SSI was permitted to address the agency’s concerns through oral discussions. While no “concerns” about SSI’s proposal remained after discussions, there was a residual concern about YSG’s proposal, and the agency permitted YSG to address it with a later, limited written submission (one additional resume).

Takeaway: Do not demand FPRs in task order competitions under multiple award contracts. If you lose a task order competition, you must demonstrate that you did not receive a “fair opportunity” to be considered in order to be successful in a protest. This is far more difficult than showing that the agency failed to comply with Part 15 procedural requirements.

In contrast to the instant case, the GAO will sustain protests where an offeror in the competitive range of a FAR Part 15 procurement is prejudiced when an agency conducts discussions with one offeror, but fails to conduct discussions with all offerors in the competitive range, or fails to allow the offeror to submit final proposal revisions. For example, see *Ridoc Enterprises, Inc./Myers Investigative & Security Services, Inc.*, B- 293045.2, July 26, 2004, 2004 CPD ¶ 153 (agency failed to conduct discussions with all of the offerors whose proposals were in the competitive range); or *Menasco, Inc.*, B- 223970, December 22, 1986, 86-2 CPD ¶ 696 (where contracting officer permitted one offeror to change its price after receipt of initial proposals, the agency had conducted discussions and should have given the other offeror in the competitive range an opportunity to revise its proposal.)