

ONCE AGAIN: RECURRING AGENCY MISTAKES IN DISCUSSIONS

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A recent blog identified “Six Recurring Agency Mistakes in Discussions.” One of the frequently repeated mistakes (conducting unequal discussions) was again repeated in a recently sustained Government Accountability Office (“GAO”) protest decision, *Deloitte Consulting, LLP*, B-412125, April 15, 2016. Although there were three grounds upon which the GAO sustained the protest, the relevant one for this blog was previously identified as follows:

Agencies must conduct discussions equally for all contractors in the competitive range. An agency may not identify specific weaknesses in one offer, while failing to advise other offeror(s) that have the same weakness. That is, an agency must identify to each offeror the exact weakness found in their offer.

This mistake was made by the Defense Health Agency in its evaluation of proposals for governance, requirements and architecture management support. Past performance was identified in the solicitation as the second most important of four evaluation factors. The solicitation stated that the offeror’s ability to provide the required services would be based on a “demonstrated record of recent, relevant, performance” (i.e. same or similar scope, magnitude and complexity as in this solicitation). Past performance projects were to be evaluated as “very relevant,” “relevant,” “somewhat relevant,” or “not relevant.” The agency evaluated offers, conducted discussions and made award to Data Networks Corporation. One of Deloitte’s protest grounds was that the agency had conducted “unequal discussions.”

The GAO sustained the protest on the ground of unequal discussions. GAO noted that the agency had advised Data Networks Corporation of each reference it had evaluated as only “somewhat relevant,” but did not advise Deloitte of its own “somewhat relevant” references. The GAO also noted that FAR 15.306 prohibits agencies from engaging in conduct that favors one offeror over another. When the agency chose to include notice of “somewhat relevant” references in discussions with Data Networks Corp. it was obligated to equally notify other offerors where their past performance evaluations also included “somewhat relevant” references.

After discussions had concluded, Deloitte (and perhaps other offerors in the competitive range) could have revised its past performance references so they were either “very relevant” or “relevant,” and thereby achieved a higher evaluation.

This leads the writer to ask a simple question – why aren’t contracting officials given in-service training on the six recurring agency mistakes so they are not repeated?