

COMPETITOR’S FILING OF A PROTEST DOES NOT CONSTITUTE DISCUSSIONS

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When an agency agrees to take corrective action in response to a protest, and re-evaluates offerors, does this constitute discussions? The Government Accountability Office (“GAO”) gives a definitive “no” unless certain conditions are met. *Quality Technology, Inc.* B-420576.3, June 30, 2022.

The Department of Health and Human Services issued a solicitation for task order proposals for operation of an Information Technology Service Desk. After evaluation of initial proposals, discussions and evaluation of revised proposals, the agency issued an order to Quality. Two unsuccessful offerors protested that award at GAO, and in response to the protests, the agency agreed to re-evaluate proposals and make a new source selection decision. In so doing, the agency did not reopen discussions, and did not give offerors an opportunity to submit revised proposals. After the re-evaluation, the agency issued a task order to Sparksoft and Quality protested.

The first two grounds of protest concerned the price evaluation, which GAO dismissed as untimely in one case, and not a legally sufficient basis of protest in the other ground.

The third ground of protest was that the Agency’s consideration of facts contained in Sparksoft’s protest constituted discussions, which the agency conducted unequally with only Sparksoft. Quality alleged that “the Agency clearly used Sparksoft’s protest as additional information to impact its corrective action and re-evaluation of offers.” The GAO found no basis to consider the merits of this protest, and dismissed it. FAR 15.306 describes a range of exchanges that may take place when an agency decides to hold discussions. The “acid test” of discussions is that the agency provides the offerors with an opportunity to revise or modify their proposals. Quality never alleged in its protest that Sparksoft was given the opportunity to revise or modify its proposal—simply that Sparksoft engaged in discussions with the agency merely by submitting a protest to the GAO. GAO noted that Quality never pointed to any procurement statute or regulation to support its view that the mere submission of a protest amounts to discussions with the agency. GAO could find not such legal authority. Accordingly, GAO dismissed this ground of protest because it failed to set forth a legally sufficiency basis for protest.

Takeaway. If a competitor files a protest, and the agency considers it, that does not result in discussions. However, if that offeror is allowed to submit proposal revisions as a result of the protest, then all offerors must be granted a similar opportunity.

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