

RE-RECURRING AGENCY MISTAKES IN DISCUSSIONS

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About a year ago, this blog published two articles on discussions, “Six Recurring Agency Mistakes in Discussions” and “Once Again: Recurring Agency Mistakes in Discussions.” (May 2016). The “number 1” mistake was:

- 1. Agencies must conduct meaningful discussions.** When conducted, discussions must be meaningful. That is, discussions must identify deficiencies and significant weaknesses in an offeror's proposal that could reasonably be addressed so as to materially enhance the offeror's potential for receiving award.

It seems that this mistake doesn't just recur, it re-recurrs frequently, most recently in *Mevacon-NASCO JV; Encanto Facility Servs., LLC*, B-414329 et al., May 11, 2017. *Mevacon* is a long and complex protest involving the evaluation of an Army Corps of Engineer contract for real property services at Fort Hood, Texas. The protesters alleged that the Corps unreasonably evaluated the technical proposal, failed to conduct meaningful discussions, improperly concluded that the awardee met certain bona fide place of business eligibility requirements, and made an unreasonable best value award decision. Of all these grounds, the protest was sustained only on the “failure to conduct meaningful discussions” with one of the protesters.

In evaluating Encanto's proposal, the Corps assigned three strengths and four weaknesses. In giving the proposal a marginal rating, the Corps stated:

Proposal does not clearly meet the requirements and has not demonstrated an adequate approach and understanding of the requirements. The proposal has one or more weaknesses which are not offset by strengths. *Risk of unsuccessful performance is high.* (Emphasis added).

The GAO recited the requirement that agencies must, during discussions, address, at a minimum, significant weaknesses and deficiencies. FAR 15.306. An agency's substantive discussion of a weakness, rather than the way the agency characterizes it, is determinative. Further, when an agency finds a risk that may jeopardize successful performance of a contract, this is a significant weakness that *must* be addressed during discussions.

The Corps labeled their concerns with Encanto's proposals as “weaknesses” and therefore, there was no requirement to conduct discussions on these issues (only “significant weaknesses” require discussions). The GAO completely disagreed with such a categorization. GAO noted that the agency's evaluation assessed “significant weaknesses which call into question the offeror's ability to successfully perform the contract...[and we] conclude that the Corps' failure to address these significant weaknesses with Encanto during discussions was improper”. GAO therefore sustained the protest on that ground.

TAKEAWAY: Agencies cannot mislabel as “weaknesses” serious flaws in a proposal that could jeopardize a contractor's performance of a contract. Such a flaw in a proposal is a significant

weakness and must be brought up in discussions. Otherwise, discussions are misleading, and a protest of misleading discussions will be sustained.