

UNEQUAL EXCHANGES IN TASK ORDER COMPETITION

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A significant number of competitions are held pursuant to task orders either issued under the Federal Supply Schedules (See Federal Acquisition Regulation Subpart 8.4) or under the Fair Opportunity Submission Request (“FOSR”) outlined in FAR 16.505(b)(1). A recent Government Accountability Office (“GAO”) case on an FOSR procurement demonstrated that regardless of the actual language in the regulations, agencies are required to treat offerors in a fair manner and may not disadvantage one offeror over another (i.e. holding unequal exchanges). *AECOM Management Servs., Inc.*, B-418828, March 17, 2021.

The Department of the Navy issued an FOSR for contractor logistics support, pursuant to a Navy multiple award, indefinite delivery, indefinite quantity (“IDIQ”) contract. The FOSR stated that it might conduct oral or written interchanges with one or more offerors. It further stated that all offerors would be treated fairly but noted that this did not mean that interchanges would be conducted with all offerors or that all interchanges would be of the same nature or depth.

AECOM protested that the Navy conducted unfair interchanges with the winner (Vertex) that allowed the awardee to revise its proposal to remedy significant noncompliances with the solicitation instructions (failure to fully price its labor hours). This was protested as unfair because the Navy failed to notify AECOM about a “confidence decreaser” (deficiency) in its proposal, or permit AECOM to revise its proposal.

The GAO held that the Navy did not conduct interchanges (discussions) fairly, because Vertex was provided the opportunity to make significant revisions to its proposal (resulting in a \$20 million price increase), whereas AECOM was never advised of the confidence decreaser or provided any opportunity to revise its proposal (one of the primary reason AECOM was not selected for award). Only one offeror was provided with a meaningful opportunity to enhance its proposal, even though both offerors had significant “weaknesses.” Therefore, GAO sustained the protest.

The GAO recommended that the Navy reopen interchanges with AECOM and advise AECOM of the confidence decreaser. Also the GAO recommended that the Navy provide AECOM with an opportunity to revise its proposal, and then the Navy should perform a new evaluation and make a new source selection decision.

The Takeaway: Even where the detailed procedure for discussions found in FAR 15.306 (establishing a competitive range, conducting exchanges with the intent of allowing offerors to revise their proposal, identifying deficiencies and significant weaknesses in the proposals, and then permitting all offerors in the competitive range to revise their proposals) are not specifically identified, the Fair Opportunity Submission Request requires fairness to all offerors. An agency will not be permitted to conduct unequal exchanges where the solicitation requires the agency to treat offerors fairly but the agency permitted only the awardee to substantially revise its proposal despite conducting exchanges in multiple offerors.

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