

SIX RECURRING AGENCY MISTAKES IN DISCUSSIONS

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Discussions may become a very important part of a negotiated procurement. Discussions always occupy a compelling spot in the lore of sustained protests, because agencies keep repeating their mistakes. For years, agencies have had trouble conducting discussions, which is an important reason why agencies frequently try very hard *not* to hold discussions, if at all possible. Two recent sustained protests at the Government Accountability Office (“GAO”) and one at the Court of Federal Claims show how frequently agencies fail to conduct discussions properly. Before reviewing the cases, it’s first important to review the key Federal Acquisition Regulation (“FAR”) sections, and how the GAO and the Court apply them.

Rules on Discussions

Clarifications are limited exchanges, between the Government and offerors, that may occur where offerors are given the opportunity to clarify certain aspects of proposals. FAR 15.306(a). Clarifications cannot be used to cure proposal deficiencies or material omissions, or materially alter the technical or cost elements of the proposal, or otherwise revise the proposal.

Discussions (negotiations) are exchanges between the Government and offerors in the competitive range, that are undertaken with the intent of allowing the offeror to revise its proposal. Discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. FAR 15.306(d).

- (1) Discussions must be tailored to each offeror's proposal;
- (2) The primary objective of discussions is to maximize the Government's ability to obtain best value; and
- (3) At a minimum, the contracting officer must indicate to, or discuss with, each offeror, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. FAR 15.306(d).
- (4) A “**deficiency**” is a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level. FAR 15.001.
- (5) A “**weakness**” is a flaw in the proposal that increases the risk of unsuccessful contract performance. A “significant weakness” in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance. FAR 15.001.

Final Proposal revisions: At the conclusion of discussions, every offeror in the competitive range must be given an opportunity to submit a final proposal revision. FAR 15.307.

GAO And Court applications of the rules-recurring agency mistakes: There are six areas where mistakes are frequently made when holding discussions. Here are the important principles:

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. If an agency identifies concerns during a re-evaluation of proposals that should have been raised had they been identified before discussions were held, the agency is required to reopen discussions in order to raise the concerns with the offerors.
2. **Agencies may not conduct misleading discussions.** An agency may not mislead an offeror through the framing of a discussion question into responding in a manner that does not address the agency's actual concerns, or otherwise misinform the offeror concerning a problem with its proposal.
3. **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.
4. **Agencies may not label communications with offerors as “clarifications” when they are really discussions.** It is the actions of the agency that determine whether discussions have been held and not merely the characterization of those communications by the agency. When an agency's communications with an offeror invites a response that is necessary to determine the acceptability of the offeror's proposal, that is a discussion, not a request for clarification.
5. **Agencies may not conduct discussions with only one offeror.** When an agency conducts discussions with one offeror, it must afford all offerors remaining in the competitive range an opportunity to engage in meaningful discussions.
6. **Agencies must permit offerors to submit a final proposal revision after discussions.** If offerors are not given that opportunity, the agency has violated FAR 15.307.

Recent Cases on Agency Mistakes in Discussions: In *Caddell Construction Co. v. United States*, No. 15-645C (Fed Cl. Feb. 10, 2016), the court held that the Department of State had conducted misleading discussions when it advised the awardee that its price was higher than the Independent Government Estimate for construction of a new embassy building. In actuality, the awardee's price was *lower* than the Independent Government Estimate, and the court sustained the protest, nothing that the misleading discussions may have caused the awardee to further reduce its price, and causing the agency's price evaluation “to be a sham.”

In *Cascadian American Enterprises*, B-412208.3 & .4, Feb. 5, 2016, the GAO sustained a protest against an Army award for removal of vegetation at a Joint Base in Washington State. Although the agency asserted it had only engaged in “clarifications,” GAO found that the Army had conducted discussions by contacting the awardee and obtaining a response that was necessary to determine the acceptability of the awardee’s proposal, but never provided the same opportunity to the protester.

In *Intelsat Gen. Corp.*, B-412097, Dec. 23, 2015, the GAO found that the Defense Information Security Agency had engaged in misleading discussions by changing the agency’s interpretation of the solicitation after discussions were held, and failing to inform the protester of this change in interpretation. This amounted to misinforming the protesters about the government’s requirements.

It’s obvious that agencies keep repeating many of the same mistakes in discussions. If Agencies want to conduct discussions as required by the FAR, they must re-read not only the pertinent sections of FAR Part 15 but also the frequent mistakes, and take them to heart.