

AGENCIES MAY NOT CONDUCT PREJUDICIALLY MISLEADING DISCUSSIONS

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The Government Accountability Office (“GAO”) has frequently stated that agencies may not prejudicially mislead offerors when they conduct discussions (negotiations) in negotiated procurements. This requirement was again clearly restated in *CFS-KBR Marianas Support Services, LLC, Fluor Fed Solutions LLC et al.*, B-410486, Jan. 2, 2015.

The Federal Acquisition Regulation states that when an agency conducts discussions in a negotiated procurement, “the contracting officer must...[tell offerors about their proposals’] deficiencies, significant weaknesses and adverse past performance information to which the offeror has not yet had an opportunity to respond.” FAR 15.307(d)(3). The GAO has interpreted this section to mean that:

It is a fundamental precept of negotiated procurement that discussions, when conducted, must be meaningful and must not prejudicially mislead offerors. Specifically, an agency may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns; misinform the offeror concerning a problem with its proposal; or misinform the offeror about the government's requirements.

Metro Mach. Corp., B-281872 (Apr. 22, 1999), 99-1 CPD ¶ 101 (internal citations omitted).

In *CFS-KBR*, the Navy sought base operations support services for a location in Guam under a cost reimbursement contract. This meant that the Navy was required to perform a “cost realism” analysis to determine the probable cost of performance for each offeror, as required by FAR 15.404-1(d)(1) & (2). For service contracts cost realism analyses always consider whether the offeror’s proposed staffing level is sufficient, and the Navy did that on this procurement. However, the Navy mechanically evaluated all proposals against an undisclosed government estimate of the number of staff required, without considering the offerors’ different technical approaches. The GAO found this methodology unreasonable.

In conducting discussions the Navy advised each offeror of the precise number of staff it considered the proposal to be “deficient,” i.e., too low. Fluor, one of the protesters, increased its staffing to add precisely the number of staff identified by the Navy in the discussions, and the increase was so much that its revised staffing proposal (and high cost) was noncompetitive. GAO held that the Navy’s discussions were misleading, and this resulted in competitive prejudice to Fluor, a necessary aspect for sustaining the protest.

CFS, the other protester, was also told of its staffing deficiencies in the discussions. However, it did not allege that it was misled by the discussions. In fact, CFS proposed fewer staff than the agency had told it were necessary, adding a smaller number than the Navy had identified in the

discussions. The GAO concluded that CFS was not misled to its competitive prejudice by the discussion, and its protest was denied.

TIPS: (1) Cost realism analyses are a required part of cost reimbursement contracting.

Contractors should be certain that their proposals are realistic, fully comply with the solicitation, and provide adequate staffing to meet any requirement for services.

(2) Agencies must use reasonable and realistic methods of conducting cost realism analyses—in particular, requirements for staffing. Mechanical methodology, without considering what is in a proposal, is usually not reasonable.

(3) If you submit a proposal, and the agency engages in discussions but you lose the award, be sure to request and obtain a debriefing. At the debriefing, you should be able to determine if the discussions were reasonable, or if they were misleading. If misleading, and you were competitively prejudiced (i.e., you lost because of those discussions), consider filing a GAO protest.