

## AGENCY HAS ONLY LIMITED REQUIREMENT TO SEEK CLARIFICATIONS

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Offerors should carefully consider the Federal Acquisition Regulation (“FAR”) requirements for “clarifications” that agencies must comply with when establishing a competitive range in a negotiated procurement as well as the FAR requirements for “discussions”. *People, Technology & Processes, LLC*, B-417208, March 21, 2019 (“PTP”) is a good example which shows that the only mandatory requirement for conducting communications (clarifications) is when an offeror’s past performance information is the determining factor preventing their proposal from being placed in the competitive range. FAR 15.306(b)(1). In such a case, the clarification “shall address adverse past performance information to which an offeror has not had a prior opportunity to respond.” FAR 15.306(b)(1)(i). Other types of clarifications are discretionary on the part of the agency.

Before discussing the case, here is what the FAR requires for clarifications and discussions.

**[Clarifications] Communications.** FAR 15.306(b) notes that communications with offerors before establishing the competitive range:

- (1) **Shall** be limited to the offerors described below
  - i. Shall be held with offerors whose past performance is the determining factor preventing them from being placed in the competitive range. Such communications shall address adverse past performance information to which an offeror has not had a prior opportunity to respond; and
  - ii. May only be held with those offerors... whose exclusion from the competitive range is uncertain
- (2) **May** be conducted to enhance government understanding of proposals...Such communications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical cost elements of the proposal, and/or otherwise revise the proposal.

**[Negotiations] Exchanges with offerors after establishment of the competitive range.** FAR 15.306(d) explains that negotiations are exchanges undertaken “with the intent of allowing the offeror to revise its proposal” and of indicating to, or discussing with “each offeror... significant weaknesses and adverse past performance [and other parts of the offerors’ proposal that could enhance the proposal’s potential for award]. FAR 15.307 notes that at the conclusion of discussions,” each offeror in the competitive range shall be given an opportunity to submit a final proposal revision.

PTP involved a procurement for intelligence support for the U.S. Special Operations Command. PTP challenged its exclusion from the competitive range. The Agency did not include PTP in the competitive range because the required resumes that PTP submitted did not contain required information pertaining to the number of personnel supervised. PTP asserted that this omission could have been corrected by asking for clarifications to include the number supervised.

However, the agency noted that there was a material omission in the resumes—something that could only be cured through discussions. There was simply no situation where PTP had not been allowed to address an adverse past performance evaluation, and no requirement for the agency to conduct discussions. Furthermore, the agency *could not* request that PTP revise the resumes to address their flaw—this would clearly have amounted to discussions because PTP would have been given the right to discussions and a revision of its proposal. The agency did not conduct discussions with any other offeror, and had no obligation to hold them with PTP.

The Takeaway: Clarifications cannot be used to correct a material omission in a proposal. This could be done as part of discussions and a final proposal revision. However, agencies are not required to seek “additions” to an otherwise materially defective proposal prior to establishing the competitive range—indeed, agencies are prohibited from such actions. Clarifications are *required* only in very limited situations, described above, involving past performance. Of course, as noted above, agencies **has discretion to** seek clarifications “to enhance government understanding of proposals...Such communications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical cost elements of the proposal, and/or otherwise revise the proposal.”

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