

DISCUSSIONS WERE NOT MEANINGFUL

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Whenever an agency conducts discussions with offerors using negotiated procedures under Federal Acquisition Regulation (“FAR”) Part 15, the agency is required to provide all offerors that remain in the competition an opportunity to engage in meaningful discussions. At a minimum, FAR 15.306(d)(3) requires the agency to discuss all deficiencies, significant weaknesses and adverse past performance information to which the offeror has not had an opportunity to respond. In *BC Site Services, LLC*, B-230797.4, .5, March 21, 2023, the Army Corps of Engineers held discussions involving a Solicitation for horizontal construction in the Galveston District and Southwestern Division, however, the agency discussions with BC were not meaningful.

The procurement was conducted using FAR 36.3, Two Phase Design-Build Selection Procedures. This FAR part is used as follows: In Phase I, design work must be performed by offerors before developing price or cost proposals. Proposals are generally evaluated in Phase I to determine which offerors will submit proposal for Phase II. Phase II “shall be prepared in accordance with [FAR] Part 15, and includes submission of technical and price proposals, which shall be evaluated in accordance with Part 15.”

BC’s protest concerned discussions held in Phase I. Although the Corps denied that discussions were held or required in Phase I, the description of phase I in the Solicitation explicitly “reserve[d] the right to allow proposal revisions in accordance with FAR 15.306(d)(5),” and made further references to FAR Part 15. The Government Accountability Office (“GAO”) held that these solicitation provisions “import[ed] the discussions provisions into the Phase I evaluation process.” GAO rejected the Corps’ contention that exchanges held with offerors did not constitute discussions.

While evaluating proposals in Phase I, the Corps contacted nine of the offerors with Evaluation Notices (“ENs”) for them to address. For example, one small business offeror was requested to submit a letter of commitment verifying its bonding capacity in an EN. Other offerors were given an opportunity to submit additional information in order to make their proposals acceptable. With respect to BC, the Corps issued an EN, but that EN was limited to asking BC to confirm its organization as an LLC and to submit its articles of organizations and operating agreement. The Corps also identified information missing from BC’s proposal on 4 out of 6 past required performance projects, which the agency did not raise in an EN with BC. Specifically, in its evaluation, the Corps noted that BC’s past performance projects were not complete and signed by the client and thus “the quality of performance could not be determined.” This caused a downgrade in BC’s past performance evaluation. BC stated it could have addressed this problem if the Corps had raised it in discussions.

GAO concluded that the Corps failed to engage in meaningful discussions with BCSS and there was a reasonable possibility of prejudice. GAO sustained the protest and recommended that the Corps conduct proper discussions for Phase I.

Takeaway. Even though discussions for Phase I in this type of procurement are not mandated by FAR Subpart 36.3, an agency may choose to include them in the solicitation and conduct FAR Part 15 discussions. But when the agency elects to conduct discussions, they must be fair and meaningful.

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