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PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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Protest Allegations: Discussions with Offerors—Part I

By Luke Levasseur and Michelle E. Litteken*

This is the first part of a two-part article focused on protest allegations related to discussions with offerors. This first part focuses on when an agency crosses the line from clarifications to discussions and what qualifies as a meaningful discussion. The second part of the article, which will appear in an upcoming issue of Pratt's Government Contracting Law Report, *will explore what contractors should know about misleading discussions, what constitutes unequal discussions, and provide a round-up of recent protests involving discussions.*

WHEN DOES AN AGENCY CROSS THE LINE FROM CLARIFICATIONS TO DISCUSSIONS?

In a bid protest, the disappointed offeror often alleges that the agency failed to conduct meaningful discussions or engaged in unequal discussions. A threshold inquiry is whether the agency engaged in discussions. The Court of Federal Claims ("CFC") and Government Accountability Office ("GAO") approach the question of whether agency communications constitute discussions differently, and a protester may want to consider that difference when selecting a protest forum.

FAR DEFINITION OF CLARIFICATIONS

Federal Acquisition Regulation ("FAR") 15.306 defines clarifications as "limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated." The FAR does not expressly define "discussions," but it explains that "discussions" include negotiations that "are undertaken with the intent of allowing the offeror to revise its proposal." The FAR used to limit clarifications to communications about relatively small matters, such as eliminating clerical mistakes or minor irregularities. However, the rules were revised in 1997 to allow a free exchange of information without requiring discussions. Decisions from the GAO and CFC reveal that the two protest forums apply the FAR provisions differently, with the CFC appearing to embrace a more substantial exchange of information that can still be characterized as clarifications.

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THE "ACID TEST"

Both GAO and the CFC recognize that, if an offeror is given an opportunity to revise its proposal, the agency has engaged in discussions. Several GAO and CFC cases refer to this as the "acid test." The tough cases come when either (i) questions (often called "clarifications" by the agency) seek information that is necessary to determine technical acceptability of the proposal, or (2) the agency seeks a substantial amount of "clarify[ing]" information and an offeror's response approaches (or crosses) the line of changing the proposal.

GAO RULINGS

GAO has ruled that, when an agency uses information received from an offeror after submission of a proposal to determine the technical acceptability of a proposal, "discussions" occurred. For example, in *Evergreen Helicopters of Alaska, Inc.*,[1] GAO analyzed the "acquisition of fixed-wing aircraft services in the central region of Africa," and considered an EN requesting information about the aircraft type and tail numbers. Such a request could be seen as soliciting information inadvertently omitted from the proposal, but GAO ruled that the communications constituted discussions because the information was necessary to determine technical acceptability. In contrast, in *Tetra Tech, Inc.*,[2] GAO held that the agency's email to the awardee asking the awardee to confirm that it was accepting the end-state performance objective (as opposed to the technical approach) qualified as a clarification because the awardee was confirming information already in the proposal, not providing information that constituted a modification or revision of its proposal in response to the email.

Importantly, GAO does not necessarily accept the agency's characterization of the communications—but, instead, analyzes the parties' actions. This lack of deference is illustrated in *Evergreen Helicopters*, in which GAO rejected the agency's characterization and argument that the evaluation notices were clarifications because the offerors were not allowed to revise their proposals. Similarly, in *Kardex Remstar, LLC*,[3] the agency sent an offeror a spreadsheet with spaces for the offeror to explain how its proposal satisfied the agency's requirements. The agency characterized the communications as "clarifications" and expressly prohibited the offeror from changing its proposal. GAO rejected the agency's characterization because the information was used to determine technical acceptability—even though the offeror could not revise its proposal.

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[1] http://www.gao.gov/assets/670/662588.pdf.

[2] http://www.gao.gov/assets/670/662531.pdf.

[3] http://www.gao.gov/assets/670/660392.pdf.

CFC DECISIONS

In contrast, CFC decisions generally find that discussions occur only when an offeror is given the opportunity to revise its proposal, and the court is less likely to characterize the provision of information related to a technical acceptability determination as "discussions." For example, in *Mil-Mar Century Corp. v. U.S.*,[4] the protester argued that an email asking the awardee to substantiate its proposed price, clarify its costs for an item, address a discrepancy in its labor hours, and clarify the adequacy of its proposed labor hours qualified as discussions.

Although the agency included a disclaimer on the emails that the communications did not constitute discussions, the protester argued that the exchanges were discussions because the information the awardee provided was required by the RFP and essential to determine acceptability. The court deferred to the agency's characterization and found the information was not a material requirement. The court also noted that "an exchange can constitute a clarification, and not a discussion, even whe[n] the information provided was 'essential to evaluation criteria.'" *Evergreen Helicopters* and *Kardex* suggest that GAO would have agreed with the protester because the agency used the information to determine technical acceptability.

With respect to the amount of deference the CFC should give to an agency's characterization of the communications, the Federal Circuit has held[5] that the court should defer to the agency's interpretation of the FAR's definition if the agency's interpretation is permissible. In *Davis Boat Works, Inc.*,[6] the CFC applied that reasoning to hold that a seven-page letter with a 25-page "process guide" the awardee submitted during the first round of evaluation constituted clarifications because neither the letter nor the guide substantially revised the offeror's proposal. Instead, the court found that the Process Guide explained how the offeror would satisfy the RFP's management approach requirements. The court was not concerned with the amount of information that the offeror provided, observing "any clarification must necessarily convey new information to the agency." The court further stated: "in close cases, it is well-established that the government's classification of a particular communication as a clarification or a discussion 'is entitled to deference from the court,' as long as that classification is permissible and reasonable." In contrast, GAO has stated: "the agency's characterization of the exchange is not controlling, as it is the

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[4] http://www.uscfc.uscourts.gov/sites/default/files/opinions/HEWITT.MILMAR061213.pdf.

[5] http://caselaw.findlaw.com/us-federal-circuit/1213855.html.

[6] http://www.uscfc.uscourts.gov/sites/default/files/opinions/WHEELER.DAVIS052813.pdf.

actions of the parties that determine whether discussions have been held."

Although there are many issues to consider when deciding where to file a bid protest, contractors might not sufficiently consider the different approaches that GAO and CFC take to determining whether discussions occurred. If a contractor anticipates that a discussions-related issue may become important in a protest being considered, subtle differences between the way the CFC and GAO evaluate these issues should be analyzed carefully.

WHAT IS REQUIRED FOR DISCUSSIONS TO BE MEANINGFUL?

A common bid protest allegation made by disappointed offerors is that the agency failed to engage in meaningful discussions. It is basic procurement law that, when an agency engages in discussions with offerors under FAR Part 15, the discussions must be meaningful. But what is required for discussions to be does "meaningful"? Because protesters frequently raise the meaningful discussions protest ground, contractors and their counsel should be familiar with agencies' discussions-related obligations and how GAO and the CFC approach protests challenges to the adequacy of discussions.

FAR 15.306, which provides for exchanges with offerors after receipt of proposals, does not specifically define "meaningful" in the context of discussions. Instead, the FAR states that an agency must discuss "deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond." GAO and the CFC have based their analyses of what discussions qualify as *meaningful* on this FAR provision.

Issues that arise with respect to whether discussions were sufficiently meaningful include:

- When is a weakness significant?
- Do weaknesses that are discriminators have to be discussed?
- How specific does the agency need to be?
- Does an agency need to discuss a weakness if it first appears in an offeror's FPR?

Is the Weakness Significant?

Protesters often argue that the agency's failure to raise an issue identified during the evaluation of initial proposals violates the FAR. As noted above, the FAR only requires that deficiencies and significant weaknesses be discussed. Because there is no obligation to discuss garden-variety weaknesses within a proposal, a protest ground regarding the failure to discuss such issues (absent an unequal discussions issue) would be dead on arrival.

The FAR (15.001) defines a "weakness" as "a flaw in the proposal that increases the risk of unsuccessful contract performance." A weakness is "significant" when the concern "in the proposal is a flaw that *appreciably* increases the risk of unsuccessful contract performance." So the distinction between a weakness and a significant weakness turns on the judgment of whether there is an "appreciable" effect on the risk of unsuccessful contract performance.

As a general matter, the CFC and GAO will give deference to evaluators' determinations of whether a weakness is *significant*. That said, protesters can overcome the deference given to the agency—and GAO and the CFC will not accept the evaluator's characterizations—when the weakness had a clear impact on the rating being challenged.

Although convincing the CFC or GAO that an evaluator mischaracterized a concern with an appreciable impact as a garden-variety weakness isn't easy, it can be done. For example, in *Trammel Crow Company*,[7] the protester asserted that the GSA's discussions were not meaningful because the offeror had not been informed that one of its proposed key personnel lacked the required years of experience and another lacked experience in federal buildings of a certain minimum size. Although the agency argued that discussions were not required because the weaknesses had not been deemed "significant," GAO sustained the protest because "it [was] clear that, under the agency's evaluation methodology for this subfactor, the weaknesses in fact were significant."

What about when a Garden-variety Weakness Becomes a Discriminator?

There are numerous bid protests in which offerors' proposals are closely matched and a weakness that was not discussed (or group of such weaknesses) becomes the discriminator. Substantial precedent makes clear that the fact that a weakness eventually becomes the deciding factor does not create an obligation to conduct discussions. For instance, in *Gracon Corp.*,[8] GAO explained:

> An agency is not required to afford offerors all-encompassing discussions, or to discuss every aspect of a proposal that receives less than the maximum score, and is not required to advise an offeror of a minor weakness that is not considered significant, even where the weakness subsequently becomes a determinative factor in choosing between two closely ranked proposals. We review the discussions provided only to determine whether the agency pointed out weaknesses that, unless

[7] http://www.gao.gov/assets/390/383519.pdf.

[8] http://www.gao.gov/assets/380/371175.pdf.

corrected, would prevent an offeror from having a reasonable chance for award.

Gracon had been rated "high quality" under the relevant subfactors and factor, but the awardee's proposal was better-rated—in part because of seven weakness assessed against Gracon. GAO disagreed that Gracon's weaknesses which became discriminators should have been discussed, finding that none of the problems constituted a significant weakness or deficiency—and the fact that they ultimately made the proposal less competitive was beside the point.

How Much Explanation is Required from the Agency?

In cases in which there is no dispute about the significance of a weakness, the parties may disagree over whether the discussions directed the offeror to the area of its proposal needing improvement. The boilerplate legal concepts applied by the CFC and GAO are clear. An agency is not required to "spoon feed" offerors during discussions; instead, the agency is merely required to lead offerors into the areas of their proposals requiring amplification or correction. Consistent application of these rules can be tricky.

For example, in *Omniplex World Services Corp.*,[9] the protester argued that the three pricing-related communications it received from the agency did not meaningfully inform the offeror that its price was unreasonably high or unacceptable. In the communications, the agency informed Omniplex that the solicitation was revised in ways that should have significantly reduced the proposal price and directed the company to the changed solicitation areas. The CFC found that the agency adequately conveyed that it found Omniplex's proposed pricing to be a deficiency or significant weakness. The court acknowledged that the agency's "communications with Omniplex certainly could have been more forthcoming—especially given Omniplex's request for further guidance regarding its pricing proposal." But the protest was denied nonetheless because the agency had sufficiently informed the offeror of the proposal area in which problems were found.

GAO reached the opposite conclusion in a case involving similar communications with the offeror. During discussions in *Sentrillion Corp.*,[10] the agency informed the offeror that its proposal was deficient because it did not submit proof of a license or an application for a license, and it had submitted some expired licenses. But the agency failed to address the fact that the business licenses it submitted with its initial proposal were incomplete and not

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[9] http://www.uscfc.uscourts.gov/sites/default/files/opinions/HEWITT.OMNIPLEX080112.pdf.

[10] http://www.gao.gov/assets/660/657714.pdf.

notarized. GAO sustained the protest, acknowledging that although an agency is not required to "spoon feed" an offeror and had addressed the licenses (and thus arguably led the offeror into the area), the discussions were inadequate because the agency failed to identify every significant weakness or deficiency.

What about Proposal Problems that Result from Changes Introduced in the FPR?

A final "when are discussions required" issue arises at the end of the negotiations, when protesters sometimes allege that an agency should have reopened discussions to address a significant weakness or deficiency found by the evaluators late in the process, *i.e.*, after submission of the FPR. In *Geo Marine, Inc./Burns & McDonnell Engineering, Inc.*,[11] the protester argued that the agency should have reopened discussions when the agency changed what had been a weakness to a significant weakness during the evaluation of its FPR. During discussions, the agency had raised the issue (location of wind turbine generators), and the offeror had made the decision to not change the location but instead to provide additional explanation of its design choice. The FPR explanation made matters worse, and GAO denied the protest, ruling that an agency is not required to reopen discussions when a significant weakness or deficiency is first introduced in a FPR. Numerous CFC and GAO decisions support this rule.

SUMMARY

In sum, although the failure to engage in meaningful discussions is a common protest ground, there are nuances in the law that may add complexity to what seems like a familiar argument. Government contractors and their counsel should be aware of the requirements agencies are subject to and how the CFC and GAO approach issues related to meaningful discussions.

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[11] http://www.gao.gov/assets/670/660455.pdf.