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Protest Allegations: Discussions with Offerors—Part II

By Luke Levasseur and Michelle E. Litteken*

This is the second part of a two-part article focused on protest allegations related to discussions with offerors. This first part, which appeared in the June 2015 issue of Pratt's Government Contracting Law Report, *focused on when an agency crosses the line from clarifications to discussions and what qualifies as a meaningful discussion. This second part explores what contractors should know about misleading discussions, what constitutes unequal discussions, and provides a round-up of recent protests involving discussions.*

DON'T BE MISLED: WHAT CONTRACTORS SHOULD KNOW ABOUT MISLEADING DISCUSSIONS

Agencies often engage in discussions with offerors as part of the procurement process. Discussions can be useful to contractors because the questions asked and issues raised can direct an offeror to areas of its proposal needing improvement. In some situations, discussions can help a contractor turn an unacceptable proposal into a successful offer. However, information provided by an agency during discussions can also lead an offeror in the wrong direction. If the agency selects another proposal, the disappointed offeror may file a protest and argue that the discussions were misleading. But what qualifies as misleading discussions? How specific does an agency need to be when it engages in discussions? These are issues that contractors should be mindful of as they engage in discussions—and that they must understand to frame potential protest issues when they are not the prevailing offeror.

Although the Federal Acquisition Regulation ("FAR") does not define misleading discussions, decisions from and Government Accountability Office ("GAO") and Court of Federal Claims ("CFC") provide guidance on when discussions are misleading. Both forums have stated: "An agency may not inadvertently mislead an offeror, through the framing of a discussion question, into responding in a manner that does not address the agency's concerns; or that misinforms the offeror concerning its proposal weaknesses or deficiencies; or the government's requirements."[1]

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[1] http://www.gao.gov/assets/600/592658.pdf.

The application of this standard is straight forward in some circumstances. For example, in KPMG LLP,[2] GAO held that the CIA engaged in misleading discussions when the agency instructed KPMG during discussions that it must propose 14 full-time equivalents ("FTEs") in each contract year and that resumes should be provided for all personnel proposed to perform over the life of the contract but did not require resumes for all proposed personnel from all offerors. GAO rejected the CIA's argument that it did not mislead KPMG because its instruction that KPMG *should* submit resumes did not reflect a mandatory requirement.

Similarly, in *Metro Machine Corporation*, GAO held that the Navy misled the protester when it issued discussion questions about its proposed use of its Norfolk facilities but did not inform the protester that relying on its Norfolk facilities rendered its proposal technically unacceptable. GAO noted that the request for proposal ("RFP") did not set forth a geographic limitation for the location, and if the agency believed that the RFP required the facilities to be near Jacksonville, it should have informed the protester of that position.

To succeed in a misleading discussions protest, the protester must show that the allegedly misleading discussions were prejudicial, *i.e.*, made its proposal less competitive. For example, in Tech Systems, Inc.,[3] the protester claimed that the agency misled it by focusing on its proposed technical approach, which led the protester to overemphasize management, but refused to discuss pricing, which proved to be the determinative factor in source selection. The court rejected the protester's argument that the discussions misled it into proposing a high-cost approach because the protester did not show that is costs were higher because of the management-centric approach the agency purportedly encouraged it to propose.

Applying the discussions requirements can be less clear when a protester argues that the agency misled it by failing to direct it to areas of its proposal that were deemed significant weaknesses or deficiencies. Both GAO and CFC often state that an agency is not required to "spoon-feed" an offeror, but the level of specificity required in discussions is not always clear.

In West Sound Services Group, LLC,[4] GAO held that the agency misled the protester when it directed the protester to amplify its approach with respect to six sub-annexes under one annex but did not mention the concerns it had with the protester's approach under another related annex. GAO found that the

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[2] http://www.gao.gov/assets/600/591406.pdf.

[3] http://www.uscfc.uscourts.gov/sites/default/files/opinions/WOLSKI.TECH051111.pdf.

[4] http://www.gao.gov/assets/660/659405.pdf.

discussions did not put the protester on notice that it needed to address the second annex. In contrast, in D&S Consultants, Inc.,[5] the CFC rejected the protester's argument that discussions were misleading because the agency asked questions about its unrealistically low labor rates but did not ask about the way it allocated labor hours or its approach to mapping labor categories to the Service Contract Act ("SCA")–areas for which the agency assessed risks. The court stated:

> Although the IFN did not specifically identify problems with plaintiff's allocation of hours and SCA mapping, both issues ultimately affected the overall price and various labor rates. Therefore, that the IFN directed plaintiff to concerns about its labor rates was enough to "lead" it to the area of its proposal encompassing those issues.

As is the case in challenges to the meaningfulness of discussions, the amount of specificity required to avoid misleading an offeror is highly fact dependent. Contractors should be aware of an agency's obligation to refrain from misleading offerors as they engage in discussions and litigate bid protests.

"THAT WASN'T FAIR!"—PROTESTS BASED ON UNEQUAL DISCUSSIONS

The principles of fair and equal competition drive many aspects of procurement law and policy. These principles are evident in the FAR's requirement that when an agency engages in discussions with offerors, the agency cannot "engage in conduct that [f]avors one offeror over another." Discussions often occur as part of the procurement process, and can be beneficial to the agency and offerors. However, discussions have their drawbacks. If an unsuccessful offeror believes that other offerors were given better direction or provided with more information, discussions can provide the basis for a protest based on purportedly unequal discussions.

At first glance, the rule that discussions between the government and offerors must be equal and not favor one offeror over another seems clear. However, application of the rule can be complicated because agencies are not required to conduct identical discussions with offerors, and because discussions must be tailored to offerors' different proposals. As such, when GAO or the CFC is faced with a protest alleging unequal discussions, it is not a simple matter of determining how many questions were asked, how long discussions were conducted, or the type and number of issues that were addressed. Instead, the question is whether the agency's questions or statements made during discus-

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[5] http://www.uscfc.uscourts.gov/sites/default/files/opinions/10.14.11 Opinion REDACTED 10-28-11.pdf.

sions gave an offeror an unfair advantage.

In some instances, determining whether an offeror had an unfair advantaged requires a nuanced analysis. For example, in Sytronics, Inc.,[6] the agency told Sytronics that its proposed price "appears high" and told Jenkins Electric Company that its proposed price "appears excessive." When the offerors submitted their final proposals, Sytronics lowered its price by four percent and Jenkins lowered its price by eight percent. Although the agency stated that it did not intend to favor one offeror over another, and the use of different adjectives was inadvertent, GAO sustained the protest. GAO reasoned that an offeror would reasonably view the word "excessive" as sending a stronger message than "high," and that distinction was illustrated by Jenkins' larger price adjustment.

Other questions of unfair competitive advantage are more clear-cut. In Zodiac of North America,[7] the protester argued that an agency engaged in unequal discussions when it provided the awardee with multiple rounds of discussion questions and engaged in only one round of discussions with the disappointed offeror. The agency was evaluating the technical proposals on a pass/fail basis, and the agency's concerns with the protester's proposal were resolved after one round of discussions. GAO denied the protest, reasoning that there was nothing wrong with an agency conducting multiple rounds of discussions to resolve significant weaknesses or deficiencies. When the protester's proposal was deemed technically acceptable, it could not improve its proposal. Holding additional discussions with offerors whose proposals were not yet deemed technically acceptable did not disadvantage the protester.

The fact that discussions are tailored to an offeror's proposal can result in an unequal discussions protest, but protesters pursuing such arguments can have a difficult time. For instance, in Apptis Inc.,[8] the agency engaged in discussions with the awardee about its technical proposal, past performance, and price proposal, but the government's questions to the protester were limited to concerns about its price proposal. To someone unfamiliar with government contracts law, this apparent disparity appears to be unfair. However, the agency did not identify any *significant* weaknesses in the protester's technical proposal or its past performance record. In addition, although the agency identified weaknesses and significant weaknesses in the awardee's technical proposal, it only discussed the *significant* weaknesses. Because an agency is not required to provide offerors with all-encompassing discussions, and because the agency did

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[6] http://www.gao.gov/assets/380/376188.pdf.

[7] http://www.gao.gov/assets/670/662056.pdf.

[8] http://www.gao.gov/assets/400/390345.pdf.

not discuss non-significant weaknesses with either offeror, there was no unequal treatment and no basis to sustain the protest.

In one of the leading unequal discussions cases at the CFC, Gentex Corp. v. U.S.,[9] the court sustained a protest in which the agency provided the offerors with differing information concerning its technical requirements. The protested contract called for the development of aircrew masks to provide protection in chemical or biological warfare environments. In an email, the agency provided both offerors with information about the requirements for the batteries in the masks (*e.g.* wear hours, percentage of cold weather operations, *etc.*). Then, during discussions, the agency advised only one offeror (the awardee) that is proposal was unaffordable and asked whether it considered alternative or rechargeable batteries, or had conducted any cost as an independent variable ("CAIV") studies. But the Agency did not provide any comparable information to the protester—and denied the protester's request for exceptions to the requirements.

Gentex argued that the agency conducted unequal discussions, and the CFC agreed. The court explained: "The lack of clarity in the RFP, the discussions which suggested that [the awardee], but not Gentex, consider a CAIV tradeoff in connection with batteries, and the Air Force's failure to correct Gentex's differing understanding of the evaluation scheme of the RFP combined to render this procurement unfair." The court found a clear violation of FAR 15.306.

One difficult aspect of unequal discussions issues is that in most cases, the issues can only be understood by bid protest counsel examining an administrative record released under a protective order ("PO"), and the issues usually cannot be discussed in any detail with the client (as doing so would be inconsistent with the PO).

When considering pursuing a protest, contractors should be mindful of an agency's obligation to conduct equal discussions. It is important to remember that the number of questions raised or issues addressed is not decisive regarding whether discussions were unequal. Instead, contractors must consider the substance of the discussions—and whether they have any basis to believe the agency provided another offeror with an unfair advantage.

RECENT PROTESTS CHALLENGING DISCUSSIONS

Disappointed offerors often raise protest allegations related to discussions. Although protesters frequently allege that discussions were unequal, misleading,

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[9] http://www.uscfc.uscourts.gov/sites/default/files/opinions/WILLIAMS.Gentex%5bredacted%5dcorrected.pdf.

or not meaningful, challenges based on these allegations can be difficult to win. (Only two decisions were issued in 2014 sustaining a protest based on a discussions issue: Kardex Remstar LLC,[10] which was discussed in the first part of this article, and Marathon Medical Corp.[11]) Of course, although many of the protests discussed did not result in sustained protests based on the facts presented, they often provide useful insights for contractors in developing new claims and are worth close study.

When Does an Agency Cross the Line from Clarifications into Discussions?

Windstream Communications[12] illustrates that it is often difficult to determine whether exchanges between an offeror and an agency constitute clarifications or discussions. The 2014 protest followed a 2013 protest in which Windstream challenged the exclusion of its proposal from the competitive range. The agency took corrective action, and during the reevaluation, the agency contacted Windstream about its pricing. After reevaluating Windstream's proposal, the agency assessed two deficiencies under the "technical and management approach" subfactor and determined that Windstream's proposal was unacceptable. Windstream argued that the agency failed to engage in meaningful discussions because it raised concerns about Windtsream's prices but not the technical and management approach deficiencies. The Agency argued that it was not required to address the deficiencies with Windstream because it did not engage in discussions–the exchanges were clarifications. Windstream attempted to bolster its claims that the exchanges were discussions by pointing to the fact that it had submitted new detailed pricing information in response to the agency's questions–thereby revising its proposal–the "acid test" for discussions. However, in its submission to the agency, Windstream wrote: "We did not change any of our prices." GAO denied the protest, finding that although the format of the pricing information was different, the elements and its proposed price were the same. As such, the exchanges were clarifications–not discussions–and the agency was not required to address the proposal's deficiencies.

What Does It Take for Discussions to Be Meaningful?

The first part of this article discussed Sentrillion Corp.,[13] a decision in which GAO sustained the protest because the agency failed to raise its concerns about

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

[11] http://www.gao.gov/assets/670/663941.pdf.

[12] http://www.gao.gov/assets/670/663996.pdf.

[13] https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2013cv0636-56-0.

the completeness of some of Sentrillion's business license applications. Based on GAO's recommendation, the agency reopened the competition and issued discussion letters. In its letter to Sentrillion, the agency stated that if Sentrillion was proposing to partner with other companies to perform the work, it must submit evidence of a partnership agreement along with any business licenses or applications. During the reevaluation, the agency deemed Sentrillion's proposal technically unacceptable because the teaming agreements it had submitted—which provided that the parties would negotiate a subcontract if Sentrillion was awarded the contract—were not binding partnership agreements. Sentrillion protested at the CFC, asserting (among other protest grounds) that the discussions were not meaningful because the agency never told Sentrillion to submit binding subcontract agreements or that teaming agreements were unacceptable. The court denied the protest, finding that the discussion letter adequately conveyed the need for finalized agreements.

What Constitutes Unequal Discussions?

In Bannum Inc.,[14] the agency determined that because the awardee was rated slightly better for past performance and technical/management, the benefits of its proposal justified paying a three percent price premium. During discussions, the agency had told the awardee that its proposed price was high but did not comment on the protester's pricing, and the protester asserted that discussions were unequal. GAO denied the protest, stating: "unless an offeror's proposed price is so high as to be unreasonable or unacceptable, an agency is not required to inform an offeror during discussions that its proposed price is high in comparison to a competitor's proposed price, even where price is the determinative factor for award." GAO stated that the requirement to conduct discussions does not depend on how an offeror's proposed price compares to the Independent Government Estimate ("IGE"). However, in support of its decision, GAO noted that the protester's price was the lowest received and less than the IGE–and the awardee's initial proposed price had been above the IGE.

No Matter What, a Protester Must Show Prejudice

As is the case in all bid protests, prejudice is a central requirement in challenging the way in which an agency conducted discussions. In some instances, GAO or the CFC may not address whether the agency violated the FAR provisions governing discussions because the protester failed to demonstrate how it was prejudiced by the alleged violation. For example, in Inchape Shipping Services,[15] the protester argued that the agency engaged in unequal

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[14] http://www.gao.gov/assets/670/665525.pdf.

[15] http://www.gao.gov/assets/670/663277.pdf.

discussions because it allowed the awardee to revise its proposal by replacing the individual proposed for a key personnel role with another employee after the individual it initially proposed was placed on leave. GAO determined that it need not decide whether the change in key personnel constituted discussions because the protester had not demonstrated competitive prejudice.

CONCLUSION

Although there have not been many sustained protests based on discussions-related allegations recently, it does not mean that agencies are not engaging in unequal or misleading discussions or otherwise failing to comply with the FAR's requirements. Rather, it may be that once an agency reviews the procurement record and the protester's discussion-related allegations, it determines that corrective action is appropriate. Protests with strong arguments related to discussions should lead to corrective action when an offeror shows that it was denied an equal or fair opportunity to compete, and the offeror can claim it would have corrected whatever rendered its proposal unacceptable, and thus establish prejudice. As such because of the prevalence and importance of discussions in bid protests, contractors should be familiar with the requirements governing discussions.