

CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A LAWYER'S VIEW OF DISCUSSIONS

A LAWYER'S VIEW by Vic Cohen CLARIFICATION v. DISCUSSION

The distinction between clarifications and discussions is crucial in the source selection process. During the past several months the Contract Law Division has observed what seems to be a tendency on the part of some contracting officers to avoid the term "discussions" in their communications with offerors and instead, label everything as "clarifications." This issue of A Lawyers View will attempt to discuss the difference between these two concepts.

After proposals are submitted, the agency will then evaluate them in accordance with FAR 15.608. Subsequent to this, the Contracting Officer will then determine the competitive range. FAR 15.609. Discussions (sometimes referred to as negotiations) normally take place after the competitive range has been determined. FAR 15.609(a). In addition, if the Contracting Officer conducts written or oral discussions, the CO must conduct them with all offerors within the competitive range [41 USC § 253(d)(2) and FAR 15.610(b)] in accordance with the procedures outlined in FAR 15.610(c). If these procedures are not followed, a dreaded bid protest may raise its ugly head.

Before the competitive range determination the CO will probably be urged by the technical people to ask questions of the offerors; either to aid in the evaluations or in the competitive range determination process. The determining factor is neither what they are called nor at what stage of the solicitation process they take place, but rather what the substance of the communications are.

Definition of Clarifications

The FAR defines clarifications as follows: "Clarification," as used in this subpart, means communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal. It is achieved by explanation or substantiation, either in response to Government inquiry or as initiated by the offeror. Unlike discussion (see definition below), clarification does not give the offeror an opportunity to revise or modify its proposal, except to the extent that correction of apparent clerical mistakes results in a revision.

FAR 15.601. The key words are "minor irregularities." Anything beyond correcting minor mistakes is forbidden.

In ALM, Incorporated, B-221250, 86-1 CPD ¶ 240, the Navy allowed the successful contractor to "clari-

fy" "mistakes" in its price proposal which resulted in a 19% increase in price and then awarded the contract without discussions. The GAO, in upholding the protest, said that the clarification was really a discussion since "the resulting communication correcting a mistake prejudices the interests of the other offerors."

Definition of discussions

FAR 15.601 defines discussion as follows:

"Discussion," as used in this subpart, means any oral or written communication between the Government and an offeror, (other than communications conducted for the purpose of minor clarification) whether or not initiated by the Government, that (a) involves information essential for determining the acceptability of a proposal, or (b), provides the offeror an opportunity to revise or modify its proposal.

The GSBICA determines the difference between clarifications and discussions by asking whether the communication "was to eliminate a minor irregularity or to obtain information essential for determining the acceptability of the proposal." Hetra Computer and Communications Industries, Inc., 86-2 BCA ¶ 18882.

Cautions

The Contracting Officer must tread very carefully in this arena to avoid exposing the procurement to an allegation that all in the competitive range were not given the opportunity to participate in discussions. If the questions posed to an offeror are asked to clear up clerical errors or to explain minor irregularities and the offeror does not have an opportunity to modify its proposal, then this is merely a clarification. If, however, the questions go beyond the "minor" stage, this is a discussion and all the rules of FAR 15.609, 610 and 611 apply.



From the Editor - Vic Cohen, the author of this issue, is leaving the Contract Law Division and the Department for a position with the Farm Credit Administration. We all wish Vic the best in his new position.

☞ - Comments, criticisms, and suggestions for future topics are welcome. - Call Jerry Walz at FTS 377-