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A LAWYER'S VIEW OF TECHNICAL LEVELING

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TECHNICAL LEVELING

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Contracting officials must be alert to avoid technical leveling during discussions in negotiated acquisitions. However, the crux of the matter is knowing when and to what extent an agency should discuss technical information with various offerors? The failure of an agency to guard against technical leveling may result in a sustainable protest. This edition of A Lawyer's View discusses the problem and gives trouble shooting advice. A related topic, "technical transfusion" was discussed in an earlier edition of A Lawyer's View.

The Regulations

FAR 15.610(d) prohibits contracting officers and other government officials from engaging in technical transfusion and technical leveling. Technical leveling results when the government helps bring an offeror's proposal up to the level of other proposals through successive rounds of discussion such as by pointing out weaknesses in offeror diligence, competence or inventiveness, see FAR 15.610(d)(2). Technical leveling is often confused with technical transfusion that occurs when the government discloses technical information from one proposal resulting the improvement of a competing proposal, see FAR 15.610(d)(1).

Case Law

Confusion between technical leveling and technical transfusion exists in the various contract forums. For example, the Claims Court has incorrectly stated that technical leveling is giving one offeror information from another offeror's proposal, see M.W. Kellogg Co. v. U.S., 10 Cl.Ct. 17 (1986), Drexel Heritage Furnishings v. U.S., 7 Cl. Ct. 134 (1984), Tidewater Consultants, Inc., GSBCA No. 8069-P, September 4, 1985, 85-3 BCA ¶18,387 and Service Ventures, Inc., B-221261, April 16, 1986, 86-1 CPD ¶371.

The FAR suggests that helping, successive rounds of discussion, and pointing out weaknesses are improper; however, a review of case law reveals that they are not necessarily inappropriate. Disclosure of deficiencies always helps offerors to improve proposals because the purpose of disclosure is ultimately to provide for the submission of better offers. In addition, cases have upheld repeated rounds of discussion providing they are necessary to obtain acceptable offers and technical leveling has not occurred, see Price Waterhouse, B-220049, January 16, 1986, 86-1 CPD ¶54, M.W. Kellogg Co. v. U.S., supra. Pointing out weaknesses in inadequate offers comes very close as an example of technical leveling, but a contracting officer would have a difficult time if he had to determine the cause of each deficiency without pointing out its weakness. The best definition of technical leveling may be "coaching", see SRI International, B-224424, October 7, 1986, 86-2 CPD ¶404 and C&W Equipment Co., B-220459, March 17, 1986, 86-1 CPD ¶258, i.e., suggesting solutions to improve an offeror's proposal. In SRI, supra, the Comptroller General stated that the DoL did not improperly coach the awardee of a contract with the intent to bring the awardee's proposal up to protester's level. Technical leveling did not occur where the awardee's proposal was ranked higher technically throughout the evaluation by DoL, and DoL's comments to the awardee concerned deficiencies in its proposal or clarifying information. In C&W Equipment Co., supra, the VA submitted a list of 20 questions and comments to the awardee some of which pointed out deficiencies in the facilities and equipment proposed by the offeror. The Comptroller General found that the questions submitted did not constitute improper coaching with the intent of bringing the awardee's proposal up to protester's level.

Technical leveling may result where the acquisition is complex because it is necessary to hold discussions during which proposals are likely to be brought up to the level of other proposals, see Tidewater Consultants, Inc., supra, and 51 Comp. Gen. 621 (1972). Technical leveling also may result where the agency assists the offeror significantly by a detailed disclosure of weaknesses, see Essex Electro Engineers, Inc., B-210366, June 13, 1983, 83-1 CPD ¶650. An agency should not inform an offeror with inferior capabilities how to prepare a better proposal, see Raytheon Ocean Systems Company, B-218620.2, February 6, 1986, 86-1 CPD ¶134. Technical leveling should be avoided because all competitors must receive equal consideration, and none may be helped to the detriment of others, see Federal Data Corporation, GSBCA No. 8545-P, September 4, 1986, 86-3 BCA ¶19,289.

Advice

During discussions, agencies should avoid coaching or suggesting solutions to offerors which improve their proposals to the level of competing proposals. One technique is to concentrate on agency requirements without coaching or suggesting the approaches or solutions. Another is to eliminate weak proposals resulting from lack of offeror diligence, competence or

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- Comments, criticisms, and suggestions for future topics are welcome. - Call Jerry Walz at FTS 377-1122