



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation



A LAWYER'S VIEW OF TECHNICAL TRANSFUSION

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Technical Transfusion

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The government operates today in a high-tech environment, and contracting officials must be alert to avoid technical transfusion during discussions in negotiated acquisitions. However, the key 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 transfusion may result in a sustainable protest. This edition of *A Lawyer's View* discusses and gives guidance in handling the problem. Technical transfusion is often confused with technical leveling, a topic that will be discussed in a future 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 transfusion occurs when the government discloses technical information from one proposal that results in the improvement of a competing proposal, see FAR 15.610(d)(1).

Technical transfusion differs from technical leveling which results when the government helps bring an offeror's proposal up to the level of other proposals through successive rounds of discussion by noting weaknesses in offeror diligence, competence or inventiveness, see FAR 15.610(d)(2).

Case Law

Confusion between technical transfusion and technical leveling exists in cases from the Claims Court, the General Services Administration Board of Contract Appeals and the Comptroller General so that case law is of limited value in defining the terms. Technical transfusion is improper because disclosure of technical information concerning one proposal to another competitor during discussions results in discrimination and unfair and unequal treatment among competitors, see 51 Comp. Gen. 621 (1972). The level of discussions that an agency may conduct without technical transfusion is inversely proportional to the level of technical sophistication in the solicitation, see *C & W Equipment Co.*, B-220459, B-220459, March 17, 1986, 86-1 CPD ¶ 258.

The danger of disclosure is particularly acute in solicitations regarding research and development or concerning sophisticated high technology where an offeror's independent approach to solving a problem is of paramount importance or the basis of the procure-

ment, see 51 Comp. Gen. 621, *supra*, and 52 Comp. Gen. 870 (1973).

In 51 Comp. Gen. 621, *supra*, the Comptroller General affirmed the limited scope of discussions by NASA with the protester prior to the award to a competitor for a space shuttle main engine because the acquisition involved independent research and development. As a result, there may be no requirement for discussions, see *Raytheon Co.*, 54 Comp. Gen. 169 (1974). Although the danger is not as great in solicitations concerning medium-high technology, technical transfusion still may require limited or no discussions, see *Nuclear Assurance Corp.*, B-216076, January 24, 1985, 85-1 CPD ¶ 94, and *Frank Basil, Inc.; Jets Service, Inc.*, B-208133, January 25, 1983, 83-1 CPD ¶ 91.

Technical transfusion also may occur in situations concerning little technical sophistication but great creativity, i.e., innovative or ingenious approach or problem solution, see *Aerial Image Corporation, Comcorps*, B-219174, September 23, 1985, 85-2 CPD ¶ 319. In *Aerial Image Corporation, Comcorps*, the Comptroller General affirmed an acquisition by the Defense Logistic Agency (DLA) involving the production of an audio-visual slide show for Air Force recruitment where DLA was seeking creativity, and discussions could result in disclosure to competitors of the offeror's innovative or ingenious approach or solution to the problem.

Advice

During discussions, agencies should be careful not to disclose technical information to offerors from competing proposals to avoid transfusion of technical information. One method is to concentrate on agency requirements without suggesting the solutions. Another is to eliminate weak proposals resulting from lack of offeror diligence, competence or inventiveness from the competitive range.



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