

IS IT A CLARIFICATION OR DISCUSSION?
A REVIEW OF FAR 15.306

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In negotiated procurements under FAR Part 15, the Government has the ability to communicate with the offerors under certain guidelines. When the Government is asking for information to better understand what was already proposed, this is typically clarification, not discussion, so long as the agency does not need the information to determine whether the proposal is acceptable and the information does not change what was already proposed. When the Government is guiding the offeror into reviewing and reconsidering a section of their proposal with the intent of revising or modifying the proposal, this is a discussion. Of course, Government contracting agencies cannot engage in negotiations or discussions that favor one bidder over another. See FAR Part 15.306(e)(1).

Clarifications are “limited exchanges” used to provide offerors “the opportunity to clarify certain aspects of proposals . . . or to resolve minor or clerical errors.” See 48 C.F.R. § 15.306(a)(1), (2). If the communication is a clarification, no requirement exists for the agency to engage in other offerors in the competitive range with clarifications, and the offeror cannot revise or modify their proposal as a result of the clarification.

Examples of clarifications under FAR 15.306(a)—

- The relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond.
- The resolution of minor or clerical errors.

Discussions with the offerors typically identify concerns, errors, or omissions in the proposal. Communications between a procuring agency and an offeror that permit the offeror to materially revise or modify its proposal generally constitute discussions. *CIGNA Government Services, LLC*, Comp. Gen. Dec. B-297915.2, 2006.

When the Agency decides to have discussions, they must be with all offerors whose proposals are in the competitive range. The GAO and the Court of Federal Claims have said many times, The “acid test for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal.” *Linc Gov’t Servs., LLC v. United States*, 96 Fed. Cl. 672, 717 (2010) (quoting *DynCorp Int’l LLC*, 76 Fed. Cl. at 541).

Meaningful discussions are discussions that lead offerors into the areas of their proposals requiring amplification or correction. The purpose of meaningful discussions is to maximize the government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation. 48 C.F.R. § 15.306(d)(2). To this end, contracting officers must indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. 48 C.F.R. § 15.306(d)(3). A deficiency is defined, in part, as a material failure of the proposal to meet a government requirement. 48 C.F.R. § 15.001.



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The purpose of meaningful discussions is to “maximize the [g]overnment’s ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation.” Furthermore, [c]ontracting officer[s] must . . . indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond.” *Carahsoft Tech. Corp. v. United States*, 86 Fed. Cl. 325, 342-43 (2009)

THE LEGAL DIFFERENCE BETWEEN CLARIFICATIONS AND DISCUSSIONS

The original FAR Part 15, issued in 1984, defined “discussions” to include “information essential for determining the acceptability of a proposal.” FAR § 15.601 (1997). Revisions to FAR Part 15 in 1997 deleted this definition of “discussions,” which was viewed as too constraining, in favor of allowing “as much free exchange of information between offerors and the [g]overnment as possible, while still permitting award without discussions and complying with applicable statutes. . . . This policy is expected to help offerors, especially small entities that may not be familiar with proposal preparation, by permitting easy clarification of limited aspects of their proposals.” 62 Fed. Reg. 51224, 51228-29 (Sept. 30, 1997).

While the line between “clarification” and “discussion” is not always easy to demarcate, some core concepts appertain. Changes to the terms of an offer made in a proposal cannot be considered a clarification. (John Cibinic, Jr., Ralph C. Nash, Jr., & Karen R. O’Brien-DeBakey, Competitive Negotiation: The Source Selection Process 508 (3d ed. 2011)).

As Cibinic, Nash and O’Brien-DeBakey explain, information exchanges that do not concern changes to the terms of offers may be appropriate in the clarification process: “[I]t is useful to distinguish between information concerning the capability of the offeror and information relating to the features of the offer. Whereas the former should clearly be clarifications under FAR [§] 15.206(a), past decisions dealing with information relating to the offer make inclusion of this type of communication more problematic.” *Id.* at 509; see also *Information Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1321 (Fed. Cir. 2003) (reviewing the regulatory history of the revisions to Part 15 in 1997 regarding clarification and holding that communications for the purpose of obtaining additional information about subcontractors listed in the offeror’s proposal constituted clarifications rather than discussions); *Mil-Mar Century Corp. v. United States*, 111 Fed. Cl. 508, 539 (2013) (“[Although, in a clarification, the winning offeror] may have provided the [a]gency with required information that was not included in its proposal, the court does not find that [the offeror] revised its proposal because [it] did not change its total price and did not change the terms of its proposal to make it more appealing to the government.” (quoting *ITAC*, at 1322)).

Despite the intention that the revisions to Part 15 in 1997 would enable more information to be exchanged between the government and offerors without reaching the level of discussions, the revisions stopped short of requiring contracting officers to clarify minor or clerical errors in negotiated procurements, unlike the mandatory nature of the comparable provisions in Part 14 for sealed bidding. Consequently, a fairly sharp divide remains between the clarification rules in Part 15 for negotiated procurements and the mandatory nature of comparable provisions in Part 14 for sealed bidding. For negotiated procurements, clarifications are to be obtained at the discretion of the contracting officer.



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Where contracting officers exercised their discretion to seek clarifications, but did not go so far as to engage in “discussions,” the court has tended to uphold the contracting officers’ actions. See *Allied Tech. Grp., Inc. v. United States*, 94 Fed. Cl. 16, 44-45 (2010), *aff’d*, 649

Nonetheless, the permissive language of the clarification provisions in Part 15 does not mean that those provisions are not susceptible to judicial enforcement.

A prior decision by this court can be read to imply that a contracting officer’s discretion under FAR § 15.306(a) is so broad that he or she would never have a duty to seek clarifications. In *Gulf Group, Inc. v. United States*, 61 Fed. Cl. 338 (2004), the court held that a contracting officer did not abuse his discretion when, without explanation, he failed to clarify uncertainties in the protestor’s past performance information even though the technical evaluation team reported that clarifications were “required” before a final evaluation could be made. *Id.* at 360-61. In describing FAR Part 15, the court wrote, “[W]henever the contracting officials think a clarification of certain aspects of a proposal would be helpful, they have the discretion to seek such a clarification, even when discussions with all bidders would not occur. The FAR allows, but does not require, such exchanges to take place.” *Id.* at 360. Taken at face value, this court concurs with such a statement, but it cannot accept the implication that there are never situations in which a contracting officer’s discretion would be abused by a failure to seek clarification. . . . This is particularly true where, as here, the clerical error led the contracting officer to evaluate the past performance of a subcontractor differently for two offerors. Contracting officers are required to “ensure that contractors receive impartial, fair, and equitable treatment.” FAR § 1.602-2(b). See generally *BCPeabody Construction Services v. United States*, No. 13378, United States Court of Federal Claims (2014).

The Court of Federal Claims has recognized, “the term ‘discussion’ has a specific legal definition” in the government contracting context: “discussions involve negotiations and are undertaken with the intent of allowing the offeror to revise its proposal.” *G4S Tech.*, 2013 WL 935890, at 12 (quoting *Galen Medical Assocs., Inc. v. United States*, 369 F.3d 1324, 1332 (Fed. Cir. 2004)). Further, the “acid test for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal.” *Linc Gov’t Servs., LLC*, at 717 (2010) (quoting *DynCorp Int’l LLC*, 76 Fed. Cl. at 541).

Nonetheless, as the Federal Circuit has emphasized, “[a]ny meaningful clarification would require the provision of information.” *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1323 (Fed. Cir. 2003). Thus, even “[i]f a response [to an agency’s request for additional information] provides information essential to evaluation criteria, increases a past performance score[,] or tips the scales toward the offeror providing the clarification, it still may only be a clarification.” *DynCorp Int’l*, 76 Fed. Cl. at 542. Finally, 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. *Linc Gov’t Servs.*, at 717; ITAC, at 1323.

However, the court has also found a 25-page “Process Guide” submitted by [Awardee] in response to a USCG request for clarification did not go beyond the limited definition of “clarification,” and therefore did not afford the company an unequal opportunity to engage in “discussions” with the agency. *Davis Boat Works v. United States*, 13-58C, United States Court of Federal Claims, (2013)



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CONCLUSION

As should be obvious by now, this very specific area of law is far from clear. Even when the Agency declares the communications to be mere clarifications, there is a possibility that the government has held improper discussions. As a contractor, when the Agency is requesting information and it is not clear whether the Agency considers it a clarification or discussion, ask to revise the proposal. If the Agency refuses, then the Agency thinks this is a clarification. When the Agency is discussing material matters in the technical proposal, asking questions that require additional information, or allows proposal revision, this is probably a discussion.

If you have any questions or comments regarding the above, please contact James Krause by telephone at 904.353.5533 or email jimkrause@krauselaw.net.



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