VIRTUAL ACQUISITION OFFICE

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Back to Basics

Negotiations under FAR Part 15 Acquisitions

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This Advisory *looks at the complex topic of negotiations, focusing specifically on the procedures, rules, and guidelines of FAR part 15 and pertinent case law.*

The primary objective of the source selection process in a federal government acquisition is to select the offer representing the best value to the government; in other words, to select the offer that best meets the agency requirements at a fair and reasonable price. A source selection does not always require the conduct of negotiations between the government agency and the offerors. However, when negotiations are conducted, they are both an integral part of the source selection process and frequently the basis for protests. For this reason, it is critical that government personnel are fully prepared and completely understand the ground rules and procedures for conducting negotiations in the federal acquisition arenal.

In this *Advisory*, we look at the complex topic of negotiations, focusing specifically on the procedures, rules, and guidelines in Federal Acquisition Regulation (FAR) part 15, "Contracting by Negotiation," and pertinent case law. FAR part 15 negotiation procedures are among the most stringently defined and enforced procedures employed by a contracting officer in the course of an acquisition. They are the backdrop against which the agency will be judged with respect to whether it has met the bottom line criterion in the case of a protest; that is, whether the negotiations conducted were reasonable and fair to all the offerors.

How do negotiations fit into the source selection process?

Successful achievement of the primary objective of the source selection process requires a fair evaluation of proposals to determine which proposals meet or exceed the government's requirements and the reasonableness of proposed prices. When the initial evaluation does not clearly indicate that this best value objective will be met by acceptance of any of the initial proposals, then the government may—and should—enter into negotiations with those offerors whose proposals have a reasonable chance of selection for award based on the evaluation criteria stated in the solicitation. As pointed out in FAR 15.306(d)(2), "[t]he primary objective of 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." Figure 1 (on page 2) illustrates where negotiations and discussions fit into the acquisition life cycle.

What is the difference between negotiations and discussions?

FAR 15.306(d) defines these terms, explaining that "[n]egotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal." It also

provides that when the government conducts negotiations within a competitive acquisition they are called discussions. Therefore, throughout this *Advisory*, whenever the point being made is purely about competitive acquisition negotiations and processes, we use the term "discussions." In more general contexts or when discussing a sole source scenario, we use "negotiations."

Are FAR part 15 acquisitions the only types in which negotiations are allowed?

FAR 15.000 describes the scope of FAR part 15, stating that all contracts made by other than sealed bidding (FAR part 14) are considered negotiated contracts. This means that the term "negotiated procurement" and FAR part 15 cover acquisitions using Federal Supply Schedule contracts (FAR subpart 8.4) or any of the indefinite-delivery type contracts authorized under FAR subpart 16.5, as well as acquisitions following the procedures outlined for commercial item acquisitions (FAR part 12) and simplified acquisition procedures (FAR part 13). Thus, the pertinent FAR provisions in these sections do not address formal negotiation procedures, such as are set out in part 15. However, they do outline in general terms some streamlining of the FAR part 15 processes that agencies may employ. We discuss how negotiations appear in these contract types at the end of the *Advisory*.

What are the reasons for negotiating with offerors?

Negotiations give an agency the best opportunity to select the most advantageous solution(s) available from industry. Negotiations allow an offeror an opportunity to more fully understand the degree to which its proposed technical approach, management approach, and pricing meet or do not meet the agency's need. Thus, the offeror can better commit its resources, as needed, to making appropriate improvements to its proposal to better meet the solicitation requirements and provide the best value the firm can offer.

The acquisition process does not always require that the government enter into negotiations, but when discussions are needed in a competitive process, they are an integral step toward meeting the underlying objective of the overall source selection process—to select the offer that represents the best value to the government. In sole source acquisitions, the negotiation process more often focuses on establishing price reasonableness and mutual agreement on exactly what the government needs and how the vendor will meet the requirement.

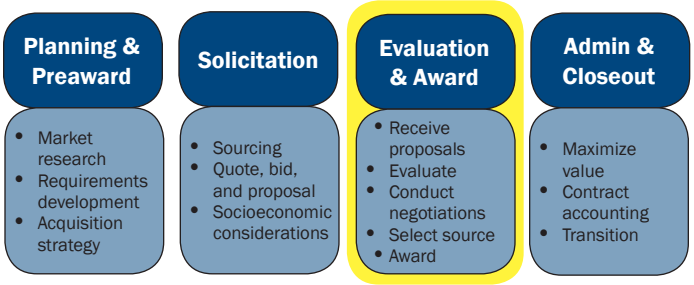

Figure 1: Federal Acquisition Life Cycle

Are negotiations the only means for sharing information with offerors after proposal receipt?

No. FAR 15.306 describes three types of information exchanges that can take place with offerors after receipt of proposals. However, negotiations are the only means of information exchange with offerors that provide an opportunity to revise and improve its proposal. The three types of exchanges are:

- **Clarifications**

Clarifications may occur if award without discussions is contemplated. Of course, unexpected adverse information received in response to a clarification request could cause the agency to change its plans and have to enter into discussions before making its source selection. In most cases, however, the agency will be able to proceed to award as contemplated after receipt of the clarifying information.

FAR 15.306(a) states:

> (a) *Clarifications and award without discussions.*
>
> (1) Clarifications are limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated.
>
> (2) If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (e.g., 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) or to resolve minor or clerical errors.
>
> (3) Award may be made without discussions if the solicitation states that the Government intends to evaluate proposals and make award without discussions. If the solicitation contains such a notice and the Government determines it is necessary to conduct discussions, the rationale for doing so shall be documented in the contract file (see the provision at 52.215-1) (10 U.S.C. 2305(b)(4)(A)(ii) and 41 U.S.C. 3703(a)(2)).

Clarifications provide offerors the opportunity to clear up any uncertainty on the part of evaluators as to what the offeror is saying or intends in the proposal but may not be used to change the proposal. Any clarification response by an offeror that would revise the proposal in any way must be disregarded for evaluation, source selection, or award purposes. A proposal revision received in response to a clarification request may *not* be incorporated into an award.

In a July 7, 2015, decision, the Government Accountability Office (GAO) found that an exchange with the ultimate awardee under a lowest price technically acceptable (LPTA) competition, which the agency asserted to be a clarification request and response, actually constituted discussions. The awardee's response revised portions of its quotation to bring them into compliance with the solicitation's terms regarding payment provisions. These revisions were accepted by the agency and incorporated in the award. The GAO decision stated:

> The agency's communications with the awardee invited a response . . . that was necessary to determine the acceptability of [the awardee] quotation and, in fact, resulted in [the awardee] being permitted to supplement or alter its quotation. This is quintessentially the nature of discussions, not clarifications. Kardex Remstar, LLC, B-409030, Jan. 17, 2014, 2014 CPD ¶ 1 at 4. Accordingly, we conclude that the [agency], having conducted discussions with [the awardee], was required to also conduct discussions with all other vendors in the competition, including [the protestor]. We sustain the protest on that basis.[1]

■ Communications

Communications are exchanges with certain offerors to enable establishment of the competitive range. Note that, per FAR 15.306(b)(1(i), under certain conditions an agency *must* have communications with one or more offerors based on negative past performance information that is precluding the firm from being included in the competitive range. FAR 15.306(b) states:

> (b) *Communications with offerors before establishment of the competitive range*. Communications are exchanges, between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range. If a competitive range is to be established, these communications —
>
> (1) Shall be limited to the offerors described in paragraphs (b)(1)(i) and (b)(1)(ii) of this section and —
>
> (i) Shall be held with offerors whose past performance information is the determining factor preventing them from being placed within the competitive range. Such communications shall address adverse past performance information to which an offeror has not had a prior opportunity to respond; and
>
> (ii) May only be held with those offerors (other than offerors under paragraph (b)(1)(i) of this section) whose exclusion from, or inclusion in, the competitive range is uncertain;
>
> (2) May be conducted to enhance Government understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the Government's evaluation process. Such communications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal. Such communications may be considered in rating proposals for the purpose of establishing the competitive range;
>
> (3) Are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range. Such communications shall not provide an opportunity for the offeror to revise its proposal, but may address —
>
> (i) Ambiguities in the proposal or other concerns (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes (see 14.407)); and
>
> (ii) Information relating to relevant past performance; and
>
> (4) Shall address adverse past performance information to which the offeror has not previously had an opportunity to comment.

Communications give the government an opportunity to clear up uncertainties with respect to offerors' proposals and to help determine whether the offeror should be included in the competitive range. In addition, as noted in the highlighted portions of above FAR quote, if there is any adverse past performance information to which the offeror has not previously had an opportunity to respond, *and* that information is germane to the contracting officer's decision whether the offeror should be included in the competitive range, then communications are required. In these cases, the communications provide the offeror a chance to respond to the key adverse past performance information.

While communications provide additional information to the government, they do not allow an offeror to revise its proposal. If an offeror does attempt to revise its offer in response to a communication, the agency must disregard the revision.

■ Negotiations

Negotiations with offerors—particularly discussions in a competitive acquisition—occur after a competitive range is established. However, for competitive acquisi-

tions conducted as part of the streamlining opportunities available under FAR subpart 8.4, parts 12 and 13, or subpart 16.5, a competitive range determination generally is *not* required. In these cases, agencies must treat offerors fairly whenever conducting discussions. Regardless, the purpose of discussions is always the same: to enable offerors to improve their proposals so the government is able to select the best value solution for meeting its needs. FAR 15.306(d) states:

> (d) *Exchanges with offerors after establishment of the competitive range*. Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions.
>
> (1) Discussions are tailored to each offeror's proposal, and must be conducted by the contracting officer with each offeror within the competitive range.
>
> (2) The primary objective of 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.
>
> (3) At a minimum, the contracting officer must, subject to paragraphs (d)(5) and (e) of this section and 15.307(a), 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. The contracting officer also is encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. However, the contracting officer is not required to discuss every area where the proposal could be improved. The scope and extent of discussions are a matter of contracting office judgment.
>
> (4) In discussing other aspects of the proposal, the Government may, in situations where the solicitation stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, negotiate with offerors for increased performance beyond any mandatory minimums, and the Government may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the offered price decreased.
>
> (5) If, after discussions have begun, an offeror originally in the competitive range is no longer considered to be among the most highly rated offerors being considered for award, that offeror may be eliminated from the competitive range whether or not all material aspects of the proposal have been discussed, or whether or not the offeror has been afforded an opportunity to submit a proposal revision (see 15.307(a) and 15.503(a)(1)).

Figure 2: Flowchart of Exchanges after Receipt of Proposals, FAR 15.306

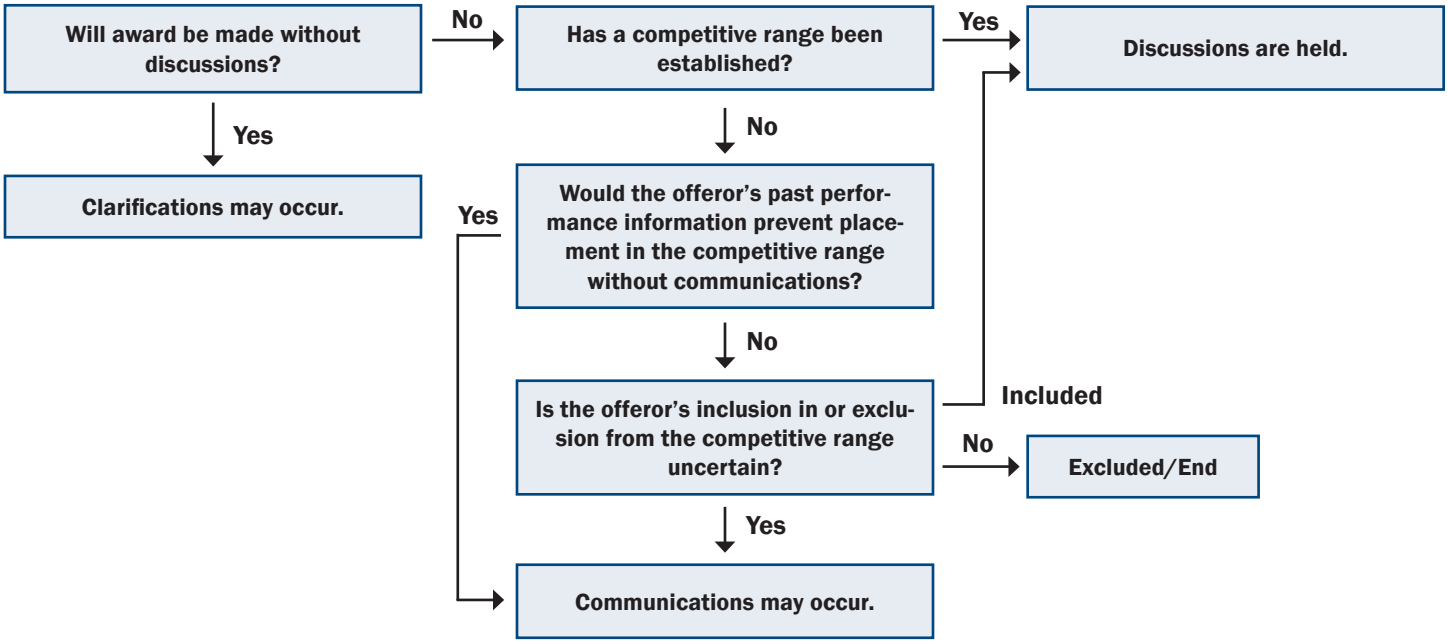

Figure 2 on page 4 shows the types of exchanges and how and where they fit into the overall source selection process.

What is a competitive range determination and how is it established?

After evaluation of initial proposals, if the evaluation results indicate some offerors do not have a reasonable chance of revising their respective proposals to the extent that they are likely to become competitive, those proposals may be excluded from further consideration. That is, the excluded firms are *not* in the competitive range. GAO has said that a firm need not be further considered if it would be required to substantially rewrite its proposal.

The competitive range consists of those proposals that are most highly rated and stand a reasonable chance of being selected for award. Thus, the competitive range is established based on the results of initial proposal evaluation and includes only those firms that might be selected for award. In some cases, the government may further reduce the number of proposals in the competitive range for efficiency purposes.

The competitive range is described in FAR 15.306(c):

> (c) *Competitive range*.
>
> (1) Agencies shall evaluate all proposals in accordance with 15.305(a), and, if discussions are to be conducted, establish the competitive range. Based on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range comprised of all of the most highly rated proposals, unless the range is further reduced for purposes of efficiency pursuant to paragraph (c)(2) of this section.
>
> (2) After evaluating all proposals in accordance with 15.305(a) and paragraph (c)(1) of this section, the contracting officer may determine that the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency (see 52.215-1(f)(4)), the contracting officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals (10 U.S.C. 2305(b)(4) and 41 U.S.C. 3703).
>
> (3) If the contracting officer, after complying with paragraph (d)(3) of this section, decides that an offeror's proposal should no longer be included in the competitive range, the proposal shall be eliminated from consideration for award. Written notice of this decision shall be provided to unsuccessful offerors in accordance with 15.503.

Once an offeror has been excluded from the competitive range, it must be notified that it no longer will be considered for award.

FAR 15.503, "Notifications to Unsuccessful Offerors," states:

> (a)(1) *Preaward notices of exclusion from competitive range*. The contracting officer shall notify offerors promptly in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition. The notice shall state the basis for the determination and that a proposal revision will not be considered.

Does the solicitation need to indicate the government will hold discussions in a competition?

No, in fact, the opposite is the case. An agency must expressly reserve the right to award without discussions within the terms of the solicitation or else it would be compelled to conduct discussions. If an agency wants to reserve the right to award without discussion, it will do so by including FAR 52.215-1, "Instructions to Offerors—Competitive Acquisition."

It should be noted that, even if discussions were not originally contemplated, the contracting officer still might choose to conduct discussions.

FAR 52.215-1 provides:

> (f)(4) The Government intends to evaluate proposals and award a contract without discussions with offerors (except clarifications as described in FAR 15.306(a)). Therefore, the offeror's initial proposal should contain the offeror's best terms from a cost or price and technical standpoint. The Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

If the solicitation indicates there will be discussions, but does not reserve the right to award without discussions (see FAR 52.215-1, Alternate 1), then discussions are required. We also have seen tailored solicitation provisions in which the government indicated that holding discussions was more likely than not, often due to the complexity of the specific requirement, and yet it explicitly reserved the right to award without discussions. Numerous GAO decisions have upheld the government's right

to award without discussions, so long as the government has explicitly reserved that right in the terms of the solicitation. In the digest of an August 27, 1985, decision, GAO states:

> An award made on the basis of initial proposals was proper where the solicitation notified offerors that award might be made on the basis of initial proposals, and the number of proposals and the range of prices support the contracting agency's conclusion that there was adequate competition resulting in a reasonable price to the government.[2]

We have reviewed numerous similar GAO decisions issued subsequent to this case in which the government decision to award without discussions was upheld. Thus, in a negotiated procurement, holding discussions after evaluation of initial offers is required unless the right to award without discussions "based on initial offers as received" is explicitly reserved in the solicitation.

What topics must be discussed in negotiations, and what additional areas should be considered as part of the negotiations?

Discussion topics in both competitive and sole source negotiations vary based on the specific evaluation findings for each proposal, but the objective is to obtain proposals that meet the government's needs at fair, reasonable, and affordable prices. The key components for any discussions are that they must be meaningful and fair so that they do not prejudice any offeror. Since experience is often the best teacher, Table 1 on page 7 shows three decisions from GAO and one from the Court of Federal Claims (COFC) that illustrate issues with regard to holding meaningful, fair discussions.

To clarify an important characteristic of meaningful discussions, note the language in the Grunley case. The government should lead an offeror into the areas of its proposal requiring amplification or revision and need not "spoon-feed" the offeror. In fact, the government team must *not* tell the offeror how to revise its proposal.

Regarding the COFC decision, we understand the basis for denying the joint venture's protest from the standpoint of meaningful discussions. However, we wonder if the offeror could have provided a better solution for meeting the government's needs—perhaps by adding an appropriately experienced subcontractor in a key role—had it been apprised of the weakness. The discussions, as held, were properly found to be meaningful, but did they fall short of giving the agency the best chance of finding the best solution?

What are the differences among deficiencies, weaknesses, and significant weaknesses?

The FAR defines deficiencies, significant weaknesses, and weaknesses in FAR 15.001, "Definitions":

> A "Deficiency" is a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.
>
> A "significant weakness" in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance.
>
> "Weakness" means a flaw in the proposal that increases the risk of unsuccessful contract performance.

The distinction between weakness and significant weakness is important because if negotiations are to be conducted, FAR 15.306 (d) (3) provides:

> At a minimum, the contracting officer must, subject to paragraphs (d)(5) and (e) of this section and 15.307(a), 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. The contracting officer also is encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. However, the contracting officer is not required to discuss every area where the proposal could be improved. The scope and extent of discussions are a matter of contracting officer judgment.
>
> Therefore, any discussions with offerors in the competitive range must discuss deficiencies, significant weaknesses and adverse past performance information where the offeror has not had a previous opportunity to address it.

Not every weakness needs to be addressed during discussions, as illustrated in the COFC decision. However, the contracting officer should consider discussing any weakness if it could materially enhance the proposal's potential for award, because that enhances the likelihood of the government receiving the best possible solution. A weakness that does not have a significant impact on the acceptability of the proposal may not need to be discussed. On the other hand, if a weakness goes to the acceptability of the proposal, it should be discussed.

As GAO has indicated:

> Although discussions must address at least deficiencies and significant weaknesses identified in proposals, the scope and extent of discussions are largely matters of

Table 1: GAO and COFC Decisions Related to Discussions

Case Identification	Protest Issue and Decision
GAO B-406583.2; B-406583.3 West Sound Services Group[3]	The agency's evaluation of the protestor's proposal identified two weaknesses: failure to address an individual approach for all subannexes and low staffing levels for several annexes. With respect to the first weakness, the protestor claimed that, although the agency's discussions led it to amplify its approach for the subannexes under annex 15, they did not mention similar concerns with the subannexes under annex 16. On the second weakness, the agency pointed out concerns with the low staffing levels of two annexes, but did not point out concerns with other annexes it had determined to be low. The agency argued that its discussion of the annex 15 subannexes should have alerted the protestor to the concerns about annex 16 by reminding the offeror to discuss its approach for each subannex. The agency also argued that it did not have to discuss staffing levels for the other annexes because those weaknesses were only identified upon evaluation of the revised proposal submission, although that revision had not changed those staffing levels from the original submission. GAO found the agency had failed to engage in meaningful discussions, resulting in prejudice to the protestor, since it did not convey its actual concerns to the protestor in a manner that would have enabled it to respond meaningfully to the evaluated significant weaknesses in its proposal.
GAO B-407708; B-407708.2 Nexant, Inc.[4]	In another case, the request for proposals for a services contract had five mandatory tasks involving a defined list of countries plus one optional task (task 6), which provided for an agency option to authorize additional country-specific support for the five mandatory activities. This sixth requirement was not limited to the countries listed in the base requirement. The protestor's proposal was assigned a significant weakness for misunderstanding the task 6 geographic scope and failing to provide creative solutions. During discussions, the agency asked the protestor to clarify its overall understanding of task 6 but did not address its specific concerns about misunderstanding the geographic scope or the lack of creative ideas. GAO agreed with the protestor, stating, "An agency may not mislead an offeror through the framing of a discussion question into responding in a manner that does not address the agency's actual concerns, or otherwise misinform the offeror concerning a problem with its proposal."
GAO B-407900 Grunley Construction Company, Inc.[5]	In evaluating two offers received for a fixed-price construction contract, the agency identified five deficiencies with respect to the protestor's proposed pricing. Consequently, the agency requested "bid book information" from both offerors to get a full price breakdown. After reviewing the protestor's bid book, the agency concluded the protestor did not understand the scope of the requirement since its total cost was significantly less than the independent government cost estimate. The agency determined the protestor's resource loadings were skewed toward the front end such that the protestor appeared to have underpriced the options. During discussions, the agency informed the protestor that the price proposal appeared to be materially unbalanced, reflecting an unreasonable and unrealistically low price significantly below the government estimate, and raised questions about the protestor's understanding of the level of effort required. The protestor responded by raising its total price in its final proposal revision and did not receive the award. The protestor argued that the agency was required to raise each of the five weaknesses identified in the initial proposal evaluation during discussions. The protestor contended that, had the agency done this, it would have provided an explanation for certain portions of its proposed pricing rather than just raising its total price, which would have allowed its price to remain lower than the awardee's. GAO did not agree, noting that the agency made the protestor aware of its concerns with its proposed pricing and was not required to identify each specific area where the protestor's prices appeared too low. Rather, the agency was only required to lead the protestor into the areas of its proposal requiring amplification or revision. GAO added that "all-encompassing discussions are not required, nor is the agency obligated to 'spoon-feed' an offeror as to each and every item that could be revised to improve its proposal." Meaningful discussions do not always involve purely technical issues; effectively discussing pricing concerns may be an important component of meaningful discussions.
COFC 09-372C Structural Assocs. Inc./ Comfort Sys. USA (Syracuse) Joint Venture[6]	The protestor argued the agency should have addressed during discussions that its evaluation was that the protestor's and its subcontractors' experience, while similar, was not a perfect match for the requirement. As a result, the firm was rated "good," and the matter was not addressed in negotiations. The court denied the protest, finding that when an area of concern is neither a significant weakness nor a deficiency, the agency is not required to raise the issue during discussions. The decision stated, "Mandatory discussions, in other words, are designed to point out shortcomings in an offeror's proposal as judged from the standpoint of the government's stated needs, rather than from the standpoint of the proposal's relative competitiveness." While deficiencies and significant weaknesses in an offeror's proposal must be discussed, not all weaknesses—especially those that cannot be corrected by revising the proposal—need to be addressed.

> the contracting officer's judgment. An agency is not required to afford offerors all-encompassing discussions, or to discuss every aspect of a proposal that receives less than the maximum score, and is not required to advise an offeror of a minor weakness that is not considered significant, even where the weakness subsequently becomes a determinative factor in choosing between two closely ranked proposals. We review the discussions provided only to determine whether the agency pointed out weaknesses that, unless corrected, would prevent an offeror from having a reasonable chance for award.[7]

GAO has stated that award cannot be made to a proposal that does not meet all solicitation requirements:

> In negotiated procurements, a proposal that fails to comply with material terms of the solicitation should be considered unacceptable and may not form the basis for award. See, Champion-Alliance, Inc., B-249504, Dec. 1, 1992, 92-2 CPD para. 386 at 3.[8]

GAO has sustained numerous protests regarding an agency accepting a quotation that failed to conform to a material solicitation requirement. GAO has indicated that it is unreasonable to make an award where the proposal is technically unacceptable.

Can cost or pricing issues be discussed in negotiations?

Yes, any cost or price issue arising in evaluation of an offeror's proposal can—and should—be a topic for discussions whenever it is germane to the offeror's chances of selection for award. The exact need is dependent on the situation, of both the procurement and the specific offer. The catch, of course, is that the discussion cannot address an offeror's relative position in comparison to other offerors. The Grunley case cited in Table 1 is a circumstance in which an agency discussed pricing issues affecting its evaluation of a fixed-price proposal.

However, note that the discussion point upheld by GAO involved only issues arising within the proposal and concerns with what it demonstrated regarding the offeror's understanding of the requirement and the potential for resultant performance risks. An offeror cannot be told, "Your proposal is second lowest." Thus, in firm-fixed-price competitions, there may be little to discuss about pricing other than, say, a comparison to the independent government cost estimate (IGCE) or the available budget, e.g., "Your offer exceeds the IGCE by $XXX. We cannot say whether any other offers also exceed the IGCE, but you will want to ensure you are offering the best price you can that allows you to meet all the performance requirements."

At the other end of the spectrum, if cost data were evaluated per FAR 15.404-1(a)(4) to help assess reasonableness or realism within a fixed-price competition, then the government may and should address issues that have been found. For example, "We cannot say whether your offer price is high or low in comparison to others, but your pricing is significantly below the budget allowance and your labor costs appear to be well below what we saw in our market research. We have concerns about your ability to perform." Again, see the Grunley case, where meaningful discussions necessarily involved discussion of cost realism issues even though the ultimate contract was firm-fixed-price.

Conversely, in a competition for a cost-reimbursement contract, the agency is required to evaluate cost realism and to determine each offeror's "probable cost of performance," per FAR 15.404-1(d)(2). Any evaluation adjustments assessed through the cost realism evaluation must be identified and explained to the offeror in negotiations. Contractor responses that rebut any such adjustments would need to be presented through the final proposal revisions requested upon conclusion of negotiations.

Are offerors permitted to ask questions or propose alternatives during discussions?

Offerors normally participate actively during discussions. They are allowed, and should be expected, to ask questions that help to clarify and crystalize what the government has found in its evaluation of their initial proposals. In general, the process of negotiations should allow for a give and take. The one area the government should avoid in discussions is providing solutions to the offeror, including in areas in which they are deficient or have significant weaknesses. The government does not normally help offerors write proposals. It is better to tell an offeror that whatever solution is proposed will be reviewed.

GAO case law makes clear that an agency does not need to tell an offeror how to rewrite its proposal. The Grunley decision noted that the government need not "spoon feed" offerors in discussions with every detailed issue found in evaluation. GAO has used this term in other cases to point out that the government need not tell an offeror what to say in a revision. Instead, the back-and-forth discussion should fully inform offerors about issues in areas where they need to, or may decide to, revise their proposals to attain full conformance to the solicitation requirements and enhance the likelihood that their final proposal revisions (FPRs) constitute the best value for meeting the government's need and being selected for award.

If an offeror raises a question during discussions about a specific alternative approach, the government may react but must be careful. As an example, the government could state that the offeror's summary description in that forum raises concerns about a lack of testing adequacy or that the described alternative has no obvious deficiencies as it has been explained. However, all such government responses must include explicit notice that the government is not judging whether the alternative is acceptable and will determine whether it is an acceptable approach when the government reviews the proposed alternative (or solution) in the FPR. Evaluation of the FPR, including any new approach incorporated, will then follow the solicitation's written requirements.

Must negotiations always be held via face-to-face meetings?

No, an agency is not required to hold discussions with offerors in any particular format or with the participation of any specific personnel. In fact, unless required by agency policy, the contracting officer is not required to participate on the team, although we recommend it.

In some relatively rare cases, the contracting officer may conduct written discussions because the issues for discussion with each firm are straightforward. For example, the contracting officer issues letters to each firm in the competitive range identifying the issues—at a minimum including deficiencies and significant weaknesses—and requesting FPRs by a designated cutoff date.

In the more common case, when discussions are to be conducted either in person or via a remote electronic connection that facilitates a back-and-forth exchange between the two parties (i.e., conference call or video meeting), the constraints at FAR 15.306(e) should govern both the selection of the negotiation team(s) and each team's preparation. FAR 15.306(e), "Exchanges with Offerors after Receipt of Proposals," states:

> (e) Limits on exchanges. Government personnel involved in the acquisition shall not engage in conduct that-
>
> (1) Favors one offeror over another;
>
> (2) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror;
>
> (3) Reveals an offeror's price without that offeror's permission. However, the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion. It is also permissible, at the Government's discretion, to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable (41 U.S.C.2102 and 2107);
>
> (4) Reveals the names of individuals providing reference information about an offeror's past performance; or
>
> (5) Knowingly furnishes source selection information in violation of 3.104 and 41 U.S.C. 2102 and 2107.

Suppose, for example, one offeror included in the competitive range requests face-to-face discussions with the contracting officer. Presuming this request is granted, the contracting officer should at least offer to conduct in-person discussions with all firms that will be included in discussions. It is prudent to provide the same opportunity to all offerors—even if one or more firms in the competitive range might end up declining. If the contracting officer provides all offerors the same opportunity for face-to-face discussions, but some of the offerors cannot be there in person, the treatment by the government should be demonstrably fair. For example, if not all offerors can attend in-person discussions, it would be prudent to conduct the discussions with those firms by phone and not just in writing, to allow for the same give and take with each offeror.

GAO decisions are clear that all offerors are to receive equal treatment. While the substance of the discussions will necessarily differ for each offeror, i.e., the substance will depend on what issues need to be discussed based on each offer's specific evaluation, it is important they be fair and that offerors are treated equally. In a March 2008 decision, GAO noted:

> [Protestor] complained that the agency conducted face to face discussions with other offerors, but not with [protestor], and asserts that the discussions with other offerors must have been more extensive than the discussions with [protestor]. However, there is no requirement that either the form or the content of discussions be identical for each offeror; to the contrary, discussions are to be tailored to each offeror's proposal. See Federal Acquisition Regulation § 15.306(d)(1), (e)(1); PharmChem, Inc., B-291725.3 et al., July 22, 2003, 2003 CPD P 48 at 6. Accordingly, without additional information regarding the substance of the discussions, [protestor's] allegations are not clearly meritorious.[9]

Who should be on the government negotiation team?

The multiple considerations that drive negotiation team membership include the specific issues to be discussed with each individual offeror and the forum for conducting

the discussions. The contracting officer usually will lead the negotiation team and will select team members who are knowledgeable of the evaluation results and issues to be discussed with each particular offeror. This will ensure the discussions are meaningful by ensuring appropriate familiarity with the issues to be discussed, including all deficiencies and any weaknesses or strengths. In addition, the government's negotiation team should include individuals who are familiar with the proposal, to address questions and comments from the offeror's negotiator(s). This does not mean all unexpected questions received need to be answered on the spot. Instead, the team lead may commit to answer the offeror's question later—so long as the answer is provided prior to the conclusion of negotiations and the offeror has a chance to follow up on the government's answer.

When the contracting officer does not personally lead the discussion team, a contract specialist ordinarily should lead. In either case, the team leader should be the same individual throughout all discussions with all offerors to help guard against allegations of unequal treatment.

How should team members prepare?

There should be a prepared agenda and a common understanding among team members as to matters such as:

- Who will chair the meeting and, if necessary, call for a caucus to discuss responses to an offeror's question.
- Who will be the presenter of each item and what will be said.
- How and by whom questions from the offeror will be fielded.

Team members should ensure they are familiar with the specifics of the offer under discussion and the evaluation results for that offer. They also should be aware of ground rules. For example, it is inappropriate in discussions to bring up comparisons with other offerors' proposals (except for acquisitions below the simplified acquisition threshold; see below). A formal "just-in-time" training session on the upcoming discussions, similar to the training often provided to evaluation teams, can be a valuable investment of time and effort. Also, if an offeror raises an issue that cannot be adequately addressed extemporaneously, do not hesitate to offer to get back to the offeror later with a response, before the formal close of discussions.

What happens at the conclusion of discussions?

The agency may determine to eliminate or remove an offeror from the competitive range due to information learned from discussions. For all offerors remaining in the competitive range upon conclusion of discussions, the agency must solicit final proposal revisions. Requests for FPRs should be made in writing to avoid confusion and should establish a common cutoff date and time.

FAR 15.307(b) states:

> (a) If an offeror's proposal is eliminated or otherwise removed from the competitive range, no further revisions to that offeror's proposal shall be accepted or considered.
>
> (b) The contracting officer may request or allow proposal revisions to clarify and document understandings reached during negotiations. At the conclusion of discussions, each offeror still in the competitive range shall be given an opportunity to submit a final proposal revision. The contracting officer is required to establish a common cut-off date only for receipt of final proposal revisions. Requests for final proposal revisions shall advise offerors that the final proposal revisions shall be in writing and that the Government intends to make award without obtaining further revisions.

If the government team decides, as a result of discussions, that an offeror stands no reasonable chance of selection for award, i.e., is no longer among the most highly rated, that offeror must be notified that it no longer will be considered for award. This notice follows the requirements of FAR 15.503 as noted on page 5.

After receipt of final proposal revisions, what are the next steps?

- The agency should evaluate each offeror's FPR against the solicitation evaluation criteria to see if the score should increase, decrease, or stay the same.
- The revised evaluations are then compared to one another and presented to the source selection authority.
- The source selection authority should consider all information, including FPR evaluation results and the input of other team members, when making the best value determination in selecting the source(s) to receive award(s).

FAR 15.308, "Source Selection Decision," discusses best value determinations and source selection:

> The source selection authority's (SSA) decision shall be based on a comparative assessment of proposals against all source selection criteria in the solicitation. While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA's independent judgment. The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the SSA, including benefits associated with additional costs. Although the rationale for the selec-

tion decision must be documented, that documentation need not quantify the tradeoffs that led to the decision.

Can the government reopen discussions after receipt of FPRs?

Yes. Normally, after FPRs are submitted, the expectation is that they will be evaluated and award will be made to the winning offeror. However, if after discussions and evaluation of FPRs there is a compelling reason to reopen discussions, there is no prohibition against a subsequent round (or rounds) of discussions. All offerors remaining in the competitive range after FPRs must be allowed to make changes to their proposals and submit new FPRs after discussions are reopened. In the event the agency has no questions or issues for a particular offeror in the competitive range, that offeror still must be provided the opportunity to submit a proposal revision

In fact, in the West Sound Services protest in Table 1, during evaluation of FPRs the government had discovered weaknesses in the proposed staffing level that had been present, but unrecognized, in the original evaluation. As part of its decision, GAO stated that the agency should have reopened negotiations to address the issue:

> Where, as here, an agency identifies new concerns during a post-discussions reevaluation, and those concerns would have been required to be raised had they been identified before discussions were held, the agency is required to reopen discussions in order to raise the concerns with the offeror for discussions to be meaningful.[10]

Are discussions permitted under a lowest price technically acceptable source selection process?

Yes, and the objective of discussions remains the same, that is, "to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation." When appropriate for the underlying requirement, the government process efficiencies expected from use of a lowest price technically acceptable (LPTA) approach include a greater likelihood that award without discussions will prove to be a viable alternative. However, initial proposal evaluation results may not yield a clear best value source to meet the government's need, resulting in a need for discussions.

Discussions with one or more offerors may involve issues with technical approaches that have been evaluated as falling short of acceptability. However, it is inappropriate to discuss the quality of a technical offer in an effort to obtain revisions that would improve the offer above the fully acceptable level as defined in the solicitation. In addition, pricing can be discussed if, in the contracting officer's judgment, more competitive pricing may be obtained.

Some agencies will opt to include a solicitation provision under an LPTA acquisition that any firm deemed technically unacceptable on any factor will be excluded from further consideration. We believe the most likely purpose for using such a provision would be to gain the efficiency and increased likelihood of awarding without discussions. In this case, the expectation is that one or more of the technically acceptable offers will offer a reasonable price, that is, a proposed price that meets, for example, the adequate price competition standards/characteristics described at FAR 15.403-1(c)(1). If so, then the contracting officer/source selection official may determine to proceed to award without discussions and achieve the hoped for efficiency.

However, even the inclusion of such a solicitation provision does not automatically preclude the establishment of a competitive range and conduct of discussions. Since all firms involved in discussions would, by definition, be technically acceptable, discussions would necessarily only address pricing. For example, the contracting officer, upon looking at the actual proposed prices, could deem that the FAR 15.403-1(c)(1) requirements have not been met and that all of the initially offered prices are unreasonably high or unaffordable given the available budget.

In addition, the contracting officer may determine, in accordance with the LPTA's terms and evaluation factors, that only those offerors whose prices are within a certain dollar range of the government's expected reasonable price would stand a reasonable chance of being selected for award after submission of FPRs. That is, the determination of the most highly rated proposals may exclude some technically acceptable proposals solely because of price. In essence, this would be using price alone for purposes of ranking per FAR 15.101-2(b)(3) and would be consistent with the LPTA acquisition approach. At this point, discussions could consist of simple written advice to each firm in the competitive range that its proposal has been found to be technically acceptable and a request for an FPR with the firm's best price. This situation also could lend itself to a reverse auction conducted among the offerors in the competitive range.

However, we believe the marketplace and market research results need to be carefully weighed before deciding to use this type of clause. The promise of efficiency may be overcome if, for example, none of the offers received are found to be fully technically acceptable. In this case, the solicitation could only be canceled and a new solicitation issued. As another example, an offer with only minor technical issues but favorable pricing would automatically

be excluded with no opportunity for correction, leaving the government with only higher-priced alternatives.

The bottom line is that the LPTA process is appropriate and generally advantageous when the agency has determined there is a well-defined minimum standard of technical acceptability and no value to the agency may be realized from potentially paying a premium for additional technical quality or innovation, etc., via a trade-off. This does lead to efficiencies in the source selection process via reduced instances of negotiations. However, use of the LPTA approach does not prohibit agencies from holding discussions as appropriate to obtain the best value solution that industry has to offer for meeting their requirements.

How do negotiations differ in sole source procurements?

In a noncompetitive situation, the goal of negotiations remains the same as in the competitive environment, that is, to enable the contractor to improve its proposal as necessary so the government can award a contract that represents the best value in meeting the agency's requirement at a fair and reasonable price.

While the content of negotiations still should be meaningful to help get to the best value result, the consequences will not include "prejudicing" one offeror in comparison to others.

Perhaps the biggest difference arises from the fact that the emphasis of competitive discussions is on the technical approach far more than on pricing issues, especially in a fixed price scenario. This is because of the competitive pressure on price versus the need to make sure that each offeror completely understands the government requirement and is able to put its best foot forward via its technical approach.

In sole source negotiations, the need for technical issues to be discussed arises less often, but would be necessary if the offeror's proposal did not meet the minimum requirements set forth in the solicitation. In justifying the sole source procurement prior to issuing the solicitation, market research results, along with any other information, must not only establish that this is the only firm that can perform, but also demonstrate the firm's ability to meet the agency's needs. Since there is no competition present to encourage the use of a sharp pencil in pricing, cost or price reasonableness often becomes the primary negotiation issue. Quite often, bolstered by the analysis of certified cost or pricing data and offeror versus government estimates of reasonable costs, negotiations will focus on the reasonableness of specific cost elements and profit calculations/projections.

What about negotiations under Federal Supply Schedule, commercial item, simplified acquisition, and IDIQ-type contracts?

FAR subpart 8.4, "Federal Supply Schedule," FAR part 12, "Acquisition of Commercial Items," FAR part 13, "Simplified Acquisition Procedures," and FAR 16.504, "Indefinite-Quantity Contracts," do not provide for formal negotiation procedures such as are set out in part 15. Rather, to the extent that an agency conducts a procurement under these FAR sections, if discussions with offerors prove to be necessary, FAR part 15 contains procedures that may be used to the extent appropriate.

For purchases under Federal Supply Schedules under FAR subpart 8.4, GAO has indicated that when an agency enters into discussions, GAO will look to part 15 for guidance as to whether the discussions conducted were meaningful and fair, as indicated in a 2014 protest decision:

> There is no requirement in FAR subpart 8.4 that an agency conduct discussions with vendors. See USGC Inc., supra. However, exchanges that do occur with vendors in a FAR subpart 8.4 procurement, like all other aspects of such a procurement, must be fair and equitable; our Office has looked to the standards in FAR part 15 for guidance in making this determination.[11]

FAR parts 12 and 13 permit using negotiations when needed:

> **FAR 12.203 Procedures for solicitation, evaluation, and award.**
>
> Contracting officers shall use the policies unique to the acquisition of commercial items prescribed in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in Part 13, Simplified Acquisition Procedures; Part, Sealed Bidding; or Part 15, Contracting by Negotiation, as appropriate for the particular acquisition. The contracting officer may use the streamlined procedure for soliciting offers for commercial items prescribed in 12.603. For acquisitions of commercial items exceeding the simplified acquisition threshold but not exceeding $6.5 million ($12 million for acquisitions as described in 13.50 (e)), including options, contracting activities shall employ the simplified procedures authorized by Subpart 13.5 to the maximum extent practicable.
>
> **FAR 13.106-2 Evaluation of quotations or offers.**
>
> (b) Evaluation procedures.
>
> (1) The contracting officer has broad discretion in fashioning suitable evaluation procedures. The procedures prescribed in Parts 14 and 15 are not mandatory. At the contracting officer's discretion, one or more, but not nec-

essarily all, of the evaluation procedures in Part 14 and 15 may be used.

GAO has been clear in upholding an agency's flexibility to *not* follow the FAR part 15 negotiation constraints when opting to negotiate under either FAR part 12 or 13 acquisitions. Instead it affirmed the use of "innovative approaches to the maximum extent practicable" under simplified acquisition procedures for the sake of economy and efficiency and notes FAR part 15 procedural requirements such as formal evaluation plans and establishment of a competitive range prior to the conduct of discussions are not required so long as the actual procedures used are fair and equitable. For example, in deciding a 1999 protest, GAO noted:

> In view of these solicitation provisions, [protester's] position that the requirements under part 15 of the FAR are applicable is misplaced. The [agency] was not required to follow the FAR provisions [protester] cites because they are inapposite to a commercial item acquisition conducted under simplified acquisition procedures. Where, as here, simplified acquisition procedures are used, contracting agencies are to use innovative approaches to the maximum extent practicable in order to award contracts in the manner that is most suitable, efficient and economical in the circumstances of each acquisition. FAR Sec. 13.003(g),(h); see Bosco Contracting, Inc., B-270366, Mar. 4, 1996, 96-1 CPD Para. 140 at 2. Further, FAR Sec. 13.106-2(b) encourages the evaluation of quotations in an efficient and minimally burdensome fashion and explicitly states that the evaluation procedures provided for in part 15 are not mandatory, nor is a formal evaluation plan, the establishment of a competitive range, or the conducting of discussions required. Our Office reviews allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with the concern for fair and equitable competition that is inherent in any federal procurement. Huntington Valley Indus., B-272321, Sept. 27, 1996, 96-2 CPD Para. 126 at 2.[12]

In multiple award indefinite-delivery, indefinite quantity (MA/IDIQ) contracts under FAR 16.504, the contracting officer is given great latitude to establish ordering procedures that provide each of the MA/IDIQ contractor holders a "fair opportunity" to be considered for each order per FAR 16.505. If definitive pricing for items to be ordered is not established in the ordering vehicles, and an ordering officer determines a need to enter into discussions, the situation is specifically exempted from the source selection procedures of FAR 15.3, but they may be adopted in specific circumstances by agencies. This may occur if a contracting officer adopts the terms and practices, for example, by explicitly establishing a competitive range. However, GAO also has found in some cases that agencies, in following familiar practices within a given competition, have de facto been using FAR 15.3-type procedures and determined protest decisions accordingly. For example, in a task order competition where the agency made a go/no go decision, GAO ruled that when discussions are held, weaknesses and deficiencies must be discussed. When the agency identifies weaknesses and deficiencies in the protestor's proposal, it must allow the offeror to address them. GAO noted:

> [W]e also find that, to the extent that the agency identified program manager turnover and delays in invoicing as weaknesses or deficiencies in [protestor's] performance on previous task orders, it was required to raise those concerns during the discussions the agency chose to conduct. In this connection, although the regulations concerning discussions under Federal Acquisition Regulation (FAR) part 15 do not, as a general rule, govern task and delivery order competitions conducted under FAR part 16, Hurricane Consulting, Inc., B-404619 et al., Mar. 17, 2011, 2011 CPD ¶ 70 at 6, our Office nonetheless will review task order competitions to ensure that the competition is conducted in accordance with the solicitation and applicable procurement laws and regulations. Imagine One Tech. & Mgmt., Ltd., B-401503.4, Aug. 13, 2010, 2010 CPD ¶ 227 at 7. While FAR § 16.505 does not establish specific requirements for discussions in task order competitions, exchanges in that context, like other aspects of such a procurement, must be fair and not misleading. CGI Fed. Inc., B-403570 et al., Nov. 5, 2010, 2011 CPD ¶ 32 at 9. Here, we do not regard the discussions as fair because the record shows that the agency identified two weaknesses or deficiencies that appear to have formed the underlying basis for its assignment of a "No Go" rating to the [protestor's] proposal, but those weaknesses or deficiencies were never brought to [protestor's] attention.[13] ♦

Endnotes

1 A copy of the GAO decision is available at the Protest Page of the VAO at https://www.gotovao.com/index.cfm?action=comment&id=0410057355000443#. Also note that the Kardex decision cited by GAO in the quoted passage is also cited on p. 13 of this *Advisory* with respect to applicability of FAR part 15 guidance to Federal Supply Service procurements.

2 See Matter of: L.W. Milby, Inc. (B-219388), August 27, 1985; http://www.gao.gov/assets/470/466348.pdf.

3 See Matter of: West Sound Services Group (B-406583.2; B-406583.3), July 3, 2013; https://www.gotovao.com/index.cfm?action=comment&login_spusername=&id=0410052551000443.

4 See Matter of Nexant, Inc. (B-407708; B-407708.2), January 30, 2013; https://www.gotovao.com/index.cfm?action=comment&id=0410050329000443#.

5 See Matter of: Grunley Construction Company, Inc., (B-407900), April 3, 2013; https://www.gotovao.com/index.cfm?action=comment&id=0410051678000443.

6 See Matter of Structural Assocs. Inc./Comfort Sys. USA (Syracuse) Joint Venture, 09-372C, reissued December 3, 2009; http://www.uscfc.uscourts.gov/sites/default/files/opinions/WIESE.STRUCTURAL120309.pdf.

7 See Matter of: Northrop Grumman Info. Tech., Inc. (B-290080 et al.), June 10, 2002; http://www.gao.gov/products/A04979.

8 See Matter of: Hanel Storage Systems, L.P. (B-409030.2), September 15, 2014; http://www.gao.gov/products/D09926.

9 See Matter of: Blue Hackle Middle East, WLL (B-310566.3), March 24, 2008; http://www.gao.gov/products/B-310566.3. In a more recent case, GAO similarly held that the awardee had been engaged in discussions with respect to its ability to meet a specific solicitation requirement while the protestor had been denied the opportunity to provide equivalent treatment with respect to its offer's very different evaluated issues. See Matter of: Marathon Medical Corporation (B-408052), June 4, 2013; http://www.gao.gov/products/B-408052#mt=e-report.

10 Matter of West Sound Services Group.

11 See Matter of: Kardex Remstar, LLC (B-409030), January 17, 2014; http://www.gao.gov/products/D06651.

12 See Matter of: United Marine International, LLC (B:281512), February 22,1999; http://www.gao.gov/products/403155.

13 See Matter of: Mission Essential Personnel, LLC (B-407474, B-407493), January 7, 2013; http://www.gao.gov/assets/660/651707.pdf.

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