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Discussion in the Bidding Process: Competitive Discussions and What May Result in a Protest: General Principles and *Rotech Healthcare* Examined

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According to the spirit of FAR Part 15, competitive discussions are meaningful negotiations conducted as part of the overall competitive acquisition. In some cases, discussions are not conducted correctly and may be the basis for a successful protest. This update will discuss very general rules of competitive (note, noncompetitive has different aspects) negotiations/discussions as well as a recent protest on unequal discussions, which was sustained. This should not be considered legal advice.

General Rules

In general, an agency or any member of its procurement team, should not engage in conduct that:

- Favor's one contractor over another;
- Reveals a contractor's technical solution, unique uses of commercial items, or any information that would compromise a contractor's intellectual property to another contractor;
- Reveal a contractor's price without that contractor's permission;
- Revel the individual names providing reference information about a contractor's past performance; or
- Knowingly furnish source selection information in violation of law or regulation.

Interim Proposal Revisions: A contractor should not be required to furnish more information than is necessary for discussions and evaluation.

Requesting a Final Proposal Revisions:

- Each contractor in the competitive range should have an opportunity to submit a Final Proposal Revision ("FPR").
- All requests for FPRs should be in writing.
- There should be a common cut-off date for receipt of FPRs;
- Each contractor should be advised in writing that:
 - Its FPR must be in writing; and
 - The Government intends to make award without obtaining further revisions.

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The “Acid Test” of Defining Pre-Award Competitive Discussions that Sustains the Protestor’s Position: *Rotech Healthcare, Inc.*, August 17, 2016

In *Rotech Healthcare, Inc.*, B-413024 (August 17, 2016), the GAO held that an agency’s letter inviting one offeror to submit revised pricing constituted discussions and sustained the protestor’s position (Rotech) that such discussions with only one offeror was improper.

Rotech protested the Government’s letter to another offeror asking it to confirm or provide alternate pricing, contending it was unequal discussions because no such letter was sent to Rotech. The GAO agreed, holding that the “acid test of whether or not discussion have occurred is whether the offeror has been afforded an opportunity to revise or modify its proposal.” The GAO went on to find where the agency conducts discussions with one offeror, it must conduct discussions with all offerors in the competitive range.

Accordingly, the GAO recommended that the agency request revised price proposals from the offerors in the competitive range (as well as correcting other deficiencies) AND that the protester be reimbursed its costs of filing and pursuing its protest, including reasonable attorney fees.

If you have any questions about this or other updates, please feel free to contact the author.