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Contract Award on Initial Proposals

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Preface

The author, a Major in the United States Air Force, is a judge advocate currently assigned to Headquarters, Air Force Systems Command, Andrews Air Force Base, Maryland. The views expressed herein are solely those of the author and do not purport to reflect the position of the Department of the Air Force, the Department of Defense, or any other agency of the United States Government.

Introduction

The award of contracts on the basis of initial proposals, without holding discussions is a technique of negotiated procurement which is used all too infrequently. When one offeror's proposal is so clearly superior to those of the other offerors, the government should seriously consider making the contract award without holding discussions if the conditions required by statute and regulation exist. By making award on the basis of initial proposals, the amount of time necessary to award a contract is reduced. In addition, the government's administrative costs are lower because it is unnecessary to conduct rounds of discussions and to evaluate updated proposals, while offerors' costs are reduced because they do not have to prepare updated proposals. Making award without conducting discussions is also fairer to the offerors because if they have no realistic opportunity to be selected for the award, the government should not needlessly keep them in the competition.

This thesis will examine the rules governing the award of contracts without discussions. It will first examine the authority agencies possess to make such awards, reviewing the legislative histories of the statutes involved and the regulations which apply to awards on the basis of initial proposals. It will then examine the requirement that no discussions be conducted, exploring what contacts constitute discussions, and what contacts are permissible. Next will be an analysis of whether the government can accept a proposal which does not conform in every respect to the solicitation and the degree of discretion the contracting officer possesses in determining whether an offeror's proposal should be allowed to remain in the competition. The effect of changes in specifications

will also be explored. Finally, the issue of whether the government can accept a proposal which is not the lowest priced offer will be examined. It will be seen that recent statutory changes have had a profound effect on an agency's ability to award a contract without conducting discussions.

Until recently, most of the rules governing the award of contracts without discussions were found in the decisions of the Comptroller General. These decisions were reflected in the procurement regulations. In the last few years the General Services Board of Contract Appeals has added its decisions to the body of law as a result of its statutory authority to hear protests against contract awards in automated data processing equipment contracts. Since the passage of the Competition in Contracting Act, the rules governing awards on the basis of initial proposals have also been regulated in greater detail by statute, although decisional law remains of great importance.

While contract award on the basis of initial proposals is in many ways similar to procurement by sealed bids, it does afford the agency some added flexibility since the option to conduct discussions always is available. However, as will be seen, this flexibility has been constrained since the passage of procurement reform legislation in the mid-1980s. The differences between the earlier rules governing award without discussions and the new rules will be highlighted throughout the paper. Whether these reforms have improved this type of negotiated procurement remains an open question.

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Chapter I. Authority

While at one time the government's authority to award a contract was not subject to Congressional control, since 1962 the rules concerning such awards have been governed, at least for some agencies, by statute. Since 1984, all agencies' authority to award contracts without conducting discussions has been controlled by statute. This chapter will explore those statutes and their antecedents. The basic rules for awarding contracts without discussions will be very briefly reviewed, followed by a short discussion concerning when contract award without discussions should be used.

A. Statutes

The two basic procurement statutes, the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949, both as amended by the Competition in Contracting Act of 1984, provide the basic authority today for contract award on the basis of initial proposals. In this section, the provisions of each statute, together with their legislative histories, will be studied to ascertain the reason for the authorizing language. As will be seen, the primary theme behind each statute is the enhancement of competition. It is against the backdrop of this competition theme that the policy and mechanics of award without discussions must be examined. One will quickly discover that unless competition and fairness requirements are fulfilled, a contract award made without conducting discussions is improper.

1. Armed Services Procurement Act

The concept of awarding contracts on the basis of initial proposals was first authorized by statute in 1962, with the passage of Public Law

87-653, which amended the Armed Services Procurement Act of 1947.[1] The 1962 statute added a new subsection (g) to 10 U.S.C. section 2304, which read as follows:

> (g) In all negotiated procurements in excess of $2500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirement of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered: *Provided, however,* That the requirements of this subsection with respect to written or oral discussions need not be applied to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussion.[2]

No statutory provision existed previously,[3] however, this provision codified a requirement found in the Armed Services Procurement Regulations (ASPR), section 3-805.1.[4] This regulation listed five exceptions to the requirement for conduct of discussions:

> (i). Procurements not in excess of $2500;
> (ii). Procurements in which prices or rates are fixed by law or regulation;
> (iii). Procurements in which time of delivery will not permit such discussions;
> (iv). Procurements of the set-aside portion of partial set-asides or by small business restricted advertising;
> (v). Procurements in which it can be clearly demonstrated from the existence of adequate competition or

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[1] 10 U.S.C. Ch. 137 (Hereinafter referred to as ASPA).

[2] P.L. 87-653(c), 76 Stat. 528(c), September 10, 1962. This subsection was codified at 10 U.S.C. Sec. 2304(g).

[3] H. Rep. No. 1638, 87th Cong., 2d Sess. 20 (1962); S. Rep. No. 1884, 87th Cong., 2d Sess. 28 (1962).

[4] Amending Armed Services Procurement Act: Hearings on H.R. 5532 Before Senate Committee on Armed Services, 87th Cong., 2d Sess. 4-5, 37 (July 19, 1962).

> accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussions would result in a fair and reasonable price. *Provided, however,* that in such procurements, the request for proposals shall notify all offerors of the possibility that award may be made without discussion of proposals received and hence, that proposals should be submitted initially on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government.[5]

As can be seen from the language quoted above, the statute passed in 1962 closely resembled the regulatory provision. In fact, the only opposition to passage of the statutory provision came from the General Accounting Office (hereinafter referred to as the GAO), which felt the language would permit awards to low offerors in negotiated procurements on the same basis as is required in formally advertised procurements.[6] It was the GAO's position that discussions with all offerors within a competitive range was the essence of sound negotiation procedures and essential to achieving the most favorable price for the government.[7] Congress, without commenting on the GAO's objections, passed H.R. 5532 without amendment to the provision which created 10 U.S.C. section 2304(g).

The stated emphasis of H.R. 5532 was upon competition as a means of procuring supplies and services with fair and equal opportunities for

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[5] ASPR 3-805.1.

[6] Amending Armed Services Procurement Act: Hearings on H.R. 5532 Before Senate committee on Armed Services, Statement of J.E. Welch, Deputy General Counsel, U.S. General Accounting Office, 87th Cong., 2d Sess. 61-62 (August 2, 1962).

[7] H. Rep. No. 1638, *supra*, at 15; S. Rep. No. 1884, *supra*, at 21-22.

suppliers and at prices brought about by competition in the market.[8] When discussing the bill on the floor of the House of Representatives, Representative F. Edward Hebert, Chairman of the House Committee on Armed Services, opened his remarks by saying, "...[T]his bill, H.R. 5532, has for its chief purpose, an increase in competitive purchasing."[9] Thus, the intent behind the new section allowing award without discussions was that such awards would not take place unless first, adequate competition had in fact occurred; second, offerors were notified that award on the basis of initial proposals was possible; and third, that fair and reasonable prices were obtained notwithstanding the lack of discussions with all offerors in the competitive range. In such cases, the fact competition took place was viewed as a safeguard to the possibility that the best price might not have been obtained. Representative Hebert stated that the statutory exception to the requirement for discussions was meant to cover those limited instances in which it would be futile to have discussions, using as his examples, prices fixed by ratemaking authority or where there is an established market.[10] It was not intended that award without discussions would become the normal practice, and indeed, the regulations reflected this view.[11]

2. Competition in Contracting Act

The view that award on initial proposals was the exception to the

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[8] H. Rep. No. 1638, supra, at 2. See also S. Rep. No. 1884, *supra*, at 1 "In general, the objectives of the changes are--...(3) To obtain more competition in negotiated procurement;..."

[9] 108 Cong. Rec. 9969 (1962).

[10] Id.

[11] See ASPR 3-805.1.

rule was strengthened by the passage of the Competition in Contracting Act of 1984 (hereinafter referred to as CICA).[12] This statute amended 10 U.S.C. section 2304(g) and added identical requirements to the Federal Property and Administrative Services Act.[13] CICA changed the language concerning award on initial proposals to read as follows:

> The head of an agency shall evaluate competitive proposals and may award a contract--
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>
> (ii) without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the United States[14]

The primary differences between this language and that of the 1962 statute are the addition of the language concerning clarifications not constituting discussions, substituting "full and open competition" for "adequate competition" and substituting the "lowest overall cost to the United States" for "fair and reasonable prices". The notice requirement is retained in a separate section of CICA.[15] As will be discussed in detail below, the principal effect of CICA on the rules concerning contract award on initial proposals has been to require award without discussions be made only to the low offeror. The GAO has yet to indicate that "full and open competition" differs materially from "adequate

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[12] P.L. 98-369, 98 Stat. 1175.

[13] 41 U.S.C. Sec. 251 et seq.

[14] 10 U.S.C. Sec. 2305(b)(4)(A)(ii); 41 U.S.C. Sec. 253b(d)(1)(B).

[15] 10 U.S.C. Sec. 2305(a)(2)(B)(ii)(I); 41 U.S.C Sec. 253a(b)(2)(B)(i).

competition".[16] The statute defines "full and open competition" as meaning that all responsible sources are permitted to submit sealed bids or competitive proposals.[17]

The stated purpose of CICA, like that of P.L. 87-653, was to establish a preference for use of competitive procedures in the award of contracts.[18] As originally drafted, the Senate bill, S. 338, authorized award on initial proposals if a notice of this possibility was included in the solicitation,[19] and if evaluation and award were made without discussions beyond those conducted for the purpose of minor clarifications.[20] Further, the bill required that "effective competition" be obtained, which the Senate Governmental Affairs Committee stated involved five components:

> (1) the information required to respond to a public need is made available to prospective contractors in a timely fashion; (2) the government and contractor act independently; (3) two or more contractors act independently to respond to a public need by offering property or services which meet that need; (4) the government has expressed its need in a manner which promotes competition; and (5) there is no bias or favoritism, other than required by law, in the contract award.[21]

The bill as reported to the floor contained the following language:

> The head of an agency shall evaluate competitive proposals and may award a contract--
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> ***

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[16] See, e.g., Maico Hearing Instruments, Inc., 88-1 CPD Para. 42 (1988), where full and open competition was assumed where two offerors responded to the solicitation.

[17] 41 U.S.C. Sec. 403(7).

[18] S. Rep. No. 50, 98th Cong., 1st Sess. 1 (1983).

[19] S. 338, 98th Cong., 1st Sess. Sec. 311(b)(3)(A).

[20] S. 338, 98th Cong., 1st Sess. Sec. 312(d)(1)(B).

[21] S. Rep. No. 50, 98th Cong., 1st Sess. 18 (1983).

> (ii) without discussions with the offerors beyond discussions for the purpose of minor clarification where it can be clearly demonstrated from the existence of effective competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in fair and reasonable prices.[22]

This language closely resembled that of P.L. 87-653, with the exception of the requirement for "effective", rather than "adequate" competition. The change in the wording appears primarily to reflect Congress' concern that greater competition be obtained. The House bill was different in terminology from the Senate bill, and when the conference committee resolved the conflicting legislation, the words "full and open" were substituted for "effective" before competition, and instead of requiring fair and reasonable prices, as had been the rule at least since the time P.L. 87-653 passed, the Conference Committee substituted the requirement that award without discussions be made only if such award "would result in the lowest overall cost to the Government"[23] The Conference Committee stated that in substituting "full and open" for "effective" competition, it was intended "to emphasize that all responsible sources are permitted to submit...proposals."[24] No discussion appears in the Conference Report concerning the change from "fair and reasonable prices" to the "lowest overall cost to the Government".

The regulations do not go much beyond the language of ASPR 3-805.1 quoted on page 2 above. FAR 15.610 requires the conduct of discussions except when prices are fixed by law or regulation, a set-aside is

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[22] S. Rep. 297, 98th Cong., 1st Sess. 17 (1983).

[23] H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 719 (1984).

[24] id. at 1422.

involved, or when full and open competition or accurate prior cost experience clearly demonstrates acceptance of an initial proposal will result in the lowest overall cost to the government. This FAR section also states that the prices obtained must be fair and reasonable. The latter language is a throwback to the earlier statute and regulations, and reflects the lack of guidance contained in CICA and its legislative history. The FAR language exhibits a conservative tack by the drafters, who apparently were unsure as to what guidance to give, and so retained the guidance from the previous statue.[25] The requirement for fair and reasonable prices also recognizes the possibility that the lowest overall cost proposal may not represent a fair and reasonable price. FAR 15.610 also requires presence in the solicitation of a notice that award may be made without discussions and that in fact no discussions occurred. FPR 1-3.805-1(a)(5) contained additional guidance, stating that award without discussions should not occur where uncertainty existed as to technical or pricing matters, or when the proposal most advantageous to the government involved a material departure from the requirements of the solicitation. In such instances, discussions had to take place. As discussed below, these rules remain valid today even though they were not incorporated into the FAR, because the GAO continues to enforce them.

3. Federal Property and Administrative Services Act

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[25] Telephone interview with Mr. John Conklin, Deputy for Procurement Policy, Office of the Assistant Secretary of the Army (July 25, 1988). Mr. Conklin was a member of the FAR Committee which revised the FAR to incorporate CICA. His recollection is that the Committee intended to revise the FAR only to reflect CICA requirements and language. It was felt the "fair and reasonable" language already in FAR 15.610 did not conflict with CICA, and the GAO had no comment on the revision. However, the Committee did not envision the GAO deciding cases as it has, i.e., requiring award without discussions to be to the lowest priced offeror in the competitive range.

The Federal Property and Administrative Services Act (hereinafter referred to as FPASA) contained no provision concerning the award of contracts on the basis of initial proposals until the passage of CICA.[26] Until that time, contract award without discussions was covered only by regulation, first at FPR 1-3.805-1, and later by FAR 15.610(a). The rules for such awards by agencies subject to the FPASA did not differ significantly from the rules applying to agencies covered by the ASPA.

B. Basic Rules for Award Without Discussions Before CICA

Prior to the passage of CICA, the prerequisites for award of a contract on the basis of initial proposals included first, notice of the possibility of such award in the solicitation; second, no deviation from a material requirement of the solicitation in the offeror's proposal; third, either adequate competition or accurate prior cost experience with the product or service; and finally, award of the contract without conducting discussions and at a fair and reasonable price. As can be seen, these basic rules hinged on competition or accurate prior cost experience providing a basis for determining that the contract was in fact awarded at a good price. These basic requirements were reflected in FAR

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[26] See, e.g., S. Rep. 50, supra, 40-51. This is the "Changes in Existing Law" section covering all changes to the FPASA.

15.610,[27] and prior to the FAR, in DAR 3-805.1 and FPR 1-3.805-1.

C. Basic Rules for Award Without Discussions After Passage of CICA.

Subsequent to the enactment of CICA, the fundamental requirements for contract award on the basis of initial proposals remained quite similar to the earlier rules, however, now most of those rules were more explicitly set forth in the statute. Those requirements now include first, notice in the solicitation that award can be made without discussions;[28] second, no deviation from a material requirement of the solicitation in the offeror's proposal; third, either full and open competition or accurate prior cost experience with the product or service;[29] and finally, award at the lowest overall cost to the government.[30] FAR 15.610(a)(3) adds to this last requirement that in addition to representing the lowest overall cost to the government, the award must be at a fair and reasonable price. The major differences between CICA and the earlier rules thus appear in the third requirement (full and open competition vice adequate competition), discussed above, and in the last requirement (lowest overall cost to the government vice fair and reasonable prices), which will be discussed in Chapter IV.

D. Award Without Discussions Should be Used When Appropriate

It has been said the reason for award on the basis of initial

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[27] The FAR was promulgated prior to the effective date of CICA. FAR was effective on April 1, 1984. CICA became effective on January 1, 1985, and the FAR was extensively revised after the April promulgation to reflect the requirements of CICA.

[28] 10 U.S.C. Sec. 2305(a)(2)(B)(ii)(I); 41 U.S.C. Sec. 253a(b)(2)(B)(i).

[29] 10 U.S.C. Secs. 2305(b)(4)(A)(ii), 2305(b)(4)(C); 41 U.S.C. Secs. 253b(d)(1)(B), 253b(d)(3).

[30] 10 U.S.C. Sec. 2305(b)(4)(A)(ii); 41 U.S.C. Sec. 253b(d)(1)(B).

proposals is because the statutes allow contracting officers to avoid costly and time-consuming negotiations where the circumstances of the procurement clearly indicate a fair and reasonable price will be received initially as the result of adequate competition or prior cost experience.[31] In fact, the General Services Board of Contract Appeals (hereinafter GSBCA) sustained a protest where the protester was kept in the competitive range when it had virtually no chance of receiving the award.[32] The Board cited FAR 15.609(c), which requires the contracting officer to notify unsuccessful offerors at the earliest practicable time that their proposals are no longer eligible for award, as the basis for its decision. This provision, the Board noted, is designed to protect vendors who otherwise continue to incur proposal preparation costs that could not be recovered, and also puts those vendors whose proposals are determined to be so deficient as to preclude any reasonable chance of being selected for award on notice of that fact.[33] Thus it behooves the contracting officer, when the proper conditions exist, to make award on the basis of initial proposals. Such an award, when full and open competition exists, can reduce the cost to both the offerors in the form of proposal preparation costs, and to the government in the form of reduced lead time and administrative costs of running a competitive negotiation. In an age of time consuming and costly procurements, these advantages should not be lightly overlooked.

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[31] Continental Business Enterprises, Inc. v. U.S., 452 F.2d 1016, 1021 (Ct. Cl., 1971).

[32] SMS Data Products Group, Inc. GSBCA No. 8589-P, 87-1 BCA Para. 19,496 (1986).

[33] id. at 98,539.

Chapter II. Absence of Discussions

Fundamental to the rules of awarding contracts on initial proposals is the requirement that in fact no discussions take place prior to contract award. This requirement is codified by CICA.[34] In the event discussions are conducted with one offeror, then discussions must be held with all offerors in the competitive range.[35] Thus what constitutes discussions is crucial to whether award can be made on the basis of the initial proposals. In this chapter, the general rules of competitive negotiation will be reviewed. There will then follow an examination of discussions, including what constitutes discussions and the rules concerning discussions. The distinction between discussions and clarifications will be explored. It should be noted that under the rules regarding contract awards without discussions, award may take place after a clarification without conducting discussions with all offerors within the competitive range, but this is not true if discussions occur with an offeror. After that, use of discussions and clarifications to ascertain the existence of mistakes will be reviewed, followed by the requirement that no award on initial proposals can be made unless the solicitation contained a notice advising offerors of that possibility. Finally, there will be a brief look at the disadvantages of not utilizing discussions in the award process.

A. Negotiations and Competition

The Senate Committee on Armed Services, as part of its report

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[34] 10 U.S.C. Secs. 2305(b)(4)(A)(ii), 2305(b)(4)(C); 41 U.S.C. Secs. 253b(d)(1)(B), 253b(d)(3).

[35] E.g., Information Network Systems, Comp. Gen. Dec. B-208009, 83-1 CPD Para. 272 (1983); Comp. Gen. Dec. B-173040, April 20, 1972, Unpub.

recommending passage of H.R. 5532 (which ultimately became P.L. 87-653), commented on the absence of a definition of the term, "negotiation". It attempted to provide a general definition by saying that the new law would require, with stated exceptions, "... that oral or written discussions be had in negotiated procurements with all responsible offerors who submit proposals within a competitive range."[36] The Committee went on to say that if discussions were unnecessary, it was hard to see why formal advertising (now called sealed bidding) was not used.[37] Since the primary emphasis of both P.L. 87-653 and CICA was to increase competition in the procurement process, Congress clearly did not intend for agencies to bypass the requirements for competition by using negotiation rather than sealed bidding.

The general process to be followed in negotiated procurement is found at FAR Subpart 15.6. In general, a Request for Proposals (hereinafter referred to as RFP) is issued stating the government's requirements and setting forth the standards upon which proposals will be evaluated.[38] Normally oral or written discussions are held after proposal submission and evaluation to resolve deficiencies and ambiguities with all offerors whose proposals are technically acceptable or capable of being made technically acceptable through the discussion process.[39] In fact, the GAO has said it is improper to award a contract without holding discussions where uncertainty exists as to technical aspects of a

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[36] S. Rep. No. 1884, 87th Cong., 2d Sess. 2 (1962).

[37] id. at 3.

[38] FAR 15.605(c).

[39] FAR 15.610(b).

proposal.[40] These proposals are said to constitute the competitive range.[41] After discussions are held with all offerors whose proposals fall within the competitive range, the contracting officer calls for Best and Final Offers (hereinafter referred to as BAFOs). Award is made after evaluating the BAFOs.[42] The entire purpose of this process is to maximize competition and ensure fairness to the participants.[43] Thus, any shortcuts to this process must not reduce competition or fairness.

At the same time, if competition is achieved, it makes little sense to waste everyone's time and money by going through the entire process if one offeror is clearly superior and ultimately will win anyway. For example, in L.W. Milby, Inc.,[44] one offeror was vastly superior to the others. The awardee received a score of 380 points out of 400 possible and was the lowest priced offeror, while the nearest competitor received a score of 354 points. Since the RFP contained the requisite notice, no discussions were in fact held and adequate competition was obtained (the solicitation pre-dated the effective date of CICA), the Comptroller General found the award proper. He noted the winning proposal "was so far superior to the other proposals with regard to technical considerations and price that none of the other offerors had a reasonable chance of

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[40] Spacesaver Corp., Comp. Gen. Dec. B-188427, 77-2 CPD Para. 215 (1977). See also Consolidated Bell, Inc., Comp. Gen. Dec. B-220425, 86-1 CPD Para. 238 (1986).

[41] See FAR 15.609.

[42] FAR 15.611.

[43] FAR 15.603.

[44] Comp. Gen. Dec. B-219388, 85-2 CPD Para. 233 (1985).

receiving award."[45] Similarly, in Economic Consulting Services, Inc.,[46] the GAO upheld an award on the basis of initial proposals where the awardee's initial proposal was the highest rated technically and was the lowest price, and in United Computing Systems, Inc.,[47] the awardee's proposal received a score of 100 out of a possible 100 points, while the next proposal received a score of only 67.4. In such situations, where the contracting officer can determine the initial proposal offers the lowest cost to the government, it makes little sense to proceed through rounds of discussions and a BAFO when the winner already is identified so clearly. As these cases show, the Comptroller will support the agency's determination to award without discussions when one offeror stands out so starkly.

1. Discussions

Critical to the concept of award without discussions is an understanding of what are discussions. This section will examine the definition of discussions. The policy behind competitive negotiations favors discussions,[48] which in turn must be meaningful. A short analysis of what constitutes meaningful discussions will be included. Finally, this section will look to see if a call for BAFOs without more can constitute discussions.

While at first glance it appears that the rules defining what are and are not discussions are quite clear, the cases are considerably less

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[45] id. at 2.

[46] Comp Gen. Dec. B-229895, 88-1 CPD Para. 351 (1988).

[47] Comp. Gen. Dec. B-204045, 81-2 CPD Para. 247 (1981).

[48] See, e.g., FAR 15.610(b).

lucid. The problem arises because there are two lines of cases governing the proper use of discussions. In the first line of cases, discussions are found to have been conducted properly and were meaningful. In the second line of cases, discussions are found to have been improperly conducted. In this latter line, the agency asserts it was merely conducting "clarifications", which are appropriate in situations where award is made on the basis of initial proposals, but the GAO finds the agency was actually holding discussions rather than clarifications. In this chapter the first line of cases will be discussed initially. After the basic rules outlining discussions have been reviewed, clarifications will be examined. As will be seen, the cases in the clarification area carve out many exceptions to the apparently clear rules concerning discussions, and those distinctions will be examined immediately afterwards.

a. Definition

FAR defines "discussion" as follows:

> ... [A]ny oral or written communication between the Government and an offeror (other than communications conducted for the purpose of minor clarification), whether or not initiated by the Government, that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal.[49]

This definition reflects case law developed over a long period. The Comptroller General, summarizing earlier cases, stated,

> [R]esolution of the question has depended ultimately on whether an offeror has been afforded an opportunity to revise or modify its proposal, regardless of whether such opportunity resulted from action initiated by the Government or the

[49] FAR 15.601.

offeror.[50]

The Claims Court has also agreed with this definition. For example, in Isometrics, Inc. v. United States,[51] the court found discussions took place when the government allowed an offeror to modify its proposal.

As to whether in a given instance discussions have occurred, the Comptroller General has stated repeatedly that "[w]hether discussions have been held is a matter to be determined upon the basis of the particular actions of the parties, and not merely upon the characterizations of the contracting agency."[52] Thus each case must be determined on the basis of the facts specific to that case.

1. Discussions Found to Have Occurred

Applying the general rules discussed above, discussions have been found to have taken place when a buyer for an agency telephoned an offeror to verify the prices of contract line items and the subsequent verification resulted in a price modification,[53] where negotiations took place with only one of the offerors in the competitive range,[54] where descriptive literature not required by the solicitation is furnished at

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[50] 51 Comp. Gen. 479, 481 (1972). This is apparently the first case in which the GAO stated the rule in terms of discussions being the opportunity to revise or modify a proposal.

[51] 5 Ct. Cl. 420 (1984).

[52] PRC Information Sciences Co., 56 Comp. Gen. 768, 778, 77-2 CPD Para. 11 (1977) at 12. See also, e.g., Centro Corp.; Systems Research Laboratories, Inc., Comp. Gen. Dec. B-186842, 77-1 CPD Para. 375 (1975); Information Network Systems, Comp. Gen. Dec. B-208009, 83-1 CPD Para. 272 (1983).

[53] Computer Lines, GSBCA No. 8206-P, 86-1 BCA Para. 18,653 (1985).

[54] 48 Comp. Gen. 449 (1968).

the agency's request,[55] where an agency communication with an offeror concerning possible mistakes in the proposal results in a significant price change,[56] where additional information requested by the agency goes to the heart of the proposal and has a substantial effect upon the government's determination of its acceptability,[57] where the agency permitted an offeror to reduce its price and waived first article testing,[58] where acknowledgment of a substantive amendment is received after the closing time for receipt of proposals,[59] and where the agency called for submission of revised proposals, but did not call them BAFOs.[60] As can be seen from these examples, the overarching theme behind the decisions is that in each case an offeror was allowed to revise or modify its proposal. In order to preserve the integrity of the procurement process, if one offeror is allowed to do so, then all offerors in the competitive range must be allowed the same opportunity.[61] As the cases show, discussions can take place even where no formal contact occurs and regardless of who initiated the contact. Thus, one must look at the facts of the case and the behavior of the parties in order to determine whether

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[55] Meisel Rohrbau GmbH & Co., KG, 66 Comp. Gen. ___, 87-1 CPD Para. 414 (1987).

[56] ALM, Inc., 65 Comp. Gen. 405, 86-1 CPD Para. 240 (1986).

[57] Centro Corp.; Systems Research Laboratories, Inc., Comp. Gen. Dec. B-186842, 77-1 CPD Para. 375 (1975).

[58] 48 Comp. Gen. 663 (1969).

[59] 50 Comp. Gen. 202 (1970); Galaxy Aircraft Instruments Co., Comp. Gen. Dec. B-194356, 80-1 CPD Para. 364 (1980).

[60] 50 Comp. Gen. 246 (1970).

[61] ALM, Inc., 65 Comp. Gen. 405, 86-1 CPD Para. 240 (1986).

discussions took place. No hard and fast rule can be enunciated.

ii. Discussions Found Not to Have Occurred

At the same time, many cases have examined the facts and concluded that no discussions took place. For example, the following have been found not to constitute discussions: a pre-award survey,[62] an audit by the Defense Contract Audit Agency,[63] a conference entailing unilateral presentations without a chance to modify the proposal,[64] a debriefing of an unsuccessful offeror,[65] a meeting at which the offeror is allowed only to explain price reductions which were previously made,[66] discussions of matters going to capacity and capability,[67] a site visit,[68] a request for descriptive literature which was required by the solicitation,[69] and withdrawal of a letter before it could be answered.[70] Again, the key factor linking all these cases is the lack of opportunity for the offeror to revise or modify its proposal. Where the offeror does supply information, if that information was already required by the solicitation,

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[62] Sun Ship, Inc. v. Hidalgo, 484 F. Supp. 1356 (D. D.C., 1980).

[63] id.

[64] id.

[65] PRC Information Sciences Co., 56 Comp. Gen. 768, 77-2 CPD Para. 11 (1977).

[66] Comp. Gen. Dec. B-170989, B-170990, Nov. 17, 1971, Unpub.

[67] Advance Gear & Machine Corp., Comp. Gen. Dec. B-228002, 87-2 CPD Para. 519 (1987); Alan Scott Industries; Grieshaber Manufacturing Co., 63 Comp. Gen. 610, 84-2 CPD Para. 349 (1984).

[68] Robert E. Derecktor of Rhode Island, Inc.; Boston Shipyard Corp., Comp. Gen. Dec. B-211922, B-211922.2, 84-1 CPD Para. 140 (1984).

[69] AEG Aktiengesellschaft, 65 Comp. Gen. 418, 86-1 CPD Para. 267 (1986).

[70] Technical Services Corp., 64 Comp. Gen. 245, 85-1 CPD Para. 152 (1985).

or the information did not materially affect the proposal, then discussions will not be found to have occurred.

Perhaps the most interesting of these cases are those dealing with matters of capacity and capability. In Advance Gear & Machine Corp., the Air Force awarded a contract for hydraulic pump housings to Bemsco on the basis of initial proposals. The Air Force requested information from Bemsco concerning the identity of its supplier of castings and approved Bemsco as a source subject to first article testing. This approval was obtained largely because the information showed Bemsco was using drawings from an already approved source. Advance Gear objected, saying the information supplied constituted discussions with Bemsco, but the Comptroller General disagreed. He stated:

> Questions pertaining to an offeror's capacity and capability involve issues of responsibility, that is, the offeror's ability to perform the contract, as opposed to the acceptability of a proposal, and therefore may be requested or provided without resulting in the conduct of discussions.
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> Moreover, although agencies may limit the competition for parts to approved sources if necessary to assure the safe, dependable and effective operation of military equipment, ... approval as a source may be conducted outside of a procurement and is an independent activity, even though it may be coincident with a procurement. ...[71]

Thus the GAO will allow submission of a great deal of information which can have a profound impact on the source selection decision and yet find that discussions have not occurred. A contracting officer might well want to consider using this rule when the only questions concern the capability of the offeror to perform the contract. As long as the contracting officer asks no questions which allow the offeror to revise or modify its

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[71] 87-2 CPD Para. 519 at 3.

proposal terms or price, questions concerning the capacity and capability of the offeror will not constitute discussions.

b. Preference for Discussions

The statute, regulations, and cases all make it clear that discussions are expected to be the norm. For instance, CICA states that the head of an agency may award after discussions with the offerors, or without discussions if full and open competition or accurate prior cost experience clearly demonstrate that such award would result in the lowest overall cost to the United States.[72] However, the statute goes on to say,

> In the case of award of a contract [after discussions], the head of the agency shall conduct, before such award, written or oral discussions with all responsible sources who submit proposals within the competitive range, considering only price and the other factors included in the solicitation.[73]

In the event the head of the agency decides to award without discussions, he "shall award the contract based on the proposals received (and clarified, if necessary, in discussions conducted for the purpose of minor clarification)."[74] See also the discussion of the legislative histories of CICA and ASPA in Chapter 1, above.

FAR 15.610 requires discussions with all responsible offerors submitting proposals within the competitive range except in acquisitions

> (1) In which prices are fixed by law or regulation;
> (2) Of the set-aside portion of a partial set-aside; or
> (3) In which it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would

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[72] 10 U.S.C. Sec. 2305(b)(4)(A); 41 U.S.C. Sec. 253b(d)(1).

[73] 10 U.S.C. Sec. 2305 (b)(4)(B); 41 U.S.C. Sec. 253b(d)(2).

[74] 10 U.S.C. Sec. 2305(b)(4)(C); 41 U.S.C. Sec. 253b(d)(3).

> result in the lowest overall cost to the Government at a fair and reasonable price; *provided*, that--
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> (i) The solicitation notified all offerors of the possibility that award might be made without discussion; and
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> (ii) The award is in fact made without any written or oral discussion with any offeror.[75]

Case law enforces the clear intent of the statute and regulations that award without discussions is the exception, rather than the rule. The GAO has on numerous occasions stated its preference for conducting negotiations. In Metron Corp., it stated,

> An award based on initial proposals precludes technical and price revisions favorable to the government that may be made in the regular course of the procurement cycle. We think that if an agency determines that there is even a remote chance of obtaining a better price by conducting discussions and requesting best and final offers, it should do so.[76]

Further, the GAO said that even if the circumstances for award on the basis of initial proposals existed, such award was permissive, not mandatory.[77] There is, in fact, no legal right to award of a contract on the basis of initial proposals.[78] These cases very clearly illustrate the strong preference given for award after conduct of discussions.

The whole purpose of holding discussions is to give offerors in the competitive range the chance to resolve deficiencies.[79] When the contracting officer awards a contract without discussions in instances

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[75] FAR 15.610(a).

[76] Metron Corp., Comp. Gen. Dec. B-227014, 87-1 CPD Para. 642 (1987) at 4.

[77] id. at 4. See also Joseph L. De Clerk and Associates, Inc., Comp. Gen. Dec. B-221723, 86-1 CPD Para. 146 (1986).

[78] Townsend & Co., Comp. Gen. Dec. B-211762, 84-1 CPD Para. 352; Kisco Co., Comp. Gen. Dec. B-216953, 85-1 CPD Para. 334 (1985).

[79] Orkland Corp.; Falcon Research and Development Co., Comp. Gen. Dec. B-209662.2, B-209662.3, 83-1 CPD Para. 349 (1983).

where deficiencies existed which were capable of resolution through discussions the GAO has sustained protests. Thus in Orkland Corp.,[80] the GAO agreed with the agency that the contracting officer should have held discussions to attempt to resolve an apparent organizational conflict of interest rather than award the contract to another offeror. In Sperry Corp.,[81] award on the basis of initial proposals was held improper because ambiguities existed in the protester's technical proposal, with the GAO saying where omissions and deficiencies are suitable for correction, technical discussions must be held. The government was found to have improperly rejected an ambiguous proposal which could have been clarified through discussions and which would have resulted in the lowest overall cost to the government in Consolidated Bell, Inc.[82] These cases illustrate the rule that ambiguities in otherwise acceptable proposals (i.e., those within the competitive range) must be resolved through discussions. It is in this manner the government is able to assure itself of the best possible bargain.

Further, this stated preference for discussions predates the passage of CICA. In 1973 the Comptroller General cited with approval the preference for discussions found in ASPR 3-805.1.[83] One of the strongest endorsements for conducting discussions is found in Shapell Government

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[80] Id.

[81] 65 Comp. Gen. 195, 86-1 CPD Para. 28 (1986).

[82] Comp. Gen. Dec. B-220425, 86-1 CPD Para. 238 (1986).

[83] 52 Comp. Gen. 425 (1973). The ASPR language involved stated, "Written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range...", and then goes on to list the exceptions to the rules.

Housing, Inc.[84] There the Navy awarded a contract for "turnkey" housing without conducting discussions. The GAO upheld the award, but not without expressing some qualms. After stating that it had doubts concerning the propriety of awarding turnkey housing contracts without conducting discussions, the GAO got to the nub of the matter:

> [W]e believe it is ordinarily conducive to the Government's receiving the best possible contract at the lowest price to conduct discussions with all offerors within a competitive range even if an award on an initial proposal basis may be technically justified. ... Just because an initial proposal is ranked best overall does not necessarily mean that it is the best deal the Government can get. Discussions allow an opportunity for the Government to improve on the deal it was first offered, and give the Government the flexibility to get the most for its money.[85]

The message to contracting officers is clear: unless you are absolutely certain this is the best deal that can be obtained, and the conditions for award on initial proposals otherwise exist, conduct discussions. The Comptroller General clearly is more comfortable when discussions are held because it is more likely the government received the best deal in such instances. These rules apply equally to cost type contracts, notwithstanding some language to the contrary in the FPR.[86]

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[84] 55 Comp. Gen. 839, 76-1 CPD Para. 161 (1976).

[85] 55 Comp. Gen. 839, 847, 76-1 CPD Para. 161 at 11.

[86] 53 Comp. Gen. 201 (1973). The language referred to was found at FPR 1-3.805-1(a), which read, in part:

> The procedures set forth in this [section] 1-3.805-1 are generally applicable to negotiated procurement. However, they are not applicable where their use would be inappropriate, as may be the case, for example, when ... cost-reimbursement contracting is anticipated. ... While the lowest price or lowest cost the Government is properly the deciding factor in source selection in many instances, award of a contract properly may be influenced by the proposal which promises the greatest value to the Government in terms of possible performance, ultimate producibility, growth potential, and other factors.

c. Requirement for Meaningful Discussions

The cases require that when discussions are held, they must be meaningful. An in-depth discussion of what discussions must entail to be meaningful is beyond the scope of this paper, however some examination of this topic must be made to allow for a reasonable understanding of the rules concerning contract award on the basis of initial proposals.

The GAO has stated that discussions are meaningful when the contracting officer identifies the deficiencies in an offeror's proposal and allows the offeror the opportunity to correct them.[87] This rule is reflected in the FAR, which requires the contracting officer, as part of his discussions, to "advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements".[88] See also the FAR definition of "discussion" quoted on page 18 above.

The courts also agree that discussions must be meaningful.[89] However, once this rule is stated, it appears very little is required in order for discussions to be considered meaningful. In Saco Defense Sys. Div. v. Weinberger,[90] all that was required was a call for BAFOs. As will be discussed below, very often allowing submission of BAFOs will meet the requirement for discussions. Further, the GAO, in Information Network

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[87] San/Bar Corp., Comp. Gen. Dec. B-219644.3, 86-1 CPD Para. 183 (1986). See also 51 Comp. Gen. 431 (1972). The GAO most recently reiterated this rule in Raymond Corp., Comp. Gen. Dec. B-229767.2, 88-1 CPD Para. 405 (1988).

[88] FAR 15.610(c)(2).

[89] Saco Defense Sys. Div. v. Weinberger, 806 F. 2d 308 (1st Cir., 1986).

[90] id.

Sys.,[91] refused to agree that agencies must conduct "all-encompassing negotiations" with offerors. When such discussions would unfairly prejudice the rights of other offerors (such as through technical transfusion or leveling), agencies may limit discussions.[92] This leaves a great deal of discretion to the contracting officer as to the extent, if any, of discussions to be conducted. In short, if discussions are conducted, they must be meaningful, but to be meaningful, it may not be necessary to hold discussions beyond a call for BAFOs. If a protester alleges a failure to conduct meaningful discussions, the protest may still fail if all of the requirements for award without discussions existed at the time of award.

Understanding this requirement is important because if an award is made without conducting meaningful discussions, it is possible to sustain that award if the conditions for award without discussions existed. Thus, if a contracting officer failed to conduct meaningful discussions, but all other conditions for award without discussions existed (i.e., notice in the solicitation, no variance in the proposals from the terms of the RFP, full and open competition, and the proposal selected for award represented the lowest overall cost to the government), then the fact the contracting officer went forward and made the award should not be objectionable. For example, in Nuclear Assurance Corporation,[93] an award without discussions was held proper even if the protester's allegation that its proposals were

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[91] Comp. Gen. Dec. B-208009, 83-1 CPD Para. 272 (1983).

[92] id. at 16. See also Saco Defense Sys. Div. v. Weinberger, 629 F. Supp. 385, 392 (D. Me., 1986), *aff'd*, 806 F. 2d 308 (1st Cir., 1986).

[93] Comp. Gen. Dec. B-216076, 85-1 CPD Para. 94 (1985).

improperly evaluated and rejected, because the awardee's proposal was the most favorable to the government and all the requirements for an award without discussions were met. Thus, the GAO reasoned, there was no prejudice to the protester notwithstanding the government's finding of technical unacceptability. Using this lack of prejudice to the protester rationale, the GAO could sustain an award where no meaningful discussions were held with any offeror within the competitive range when all the requirements for award on the basis of initial proposals existed. While a contracting officer should never consciously attempt to make award in this manner, it is available as a defense to a protest, and the defense should be successful.

d. Best and Final Offers as Discussions

The Comptroller General has long held that a call for BAFOs without more constitutes discussions.[94] This rule has also been accepted by the courts.[95] The reason why a BAFO is considered to constitute discussions goes back to the definition of "discussions". Recall that discussions include any contact with an offeror in which the offeror is afforded the chance to revise or modify its proposal. A BAFO clearly fits within this definition because the offeror can change its original proposal when it submits the BAFO. Therefore, the GAO holds that a BAFO constitutes discussions[96].

This does not end the matter, since a call for BAFOs without more

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[94] E.g., 50 Comp. Gen. 246 (1970).

[95] Saco Defense Systems Div. v. Weinberger, 629 F. Supp. 385 (D. Me., 1986), *aff'd* 806 F. 2d 308 (1st Cir., 1986).

[96] Cyneteria, Inc., Comp. Gen. Dec. B-181707, 75-1 CPD Para. 86 (1975); Nationwide Bldg. Maintenance, Inc., 55 Comp. Gen. 693, 76-1 CPD Para. 71 (1976).

may not constitute adequate discussions in every instance. For example, in Decision Sciences Corp.,[97] a call for BAFOs was held not to be meaningful discussions because of uncertainties in the protester's proposal as to certain time commitments. The GAO felt that discussions could have cleared up the uncertainties and resulted in large cost savings. In general, a call for BAFOs will be held to be appropriate discussions where there were no technical deficiencies in any proposals.[98] Note that the GAO, boards and courts have used the terms "adequate discussions" and "appropriate discussions" when the context of the decision indicates they really intend to say that discussions were meaningful. These tribunals and the GAO apparently simply are not being careful about how the term is used. This somewhat lackadaisical use of language may be reflective of how low a threshold exists concerning what constitutes meaningful discussions. Nevertheless, an offeror has no legal right to insist on award on the basis of initial proposals,[99] and will also fail in a protest where it claims the contracting officer should have called for BAFOs where the requirements for award without discussions existed.[100] In the area of determining whether to conduct discussions, the GAO has concluded that this decisions falls within the contracting officer's discretion. Thus, for example, in Townsend & Co., the

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[97] Comp. Gen. Dec. B-196100, 80-1 CPD Para. 357 (1980).

[98] T. Warehouse Corp., Comp. Gen. Dec. B-217111, 85-1 CPD Para. 731 (1985); Mount Pleasant Hosp., Comp. Gen. Dec. B-222364, 86-1 CPD Para. 549 (1986).

[99] Townsend & Co., Comp. Gen. Dec. B-211762, 84-1 CPD Para. 352 (1984); Kisco Co., Comp. Gen. Dec. B-216953, 85-1 CPD Para. 334 (1985).

[100] E.g., Maico Hearing Instruments, Inc., Comp. Gen. Dec. B-229925, 88-1 CPD Para. 42 (1988); Economic Consulting Services, Inc., Comp. Gen. Dec. B-229895, 88-1 CPD Para. 351.

Comptroller General said, "The decision whether to award on the basis of initial proposals when all the necessary conditions are present is discretionary with the procuring activity."[101] Since there is no legal right to demand that the contracting officer call for BAFOs, what these cases seem to tell a contracting officer is that if there is technical uncertainty in proposals within the competitive range, he should consider calling for BAFOs after conducting discussions. If, however, the technical deficiencies are minor or nonexistent, award without discussions may well be feasible. Whichever course of action he chooses, the GAO will not question the decision as long as it is reasonable, i.e., the contracting officer can provide a supporting rationale for his actions.[102]

2. Clarifications

CICA permits award without discussions "other than discussions conducted for the purpose of minor clarification".[103] Therefore it is critical to understand what constitutes a clarification as opposed to contacts with offerors which constitute discussions. FAR 15.601 defines a "clarification" as

> communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal. It is achieved by explanation or substantiation, either in response to Government inquiry or as initiated by the offeror. Unlike discussion..., clarification does not give the offeror an opportunity to revise or modify its proposal, except to the extent that correction of apparent clerical mistakes results in a revision.

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[101] Comp. Gen. Dec. B-211762, 84-1 CPD Para. 352 (1984) at 2.

[102] 52 Comp. Gen. 425 (1973).

[103] 10 U.S.C. Secs. 2305(b)(4)(A)(ii), 2305(b)(4)(C); 41 U.S.C. Secs. 253b(d)(1)(B), 253b(d)(3).

In this section, circumstances constituting clarifications will be examined, followed by an analysis of the distinction between clarifications and discussions.

a. Definition

As the FAR definition shows, the key factor in determining whether a communication is a clarification is whether the offeror can revise or modify its proposal in a material way. As is the case with the FAR definition of discussion, the FAR definition of clarification reflects the GAO's decisions. A good discussion of the issues appears in New Hampshire-Vermont Health Serv.[104] In this pre-CICA decision, the protester submitted the lowest priced proposal, but award was made to the highest rated offeror. After the time for submission of initial proposals, the awardee was allowed to submit signed Representations and Certifications together with additional evidence of its ability to perform. In analyzing whether clarifications or discussions took place, the GAO had this to say:

> It is not always easy to determine if a Government-offeror contact or interchange constitutes the competitive range discussions ... or is merely a clarification inquiry. ... Certain inquiries, and the responses thereto, are generally regarded as not constituting discussions. See [ASPR] 3-805.1(b), and ASPR 2-405, which treat such things as an offeror's correction of its failure to (1) furnish required information concerning the number of its employees; (2) indicate its size status, and (3) execute equal opportunity and affirmative action program certifications, as clarification of minor irregularities. We have also regarded such things as an agency's receipt of a second cloth sample from one offeror to verify that the offeror's original sample met the solicitation requirements, [citation omitted] and an agency's informing offerors, after receipt of initial proposals, of a change in the class of black powder to be furnished by the Government, [citation omitted] as not

[104] 57 Comp. Gen. 347, 78-1 CPD Para. 202 (1978).

constituting discussions.[105]

The GAO went on to find discussions occurred because the information requested by the agency went to the heart of the offeror's proposal and had a substantial effect on the government's determination of the proposal's acceptability. In Ralph Korte Constr. Co.,[106] the Comptroller General said that if a communication prejudices the interest of other offerors, then it is not a clarification. It thus appears that in addition to whether the offeror was not given an opportunity to correct or revise its offer, any communication which goes to the heart of its proposal, has a substantial effect on the government evaluation and determination that the proposal is within the competitive range, or which will prejudice the interests of other offerors cannot be a clarification.

As has been pointed out previously, considerable information can be obtained by the government under the rubric of "clarifications". Recall the examination of questions concerning capacity and ability to perform on pages 21 and 22 above, and matters including audits, pre-award surveys and site visits may be viewed as discussions.[107] Such questions can be quite extensive, yet not constitute discussions. In addition, the GAO held that an agency's asking offerors whether its equipment would operate under certain conditions and whether cable necessary for testing would be provided were merely clarifications to already acceptable proposals.[108] Also, agency contact with an offeror merely to confirm the contents of a

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[105] 57 Comp. Gen. 347, 352-353, 78-1 CPD Para. 202 at 8.

[106] Comp. Gen. Dec. B-225734, 87-1 CPD Para. 603 (1987).

[107] See notes 62,63,67 and 68, *supra*.

[108] Emerson Elec. Co., Comp. Gen. Dec. B-213382, 84-1 CPD Para. 233 (1984).

proposal constitutes a clarification, even though the confirmation by the offeror may result in a finding of unacceptability.[109] Further, asking for additional information about a proposed subcontractor has been found not to constitute discussions.[110] Therefore, simply because a contracting officer has requested significant amounts of information does not necessarily preclude the ability to award without discussions. As the GAO has stated on numerous occasions, one must look to the behavior of the parties to see whether discussions occurred, and if they have not, the contracting officer should consider awarding the contract on the basis of initial proposals notwithstanding the fact significant information was received through the clarification process. As was pointed out earlier, so long as the information requested did not provide the offeror the opportunity to revise or modify its proposal, affect the government's ability to determine the acceptability of the proposal, or prejudice the rights of other offerors, the fact the government obtained significant information should not preclude award without discussions.

b. Clarifications v. Discussions

From the FAR definitions and the cases, it is readily apparent that the most important difference between a clarification and the conduct of discussions is the offeror's ability to revise or modify its proposal as a result of discussions, and its inability to do so as a result of

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[109] Detroit-Armor Corp., Comp. Gen. Dec. B-225422, 87-1 CPD Para. 224 (1987); GMS Gesellschaft Fuer Metallverarbertung mbH. & Co., Comp. Gen. Dec. B-197855, 81-1 CPD Para. 4 (1981). In the latter case, the offeror confirmed it intended to deliver ceremonial swords which did not conform to the RFP. In the former case, the offeror confirmed it would not deliver a component which the government evaluation team considered necessary.

[110] Kitco, Inc., Comp. Gen. Dec. B-221386, 86-1 CPD Para. 321 (1986), at 7, n. 5.

clarifications. The rule was stated succinctly in Technical Services Corp.[111] as follows:

> Discussions occur if an offeror is afforded an opportunity to revise or modify its proposal or when the information requested and provided is essential for determining the acceptability of the proposal. Clarifications are inquiries to eliminate minor uncertainties or irregularities. While an agency may request "clarifications" when award is made on the basis of initial proposals, when it conducts "discussions" it must afford all offerors in the competitive range the opportunity to submit revised proposals.[112]

In an earlier decision, the Comptroller General stated that the "acid test of whether discussions have been held is whether it can be said that an offeror was provided to opportunity to revise or modify its proposal."[113] However, as the Technical Services case shows, one must look beyond the opportunity to revise or modify the proposal and see if the information provided is essential for determining the proposal's acceptability. If it falls into this latter category, that information, while provided only for purposes of "clarification", will nonetheless constitute discussions, requiring at a minimum a call for BAFOs.

In Emerson Elec. Co.,[114] the GAO found clarifications rather than discussions took place when the agency asked technical questions and then awarded the contract without requesting a BAFO. However, any contracting officer who submits technical questions intending to award without

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[111] 64 Comp. Gen. 245, 85-1 CPD Para. 152 (1985).

[112] 64 Comp. Gen. 245,250, 85-1 CPD Para. 152 at 8. Similar language appears in True Mach. Co., Comp. Gen. Dec. B-215885, 85-1 CPD Para. 18 (1985) at 5-6. See also Motorola, Inc., Comp. Gen. Dec. B-225822, 87-1 CPD Para. 604 (1987).

[113] New Hampshire-Vermont Health Serv., 57 Comp. Gen. 347, 78-1 CPD Para. 202 (1978).

[114] Comp. Gen. Dec. B-213382, 84-1 CPD Para. 233 (1984).

discussions by relying on Emerson Elec. Co. must take care not to ask questions which go to the heart of the proposal and to the government's ability to determine its acceptability. If he fails to take heed of this prohibition, the GAO will sustain the subsequent protest, as it did in CompuServe Data Sys., Inc.,[115] where discussions were found to have occurred after submission of BAFOs where detailed technical questions were posed to an offeror following benchmark tests. The responses to those technical questions lead to a determination that the offeror's proposal was technically unacceptable. This case differs from such cases as GMS Gesellschaft,[116] the ceremonial sword case, in that in the latter the government merely confirmed the contents of the proposal, whereas in CompuServe the government posed detailed technical questions resulting in answers which apparently required further technical analysis.

In addition, waiver of minor informalities or irregularities by contracting officers is permitted without the conduct of negotiations.[117] The FAR defines a minor informality or irregularity in the context of sealed bids as

> ... one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency,

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[115] 60 Comp. Gen. 468, 81-1 CPD Para. 374 (1981).

[116] See note 109, *supra*.

[117] Presearch, Inc., GSBCA No. 8075-P, 85-3 BCA Para. 18,453 (1985).

whichever is to the advantage of the Government.[118]

There is no similar language in FAR Part 15 concerning negotiated procurements, however much of the sealed bid definition of minor informality or irregularity can be applied to negotiated procurements, as was done in New Hampshire-Vermont Health Serv., quoted on page 32 above.

Note that many minor deficiencies which standing alone would not render a proposal unacceptable, may, when taken together, result in a finding of unacceptability, as happened in RCA Serv. Co.[119] In that case, the GAO agreed with the Army that there were so many deficiencies that overall, further discussions were necessary before a determination of technical acceptability could be made. Thus although there may be minor deficiencies or irregularities which alone could be waived, if enough of them exist in a proposal, the offeror runs the risk of finding itself outside the competitive range. This is an incentive for offerors to exercise care in their initial proposals and not to wait to clean up errors by submitting a BAFO, since a call for BAFOs may never come.

While the cases show the distinction between clarifications and discussions can sometimes be fuzzy, it is important to understand those distinctions because of the ramifications surrounding the contract award if further discussions are not held. The basic rule of thumb, whether the offeror had the opportunity to revise or modify its proposal, and whether the information obtained was necessary in order for the government to determine whether the proposal is acceptable, will be useful in most instances in allowing the contracting officer to determine whether award

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[118] FAR 14.405.

[119] Comp. Gen. Dec. B-219643, 85-2 CPD Para. 563 (1985).

can be made without further discussions. It should be noted that it is irrelevant who initiated the contact.[120] Only the factors laid out in the rule of thumb matter, not who contacted whom first.

3. Mistakes

The rules concerning mistakes in proposals are similar to those dealing with mistakes in sealed bids. FAR 15.607 requires contracting officers to examine proposals for mistakes and to verify apparent errors with the offerors:

> Contracting officers shall examine all proposals for minor informalities or irregularities and apparent clerical mistakes. ... Communications with offerors to resolve these matters is clarification, not discussions within the meaning of 15.610. However, if the resulting communication prejudices the interest of the other offerors, the contracting officer shall not make award without discussions with all offerors within the competitive range.[121]

The basic rule enunciated here, that there can be no prejudice to the other offerors, tends to limit the use of the clarification procedures. However, it is still possible to verify apparent errors and award the contract without conducting discussions. The regulations prescribe the procedure to use in such instances:

> (c) When award without discussion is contemplated, the contracting officer shall comply with the following procedure:
>
> (1) If a mistake in a proposal is suspected, the contracting officer shall advise the offeror (pointing out the suspected mistake or otherwise identifying the area of the proposal where the suspected mistake is) and request verification. If the offeror verifies its proposal, award may be made.
>
> (2) If an offeror alleges a mistake in its proposal, the contracting officer shall advise the offeror that it may withdraw the proposal or seek correction in accordance with subparagraph (3) below.

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[120] 51 Comp. Gen. 479, 481 (1972).

[121] FAR 15.607(a).

(3) If an offeror requests permission to correct a mistake in its proposal, the agency head (or a designee not below the level of chief of the contracting office) may make a written determination permitting the correction; *provided*, that (i) both the existence of the mistake and the proposal actually intended are established by clear and convincing evidence from the solicitation and the proposal and (ii) legal review is obtained before making the determination.

(4) If the determination under subparagraph (3) above cannot be made, and the contracting officer still contemplates award without discussion, the offeror shall be given a final opportunity to withdraw or to verify its proposal.

(5) Verification, withdrawal, or correction under subparagraphs (1) through (4) above is not considered discussions within the meaning of 15.610. If, however, correction of a mistake requires reference to documents, worksheets, or other data outside the solicitation and proposal in order to establish the existence of the mistake, the proposal intended, or both, the mistake may be corrected only through discussions under 15.610.[122]

The FAR section quoted above sets forth the second aspect (after lack of prejudice) of the rules concerning verification of mistakes and award without discussion - that there can be no reference to anything outside the solicitation and the proposal if award is to occur without discussion. If the parties have to refer to information beyond that appearing in the RFP and the proposal, award without discussions is improper. Since the rules are clear, relatively few cases address this subject area.

a. Clarifications Used to Ascertain Existence of Mistakes

Under the rules of FAR 15.607, mere verification of proposals is proper as a clarification, as is pointing out apparent clerical errors. Withdrawal of proposals is allowed liberally, but correction of a proposal is virtually impossible because a correction constitutes a revision which fits within the definition of discussions. Very few cases exist in the

[122] FAR 15.607(c).

clarification of mistakes area. In R&B Rubber and Engineering, Inc.,[123] the contracting officer requested the awardee of the contract to verify its price three separate times before award. Citing the DAR version of FAR 15.607, the GAO stated the verification requests were not discussions and denied the protest. Ralph Korte Construction Co.,[124] involved a protest against award to a contractor after the awardee was allowed to correct its price downward by $70,000 (the total price exceeded $16,000,000). The GAO denied the protest, stating the correction was merely a clarification which corrected a clerical error. This error was termed a "minor irregularity", susceptible of correction under FAR 15.607(a).[125] Further, the GAO found no prejudice to the protester because the protester had taken so many exceptions to the specifications that its proposal failed to conform the material terms and conditions of the RFP and should have been found unacceptable, but the GAO failed to address whether there might have been prejudice to other offerors whose proposals did conform to the RFP requirements. In a somewhat unusual case, the Armed Services Board of Contract Appeals stated there was no duty to verify proposed prices which were half the prices of prior procurements, stating DAR 3-805.1 was a regulation made for the benefit of the government, not the contractor.[126] This rather expansive reading of the regulation seems to ignore the language now contained in FAR 15.607(a) requiring contracting officers to resolve all minor informalities or

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[123] Comp. Gen. Dec. B-214299, 84-1 CPD Para. 595 (1984).

[124] Comp. Gen. Dec. B-225734, 87-1 CPD Para. 603 (1987).

[125] id. at 6.

[126] Pax Electronics Co., ASBCA Nos. 8286, 8927, 1964 BCA Para. 4350.

irregularities and apparent clerical errors as well as the FAR 15.607(c) requirement that all suspected mistakes be verified. While the regulation may be for the benefit of the government in that the verification process will aid the government in avoiding complications after award, it is also apparent that the regulation is intended to be of some benefit to the offeror because FAR 15.607(a) also requires the conduct of discussions if there is prejudice to the interests of the other offerors. It seems unlikely the GAO would agree with the ASBCA's view expressed in Pax Electronics, and given the clear language of the FAR, that decision is of questionable value today.

b. Discussions Used to Determine Whether to Correct Mistakes

The basic rules discussed above tend to limit the use of clarifications because there must be no prejudice to the interests of the other offerors and the parties can rely only on the information contained in the solicitation and the proposal. The GAO therefore is likely to find discussions occurred in most instances where more than mere price verification or clerical errors exist, and there are a few more cases dealing with this subject than with the use of clarifications.

The basic rule is clearly stated and followed in American Electronic Laboratories, Inc.[127] There the protester claimed it had included travel costs in a line item, which displaced it as the low offeror. The GAO said discussions would be required to correct the alleged mistake, because to allow it to be done by a clarification would displace the apparently low offeror. Since this would work a prejudice to that offeror, FAR 15.607((c)(5) required that discussions take place. Thus the normal

[127] 65 Comp. Gen. 62, 85-2 CPD Para. 545 (1985).

remedy would be to reopen discussions and call for a new round of BAFOs. This remedy was not recommended because the prices of the protester and offeror had already been exposed, and so the award was upheld. Similarly, the GAO, in Engineering and Professional Services,[128] held that the omission of prices is not a minor informality or irregularity and could not be corrected by clarifications because to allow this would be prejudicial to the interests of the other offerors. Most recently, in ALM, Inc.,[129] the GAO found a communication resulting in a price increase of almost 19% was not a clarification and was prejudicial to the interests of the other offerors. While an error had occurred, its correction was possible only through discussions because of the prejudice worked on the others.

Lest it be thought these rules are of recent vintage, as long ago as 1971 the Comptroller General stated that correction of an alleged mistake in a proposal should not be allowed because the standards for permitting correction had not been met.[130] The key factor leading to that conclusion was the prejudice which the other offerors would have suffered. Thus it can be seen that both the GAO and the regulations manifest great concern over maintaining the integrity of the procurement system when it comes to matters of mistakes by allowing easy verification and withdrawal of proposals, but by allowing correction without discussions only if no prejudice occurs and only if correction can be made without referring to information extraneous to the solicitation and proposal. By requiring

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[128] Comp. Gen. Dec. B-219657, 219657.2, 85-2 CPD Para. 621 (1985).

[129] 65 Comp. Gen. 405, 86-1 CPD Para. 240 (1986).

[130] 50 Comp. Gen. 547 (1971).

most corrections to be effected through negotiations, these rules insure that all parties to the procurement receive an equal chance to revise or modify their proposals.

4. Set-Asides

Prior to the passage of CICA, the ASPA exempted from the requirement for discussions "procurements in implementation of authorized set-aside programs."[131] CICA contains no similar exemption, however FAR 15.610(a)(2) still states that there is no requirement for discussions in acquisitions of the set-aside portion of a partial set-aside. Such an exemption would still appear to be appropriate if granted by another statute, such as Section 8(a) of the Small Business Act.[132] Very few cases have arisen under this exception to the requirement for conduct of discussions, and none since CICA took effect. It would appear that under CICA, agencies are more reluctant to treat set-asides any differently than non-set-aside procurements insofar as the requirement for conduct of discussions is concerned.

The pre-CICA decisions rather curtly said such set-aside procurements were not subject to the discussion requirement. They dealt with procurements under Section 8(a) of the Small Business Act (hereinafter referred to as 8(a) procurements). For example, in Arawak Consulting Corp.,[133] the GAO ruled the agency was not required to conduct competitive negotiations in an 8(a) procurement, saying:

> [W]e believe that section 8(a) of the Small Business Act, to further a socio-economic policy of fostering the economic

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[131] 10 U.S.C. Sec. 2304(g).

[132] 15 U.S.C. Sec. 637(a).

[133] 59 Comp. Gen. 522, 80-1 CPD Para. 404 (1980).

> self-sufficiency of certain small businesses, authorizes a contracting approach which in general is not subject to the competition and procedural requirements of the FPR and the statutory provisions they implement.[134]

Similar results were obtained in Boone, Young & Associates, Inc.,[135] and in Expand Associates, Inc.[136] Since CICA continues to allow 8(a) procurements,[137] these cases remain a good statement of the law today. Thus in those instances where a set-aside is mandated by law, the contracting officer must examine that statute to see whether competitive negotiations are required. In some instances, such as in 8(a) procurements, there is no requirement for discussions, but at the same time, there is no prohibition from holding them.

B. Notice in Solicitation

Both CICA and the FAR require the solicitation must advise offerors of the possibility that award may be made without discussions in order for award to be made on that basis.[138] This requirement is only logical, since

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[134] 59 Comp. Gen. 522, 524, 80-1 CPD Para. 404 at 4.

[135] Comp. Gen. Dec. B-199540.3, 82-2 CPD Para. 443 (1982).

[136] Comp. Gen. Dec. B-213425, 84-1 CPD Para. 272 (1984).

[137] 10 U.S.C. Sec. 2304(c)(5), 41 U.S.C. Sec. 253(c)(5).

[138] The CICA language at 10 U.S.C. Sec. 2305(a)(2)(B)(ii)(I); 41 U.S.C. Sec. 253a(b)(2)(B)(i) reads as follows:

> (2) In addition to the specifications ..., a solicitation ... shall at a minimum include --
>
> (B) ...
>
> (ii) in the case of competitive proposals-
>
> (I) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors, but might be evaluated and awarded without discussions with the offerors;...

FAR 15.407(d) requires inclusion of the clause found at FAR 52.215-16 in all RFPs. Paragraph (c) of that clause reads as follows:

fairness requires that every offeror know it is possible award will be made on the basis of initial proposals. Once placed on notice, an offeror ignores that notice at its peril. For example, in United States Tower Services,[139] a protest against award of a contract without discussions was denied where the solicitation contained a notice that award might occur on the basis of initial proposals received, without discussions, and the offeror took exception to the statement of work. In Computervision Corp.,[140] the protester took exception to an RFP requirement that it provide certain software support. Award was made to one of the other four offerors. The GAO denied the protest, stating that explicit exceptions taken by an offeror to the solicitation can have a decided impact on the proposal's acceptability.[141] Therefore, if an offeror decides not to present its best proposal the first time around, counting on the negotiating process to resolve deficiencies, and the solicitation contains a notice that award can be made without discussions, the offeror usually will fail to win a protest if award is made to another on the basis of the initial proposal.

A prerequisite to award without discussions, however, is the presence of that notice in the solicitation. This requirement predates the passage of CICA. The ASPA stated award without discussions could be

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(c) The Government may award a contract on the basis of initial offers received, without discussions. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

[139] Comp. Gen. Dec. B-185840, 76-2 CPD Para. 44 (1976).

[140] Comp. Gen. Dec. B-224198, 86-2 CPD Para. 617 (1986).

[141] id. at 5.

made only "where the request for proposals notifies all offerors of the possibility that award may be made without discussion".[142] Both the DAR and FPR reflected this requirement.[143] The GAO, on many occasions both prior to and since the enactment of CICA, has stated that award without discussions was proper if the notice was contained in the solicitation and the other requirements for award on the basis of initial proposals existed.[144] Further, an offeror cannot rely on a government contract specialist's oral assurances that the notice will not be enforced. A protester learned this through bitter experience in International Automated Systems, Inc.[145] The only way the notice can safely be disregarded is if it is deleted by an amendment to the solicitation.

If the government fails to include the required notice in the solicitation, it cannot make award without first conducting discussions.[146] Since both CICA and FAR require the presence of the notice in the solicitation, it will rarely fail to appear in the RFP, but if for some reason the notice is omitted, then award without discussions is improper.

Occasionally a protester has argued the presence of the notice amounted to an arbitrary refusal to negotiate. The GAO has disagreed,

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[142] 10 U.S.C. Sec. 2304(g).

[143] DAR 3-805.1(v); FPR 1-3.805-1(a)(5).

[144] See, e.g., Michael O'Connor, Inc., Comp Gen. Dec. B-186654, 76-2 CPD Para. 337 (1976); Blurton, Banks & Associates, Inc., Comp. Gen. Dec. B-211702, 83-2 CPD Para. 454 (1983); Maico Hearing Instruments, Inc., Comp. Gen. Dec. B-229925, 88-1 CPD Para. 42 (1988).

[145] Comp. Gen. Dec. B-205278, 82-1 CPD Para. 110 (1982).

[146] SIMCO, Inc., Comp. Gen. Dec. B-229964, 88-1 CPD Para. 383 (1988); Bencor-Petrifond-Casagrande, Comp. Gen. Dec. B-225408, 87-1 CPD Para. 262 (1987).

however, saying the notice provision used was consistent with the FPR.[147] Thus the notice cannot be protested on the grounds that the agency refuses to conduct negotiations. At the same time, the presence of the notice in the solicitation does not mean the agency is forbidden from conducting negotiations. The Comptroller General has stated that "even where the circumstances are present, award on the basis of initial proposals is permissive, not mandatory."[148] This means the agency retains the discretion to decide whether to conduct discussions despite the fact all conditions are present for award without discussions. The GAO generally supports the agency as long as the agency's decision has a reasonable basis.[149]

So long as the notice requirements are met, the GAO has sustained some rather unusual negotiated procurements where award was made without discussions. Frequently these procurements took the appearance of sealed bidding. For example, in RCA Corp.,[150] the agency issued an RFP, but treated the proposals as if they were bids. The proposals were publicly opened and the prices announced. RCA's proposal was rejected as being

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[147] North Am. Tel. Ass'n, Comp. Gen. Dec. B-187239, 76-2 CPD Para. 495 (1976). The notice provision involved read as follows: "The government reserves the right to make award on the basis of initial proposals and without discussion or negotiation with any or all offerors." See also National Veteran's Law Center, 60 Comp. Gen. 223, 81-1 CPD Para. 58 (1981).

[148] Windham Power Lifts, Inc./Quality Plus Equip., Inc., Comp. Gen. Dec. B-214287, 84-1 CPD Para. 278 (1984) at 2.

[149] See, e.g., Moorman's Travel Serv., Inc. - Request for Reconsideration, Comp. Gen. Dec. B-219728.2, 85-2 CPD Para. 643 (1985) at 8; Economic Consulting Services, Inc., Comp. Gen. Dec. B-229895, 88-1 CPD Para. 351 (1988).

[150] 53 Comp. Gen. 780, 74-1 CPD Para. 197 (1974).

"nonresponsive", a concept germane only to sealed bid cases. The GAO, while hardly approving of the agency's conduct, nevertheless denied the protest because the solicitation did caution the offerors that award could be made without discussions. Award to the low offeror was allowed and the procurement treated as if it had been formally advertised. The GAO felt there was no prejudice to the offerors in this case. Other cases have been less egregious, but still appeared to be conducted in a manner similar to sealed bidding. GM Indus., Inc.[151] is a rather unusual case. The agency erroneously marked the solicitation as an RFP, even though it was actually an Invitation for Bids. The GAO nevertheless upheld the agency's rejection of the protester's offer as nonresponsive because all of the criteria necessary for an award on the basis of initial proposals were present. In Consolidated Indus., Inc.,[152] the RFP did not contain any technical evaluation criteria. Rather, award was to be made "to the offeror whose proposal was 'most advantageous to the Government, price and other factors considered.'"[153] The GAO had no objection to this arrangement, since all requirements for award without discussions were met. In another case the RFP contained no evaluation criteria. The protester complained that sealed bids should have been used, but the GAO denied the protest.[154] Michael O'Connor, Inc.[155] is another instance where

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[151] Comp. Gen. Dec. B-218331, 85-1 CPD Para. 431 (1985).

[152] Comp. Gen. Dec. B-210183, 83-2 CPD Para. 249 (1983).

[153] id. at 2.

[154] Communications Technology Applications, Inc., Comp. Gen. Dec. B-218935, 85-1 CPD Para. 619 (1985) (RFP contained no technical evaluation criteria and did not require submission of technical proposals).

[155] Comp. Gen. Dec. B-186654, 76-2 CPD Para. 337 (1976).

the procurement, though issued as a negotiated procurement, was conducted as if it had been formally advertised. The GAO denied the protest, finding no prejudice to the protester because the solicitation did warn everyone award might be made without discussions, and all of the conditions necessary for such an award did exist. To grant the protest and readvertise the procurement would have amounted to an auction, which is prohibited.[156] Pacific Consol. Indus.[157] is another case where price was the award selection criterion and the appropriate notice was contained in the RFP. Based on these facts, the GAO denied the protest that an award without discussions was improper.

In other instances, the technical evaluations amounted to a dead heat, in which two offerors were rated as being essentially equal. In these instances, award made to one of the two without discussions has been upheld where the requisite notice appeared in the solicitation. In Todd Logistics, Inc.,[158] the GAO found the agency's action reasonable where two offerors were rated technically equal, adequate competition existed, discussions were determined not to be likely to change the ranking, no significant technical points needed to be discussed, and the requirement was considered to be urgent. Since the solicitation contained the notice, the protest was denied. A similar result occurred in Moorman's Travel Service, Inc. - Request for Reconsideration.[159]

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[156] id. at 7.

[157] Comp. Gen. Dec. B-228724, B-228724.2, 87-2 CPD Para. 548 (1987).

[158] Comp. Gen. Dec. B-203808, 82-2 CPD Para. 157 (1982).

[159] Comp. Gen. Dec. B-219728.2, 85-2 CPD Para. 643 (1985) (technical evaluations were very close - 0.5 points apart on 100 point scale).

It should also be noted that in one instance a vendor protested to the GAO, arguing that award was made improperly by the prime contractor without conducting negotiations. The GAO rejected the vendor's protest using the same rules concerning award without discussions that it applies to the government. The GAO concluded that since the solicitation contained a notice that award could be made without discussions, and since no discussions were in fact held with anyone, the prime contractor was not obligated to conduct discussions with the vendor.[160] Thus it would appear that similar rules concerning award without discussions apply to prime contractors when they negotiate their subcontracts. Note, however, that the GAO's review of subcontractor protests is generally limited to a determination as to whether the contractor conducted its procurement in a manner consistent with and achieving the policy objectives of the fundamental principles of federal procurement law, also called the "federal norm".[161] Thus subcontractor protests on this issue should rarely occur.

Further, where the government could award a contract without discussions because the notice and other requirements for such award existed, an award to the lowest priced offeror was held proper even if the protester's allegations that its proposal was improperly evaluated were true.[162] The GAO came to this conclusion because it felt the protester would not have been prejudiced since a more favorable price had been

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[160] CVC Products, Inc., Comp. Gen. Dec. B-224467, 86-2 CPD Para. 506 (1986).

[161] id. at 2.

[162] Nuclear Assurance Corp., Comp. Gen. Dec. B-216076, 85-1 CPD Para. 94 (1985).

offered by another offeror.

All of these cases show the lengths to which the GAO has gone to sustain awards of contracts without discussions where the legal requirements for such award existed, despite apparent errors by the procuring agency. The notice requirement is important because it tells the offerors that award can occur on the basis of their initial proposals, without discussions. By placing the offerors on notice, the government makes it much more difficult for potential protesters to complain that they were unaware award might take place without discussions, or that they were somehow prejudiced by the award. As has been seen, the GAO places a great deal of reliance on the prophylactic value of the notice. As long as the notice is present and all of the other requirements for award without discussions existed, the protester has an uphill struggle on its hands. On the other hand, if the notice was not in the solicitation, the presence or absence of the requisite conditions for award without discussions will not even be reached. Therefore the presence of the notice is a threshold question of great importance in deciding whether an award without discussions was properly made. It would appear that as long as there is sufficient warning to offerors of the possibility of award without discussions, the notice requirement will be met.

C. Disadvantages of Absence of Discussions

While awarding a contract without holding discussions can speed up the procurement process and reduce the administrative costs of conducting a source selection, contracting officers should be aware that there are also some significant disadvantages to this procedure. The most obvious disadvantage is the inability of the agency to talk to the offerors and

to explore with them the points presented in their proposals. If there are some questions or uncertainties in the proposal the contracting officer will be unable to resolve them if it cannot be done through the clarification process. Of course, if there are significant questions or uncertainties, the agency should not award the contract without conducting negotiations.[163]

Another disadvantage is the inability of the agency to engage in any price bargaining. When award is made on the basis of initial proposals, it must be made to the offeror within the competitive range whose proposal represents the lowest overall cost to the government.[164] Tradeoffs of cost and technical quality are prohibited. Thus if the contracting officer feels a better deal than that presented in the initial proposals is possible, the agency cannot make the award without first conducting discussions. The GAO encourages the conduct of discussions in order to reduce the price,[165] although FAR 15.802(b)(1) requires only that contract prices be "fair and reasonable". At least one commentator has suggested that "[w]hittling away at the price is not required and could result in an unreasonably *low* price, which violates the FAR requirement that award be made at 'a fair and reasonable price.'"[166] The regulations provide scant guidance concerning this matter, however contracting officers are likely to opt for the safe course of action, which is to

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[163] E.g., Sperry Corp., 65 Comp. Gen. 195, 86-1 CPD Para. 28 (1986).

[164] 10 U.S.C. Sec. 2305(b)(4)(A)(ii); 41 U.S.C. Sec. 253b(d)(1)(B).

[165] E.g., Metron Corp., Comp. Gen. Dec. B-227104, 87-1 CPD Para. 642 (1987), quoted on p. 24 above.

[166] Cibinic, Award on Initial Proposals: Love at First Sight, 1 The Nash & Cibinic Report, Para. 81 (1987) at 178.

conduct negotiations even when they may be unnecessary because it is extremely difficult to criticize them for holding negotiations given the strong statutory, regulatory and GAO preference for the conduct of negotiations. Nevertheless, when there is a clear winner present after submission of initial proposals, and all requisite conditions for award on the basis of initial proposals are present, the contracting officer should seriously consider going forward with the award without discussions. In such instances, the GAO is very likely to support the agency in the event of a protest.

A final problem is that if an agency has never before made award without conducting discussions and then does so, a protest is a distinct possibility despite the presence of the notice in the solicitation. It is probable the offeror never even read the notice, since it usually is buried in boilerplate in the RFP. Protests are not welcome news to agencies because if the protest is made within ten days of the award of the contract, the agency must, in almost all instances, suspend performance of the contract.[167] Rather than invite the costs and delays a protest causes, most agencies are likely to follow the path of least resistance, which in this case is to conduct discussions regardless of whether they are necessary. While unfortunate, such a course of action is understandable. However, contracting officers should consider the risks and if the advantages of making award without discussions exceed the risks of a protest (even if the agency is likely to win the protest), then the contracting officer should make the award on the basis of initial proposals. The only way for an agency to sensitize offerors to the

[167] 31 U.S.C. Sec. 3553(d).

possibility of award without discussions is to advise them of it and, in the appropriate circumstances, to make the award.

Chapter III. Specification Changes and Amendments to Solicitation

A procurement frequently does not go smoothly from issuance of a solicitation through receipt of proposals, conduct of discussions (if necessary) and award. Often requirements change, resulting in amendments to the RFP and revisions to offerors' proposals. In order to receive the award, an offeror's proposal must conform substantially to the requirements of the solicitation.[168] This includes all amendments to the RFP.

This chapter will explore the basic requirement that the offeror's proposal must conform substantially with the requirements of the solicitation. It will examine the substantial conformity requirements and show what happens when a proposal does not substantially conform to the RFP. Frequently the problem arises during the evaluation process because either the offeror did not understand what the requirements were, or because the evaluation criteria set forth in the RFP were unclear. The chapter will look at evaluation criteria and the evaluation process to see what an agency can and cannot do if it wishes to make award without conducting discussions. The discretion of the contracting officer will then be probed. As will be seen, the contracting officer possesses substantial discretion in the evaluation arena and in determining the competitive range. Treatment of unacceptable offers will follow, to see whether the contracting officer is required to conduct any discussions with such offerors. Finally, there will be a brief examination of specification ambiguities and solicitation amendments to see how the

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[168] E.g., Chemex Alaska, Comp. Gen. Dec. B-212227, 83-2 CPD Para. 586 (1983).

agency is supposed to deal with offerors who have become ensnared by such changes to the solicitation. The major theme running through this chapter is that the contracting officer can, by the determination of the competitive range, control significantly whether the conditions for award without discussions will exist.

A. Conformity with Solicitation

A fundamental requirement for contract award on the basis of initial proposals is that the proposal substantially conform to the solicitation. If the offeror has failed to meet the requirements set forth in the RFP, then an award to that offeror without conducting discussions cannot be made. On occasion agencies and offerors have used the term "responsiveness" to describe this requirement, however, responsiveness is a concept associated with sealed bids, not negotiated procurements.[169] The GAO, on many occasions, has also stated that responsiveness is not a concept normally associated with negotiated procurements.[170] However, is equally true that in order to award on the basis of initial proposals, the initial proposal must conform to the material requirements of the RFP.[171] This section will examine the ramifications of this requirement and the constraints under which the contracting officer operates should the agency

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[169] FAR 14.301(a) states, "To be considered for award, a bid must comply in all material respects with the invitation for bids." FAR 15.606(c), which deals with negotiated procurement, states that if a proposal most advantageous to the government deviates from the requirements of the RFP, the contracting officer must conduct discussions.

[170] E.g., Xtek, Inc., Comp. Gen. Dec. B-213166, 84-1 CPD Para. 264 (1984) at 2: "The concept of 'responsiveness' generally does not apply to negotiated procurements as it applies in formal advertising procurements."

[171] Universal Shipping Co., Comp. Gen. Dec. B-223905.2, 87-1 CPD Para. 424 (1987).

desire to make award on the basis of the initial proposals.

1. Variance of Offer from Solicitation

Fundamental to an agency's ability to award a contract on the basis of initial proposals is the offeror's agreement to comply with all material requirements of the RFP. The FAR states the requirement in this way:

> (c) If the proposal considered to be most advantageous to the Government (as determined according to the evaluation criteria) involves a departure from the stated requirements, the contracting officer shall provide all offerors an opportunity to submit new or amended proposals on the basis of the revised requirements; *provided,* that this can be done without revealing to the other offerors the solution proposed in the original departure or any other information that is entitled to protection (see 15.407(c)(8) and 15.610(d)).[172]

The GAO has stated the rule is as follows:

> If the most favorable initial proposal's price relates to a technical proposal which substantially varies from the solicitation's requirements, there can be no reasonable assurance that acceptance of this proposal will actually be most advantageous to the Government. ... [A]cceptance of such a proposal without discussions is "gross error."[173]

This rule does not require a finding that proposals which deviate from a material solicitation requirement must be rejected; rather, it requires that if the government desires to acquire whatever it is which the proposal contains, discussions must be conducted. If the government insists on making award on the basis of initial proposals, the only course available to it with regard to the nonconforming proposal is to find the

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[172] FAR 15.606(c).

[173] Corbetta Constr. Co. of Ill., 55 Comp. Gen. 972, 979, 76-1 CPD Para. 240 (1976) at 10. This is the denial of request for reconsideration of the original decision, found at 55 Comp. Gen. 201, 75-2 CPD Para. 144 (1975).

proposal technically unacceptable. The reason for this rule is because otherwise there is doubt whether the offeror intends to be bound by the requirements of the solicitation.[174] Fairness requires that all offerors base their proposals on the same set of requirements, and failure to do so requires either the conduct of discussions or a finding of unacceptability.

There are many examples of the GAO supporting the agency's finding of technical unacceptability where the proposal deviates from the RFP requirements. In Tracor Applied Sciences,[175] the protester took "complete exception" to a Save Harmless clause. The GAO supported the agency's rejection of the proposal, saying where an agency decides to award without discussions, the proper course is to reject an offeror's initial proposal if it takes exception to a material requirement of the RFP.[176] Other examples of deviations from material solicitation requirements have included use of a cover letter which reserved the right to negotiate price increases due to small quantity procurements,[177] an offer taking exception to certain software support requirements contained in the solicitation,[178] a telephone verification to the procuring agency that the ceremonial swords which the offeror intended to supply did not conform to the

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[174] SAI Comsystems Corp., Comp. Gen. Dec. B-189407, 77-2 CPD Para. 480 (1977).

[175] Comp. Gen. Dec. B-219735, 85-2 CPD Para. 343 (1985).

[176] id. at 3.

[177] Tiernay Mfg. Co., Comp. Gen. Dec. B-209035, 82-2 CPD Para. 552 (1982).

[178] Computervision Corp., Comp. Gen. Dec. B-224198, 86-2 CPD Para. 617 (1986).

specifications,[179] an "assumption" stated in the proposal concerning travel reimbursements which deviated from the travel reimbursement provision in the solicitation,[180] an extension of an offer beyond the expiration date contained in the offer but conditioned on a price increase,[181] and a proposal which offered fewer full time counselors than required by the solicitation.[182]

At the same time, it is possible to accept a proposal which offers innovative or novel approaches to the RFP's requirements, though it has been done by in effect creating a competitive range of one. In one case, the Comptroller General went through a rather tortured reading of the various solicitation requirements to reach the conclusion that the proposal was "responsive" to the performance and technical requirements of the RFP, if not to its manufacturing requirements.[183] In this decision, the Comptroller General used the term "responsive" to describe the proposal,[184] even though this term is not germane to negotiated procurement. What in fact was happening was there was one proposal which

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[179] GMS Gesellschaft Fuer Metallverarbertung mbH. & Co., Comp. Gen. Dec. B-197855, 81-1 CPD Para. 4 (1981).

[180] SAI Comsystems Corp., Comp. Gen. Dec. B-189407, 77-2 CPD Para. 480 (1977).

[181] Corbetta Constr. Co. of Ill., 55 Comp. Gen. 201, 75-2 CPD Para. 144 (1975), *reconsid. denied*, 55 Comp. Gen. 972, 76-1 CPD Para. 240 (1976). Since no one else had the opportunity to reprice its offer, accepting an extension conditioned on a different price without allowing the other offerors the same opportunity was unfair to the other offerors.

[182] Maschoff, Barr & Associates, Comp. Gen. Dec. B-228490, 88-1 CPD Para. 77 (1988).

[183] 45 Comp. Gen. 749 (1966).

[184] id. at 753.

was vastly superior to all the others, due to the novel approach used. Rather than ground the decision on that basis, the GAO strung together the various RFP provisions in a reading which amounted to saying that while certain specifications might not be entirely adhered to, the government was going to get a superior product which would meet its needs. Negotiations were conducted only with the one offeror. It seems that a better way to decide this case would have been to find there was no deviation from a material requirement of the solicitation and agree with the agency's finding that the proposal was vastly superior to all the others. By straying into the responsiveness area and delving into the minutiae of the specifications, the Comptroller General only succeeded in muddying the waters without providing useful guidance on how to treat proposals which stand out so clearly from the rest of the pack.

2. Evaluation Criteria and Technical Evaluation

As a general rule, the solicitation must inform offerors as to how their proposals will be evaluated.[185] After performing a technical evaluation in accordance with the stated evaluation criteria,[186] the contracting officer then determines the competitive range, that is, identifies those proposals which have a reasonable chance of being selected for award.[187] It is generally on this basis that the contracting officer will decide whether discussions are necessary. For this reason, the evaluation criteria must be clearly stated and the agency must perform the proposal evaluation in accordance with those criteria. If the

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[185] FAR 15.605(e).

[186] FAR 15.608(a).

[187] FAR 15.609(a).

evaluation criteria are unclear, then the offerors cannot know how their proposals will be evaluated, and if the agency fails to evaluate the proposals as it said it would, then it has treated the offerors unfairly. Further, the GAO has stated the overriding mandate of CICA is to increase competition, and so the competitive range should be broadened, "since this will maximize the competition and provide fairness to the various offerors."[188] At the same time, the determination of whether a proposal falls within the competitive range is viewed largely as a matter within the agency's discretion.[189]

It is quite possible that the agency's technical evaluation will find no significant technical deficiencies. In such a case, it is not required that the agency conduct technical discussions.[190] If there are no technical deficiencies in a proposal, it is proper to hold only cost discussions. This was recently illustrated in Control Data Corp.[191] In that case, the protester argued that the agency violated the FAR by failing to conduct technical discussions with it. The GSBCA denied the protest, noting,

> We conclude that the contracting officer did not violate the FAR ... in not holding technical discussions with the protester, as the contracting officer made a reasonable determination that there were no technical deficiencies in the protester's offer that could be corrected through

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[188] Consolidated Eng'g, Inc., Comp. Gen. Dec. B-228142.2, 88-1 CPD Para. 24 (1988) at 3.

[189] id.

[190] Shapell Gov't Housing, Inc., 55 Comp. Gen. 839, 76-1 CPD Para. 161 (1976); Mount Pleasant Hosp., Comp. Gen. Dec. B-222364, 86-1 CPD Para. 549 (1986); Metron Corp., Comp. Gen. Dec. B-227014, 87-1 CPD Para. 642 (1987).

[191] GSBCA No. 9297-P, 88-1 BCA Para. 20,466 (1988).

discussions.[192]

Thus it is clear that if there are no technical deficiencies in a proposal which can be corrected through discussions, a contracting officer is not required to hold technical discussions. This rule of reason avoids forcing the government to perform a useless act, and also reduces the possibility that technical leveling or technical transfusion could occur.

On the other hand, if technical deficiencies exist in a proposal, but the contracting officer determines that these deficiencies are not of a degree which requires the exclusion of the offeror from the competitive range, then discussions must be held with that offeror. Perhaps this rule is best illustrated in Sperry Corp.,[193] which involved a protest by the low priced offeror whose technical rating was fifth out of the proposals within the competitive range. The agency conducted no technical discussions with the protester before calling for BAFOs. The GAO sustained the protest, finding the omissions and deficiencies in the protester's proposal were suitable for correction, "thus mandating that technical discussions be held."[194] Therefore, where the technical evaluation discloses technical deficiencies within a proposal which is within the competitive range, a contract award on the basis of initial proposals will not normally be found to be proper.

Mere disagreement with the technical evaluation is insufficient

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[192] id. at 103,492.

[193] 65 Comp. Gen. 195, 86-1 CPD Para. 28 (1986).

[194] 65 Comp. Gen. 195, 199, 86-1 CPD Para. 28 at 7. See also Decision Sciences Corp., Comp. Gen. Dec. B-196100, 80-1 CPD Para. 357 (1980), at 3-4: "We believe, however, that since IRS regarded DSC as in the competitive range, it should have conducted discussions with DSC to try to resolve these aspects of the DSC proposal that were not clear."

grounds on which a protest can succeed. The GAO has stated its standard of review in this way:

> [W]e will not evaluate the proposals anew and make our own determination as to their acceptability or relative merits. ... However, we will examine the record to determine whether the evaluation was consistent with the evaluation criteria.[195]

Thus a protester must, in order to prevail, identify some deviation from the evaluation criteria or show the evaluation was done in a manner unfair to it. It should be noted unsupported allegations of bias receive scant sympathy from the Comptroller General.[196]

While the basic rules set forth above seem fairly straightforward, there are a number of GAO decisions which do not fit easily within the framework. The problems seem to arise most frequently when cost considerations are factored into the equation. A.R.&S. Enterprises, Inc.[197] is a good example. In this case, the solicitation listed the technical evaluation factors in descending order of importance, but did not inform the offerors of the relative importance of price in relation to those technical factors. The highest technically rated offeror was

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[195] Associations for the Educ. of the Deaf, Inc., Comp. Gen. Dec. B-220868, 86-1 CPD Para. 220 (1986) at 5.

[196] See, e.g., Westvold & Associates, Comp. Gen. Dec. B-201032, 81-1 CPD Para. 354 (1981) at 4, where the GAO said,

> Concerning Westvold's allegations of irregularities and its request for an investigation, it is not the practice of our Office to conduct investigations for the purpose of establishing the validity of a protester's unsubstantiated statements. Instead, it is the responsibility of the protester to present evidence sufficient to affirmatively establish its allegations. ... Absent independent evidence of favoritism, fraud and/or discrimination, these charges amount to mere speculation and, as such, fall short of satisfying the protester's burden of affirmatively proving its case as t this issue.

[197] Comp. Gen. Dec. B-196518, 80-1 CPD Para. 193 (1980).

also the highest priced offeror. The agency proposed to make award to the lowest priced offeror, whose technical proposal was rated twenty per cent lower than that of the protester. The GAO sustained the protest, criticizing the agency's failure to state the relative importance of price in the evaluation scheme. Because price was listed after the technical factors, the GAO felt offerors were prejudiced because they reasonably could conclude that price was not controlling between technically acceptable offers and that technical superiority would be considered.[198] More recently the GAO stated its position in this way: "In our opinion, however, it is unreasonable to conclude that a technically acceptable offer should be excluded from the competitive range without consideration of price."[199] This case involved an offeror whose proposal was the lowest priced, yet was excluded from the competitive range without a determination that it was technically unacceptable. Thus it appears that if a proposal is technically acceptable, the agency must look at the proposed price before making a determination as to whether the proposal is within the competitive range. If a cost contract is involved, then the agency must examine the proposal for cost realism before making the competitive range determination.[200]

In addition to the cost considerations, there are a number of cases which do not fit well within the rule at all. These cases involve solicitations which stated no evaluation criteria at all. These cases,

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[198] Id. at 3-4.

[199] Howard Finley Corp., 66 Comp. Gen. ___, 87-2 CPD Para. 4 (1987) at 4.

[200] Kinton, Inc., 67 Comp. Gen. ___, 88-1 CPD Para. 112 (1988).

discussed on pages 48 and 49 above, took on the appearance of sealed bidding, yet the GAO did not object to the procurements. The most egregious instances appear to be Consolidated Indus., Inc.[201] and Communications Technology Applications, Inc.[202] In both cases no technical evaluation criteria were set forth in the RFP, and in the latter case technical proposals were not even required. Nevertheless, the GAO held the contracts were awarded properly in each case. It did not find any requirement existed to request and evaluate technical proposals. These cases simply do not comport with what is considered the norm in negotiated procurements. While it is true that FAR 15.605 does not specifically require RFPs to contain technical evaluation factors, it seems that if price is to be the salient factor in deciding to whom to award the contract, then sealed bids should be used. In this regard, CICA states that sealed bids should be used where time permits, award will be made on the basis of price and price-related factors, discussions are not necessary, and there is a reasonable expectation of receiving more than one bid.[203] Thus these cases must be viewed as anomalies. While the GAO may not object to negotiated procurements in which the solicitation contains no technical evaluation criteria or even a requirement for a technical proposal, if an agency wishes to procure goods or services based strictly on price or price-related factors, the appropriate procedure to use is sealed bids, not negotiations. Protests to the effect that the agency improperly used negotiations rather than sealed bids can be denied

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[201] Comp. Gen. Dec. B-210183, 83-2 CPD Para. 249 (1983).

[202] Comp. Gen. Dec. B-218935, 85-1 CPD Para. 619 (1985).

[203] 10 U.S.C. Sec. 2304(a)(2); 41 U.S.C. Sec. 253(a)(2).

because the defect in the solicitation is apparent on its face, and the GAO rules require such protests to be filed prior to the time for receipt of the proposals.[204] Therefore, while tailoring an RFP in such a way as to make it appear to function exactly as an Invitation for Bids is not good procurement practice, unless someone protests this prior to the time for receipt of proposals, the GAO is unlikely to hear the protest, preferring instead to read CICA and the FAR broadly and find such a practice is not prohibited. However, the better practice, in both awards without discussions and awards after holding discussions, is for the agency to state the technical evaluation criteria in the solicitation, state the importance of cost or price as it relates to technical quality, and adhere to the stated evaluation scheme when reviewing the proposals. This is illustrated by Technical Micronics Control, Inc.,[205] a case where the agency went too far. The solicitation for operation and maintenance of a government facility contained no evaluation factors and requested no technical or cost proposals. Only an award fee structure was required to be submitted. The GAO concluded this was a competition in form, but not in substance, because in the absence of technical and cost proposals, there was no basis for any meaningful negotiations. Thus the offerors must be given some basis beyond merely a fee structure on which to compete in order to satisfy proper negotiated procurement practice.

3. Contracting Officer Discretion

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[204] GAO Bid Protest Regulations, 4 CFR Sec. 21.2(a) (1988). The GAO cited to the previous version of this regulation in Consolidated Indus., Inc., Comp. Gen. Dec. B-210183, 83-2 CPD Para. 249 (1983) at 2-3 in refusing to hear the protester's assertion of unduly restrictive specifications and delivery schedule.

[205] Comp. Gen. Dec. B-206843, 82-2 CPD Para. 221 (1982).

The contracting officer has a significant amount of discretion in the source selection process, particularly in setting the competitive range and in deciding whether to make award on the basis of initial proposals. In Bruno-New York Indus. Corp.,[206] a pre-CICA case, the GAO said, "The decision whether award on the basis of initial proposals will result in a 'fair and reasonable' price is essentially within the discretion of the contracting officer."[207] Metron Corp.,[208] a decision made under the provisions of CICA, comes to a similar conclusion, that is, that the agency has the discretion to decide whether to award without discussions when the conditions for such an award otherwise exist.

It follows, therefore, that the contracting officer has the discretion to control the content and the extent of any discussions. For example, in Automated Business Sys. & Services,[209] a protester claimed award should have been made without discussions. The GSBCA dismissed the protest, saying the contracting officer had the discretion to request updated technical proposals because of the passage of time, and that the contracting officer had the discretion, under FAR 15.610(b), to control the content and extent of discussions.

Just as the contracting officer has the discretion to conduct discussions, a number of decisions state equally firmly that when conditions exist for award without discussions, it is within the contracting officer's discretion to make the award on that basis. For

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[206] Comp. Gen. Dec. B-184679, 76-1 CPD Para. 36 (1976).

[207] id. at 2.

[208] Comp. Gen. Dec. B-227014, 87-1 CPD Para. 642 (1987).

[209] GSBCA No. 8888-p, 87-2 BCA Para. 19,790 (1987).

example, the Comptroller General stated in T. Warehouse Corp., "The decision to award on initial proposals is discretionary with the procuring activity, and an offeror has no legal right to award on its initial proposal."[210] Similar statements appear in Townsend & Co.,[211] Kisco Co.,[212] Bruno-New York Indus. Corp.,[213] and 52 Comp. Gen. 425 (1973). Therefore protests to the effect that award should or should not have been made on the basis of initial proposals will fail if they do not identify some deviation from the statute, regulations or solicitation.

An example of the exercise of this discretion is awards without discussion where time constraints militated against the use of discussions. In Raytheon Co.,[214] the time for delivery did not allow for discussions. The GAO upheld the award. While the solicitation did contain the required notice that award might occur on the basis of initial proposals, which alone made the award proper, the GAO went on to say, "In any event, notification in an RFP of the possibility of award on the basis of initial proposals is not a prerequisite to such award where, as here, discussions are dispensed with for reasons of urgency."[215] The fact the protester's proposal was viewed as unacceptable may have assisted the GAO in reaching this conclusion. In an even more stark case, the agency said

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[210] Comp. Gen. Dec. B-217111, 85-1 CPD Para. 731 (1985) at 4.

[211] Comp. Gen. Dec. B-211762, 84-1 CPD Para. 352 (1984).

[212] Comp. Gen. Dec. B-216953, 85-1 CPD Para. 334 (1985).

[213] Comp. Gen. Dec. B-184679, 76-1 CPD Para. 36 (1976).

[214] Comp. Gen. Dec. B-184375, 76-1 CPD Para. 55 (1976), *aff'd. on reconsid.*, Comp. Gen. Dec. B-184373, 76-1 CPD Para. 288 (1976).

[215] 76-1 CPD Para. 55 at 3.

it awarded without discussions because of delays it encountered in issuing the RFP and the production time involved in supplying the items. The GAO denied the protest, saying, "Delphi [the protester] has offered no evidence to refute the agency's position in this respect. We therefore have no basis to conclude that the contracting officer's decision to award without discussions was improper and not in conformance with DAR 3-805.1(iii)..."[216] It thus appears that urgency is grounds for awarding a contract without discussions even if the requirements for such award, including notice, do not exist. However, reliance on these cases must be done gingerly, since they both were decided before the enactment of CICA with its more stringent requirements. In addition, a pre-CICA case also stated that urgency was not a reason to limit negotiations.[217] Note that CICA authorizes use of noncompetitive procurements when

> the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals[218]

Even under these circumstances, the contracting officer is required to solicit as many sources as is practicable,[219] and an approval is required from a higher authority, although it can come after the fact.[220] Given these constraints, the pre-CICA decisions, while not expressly overruled,

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[216] Delphi Indus., Inc., Comp. Gen. Dec. B-194802, 79-2 CPD Para. 239 (1979) at 4.

[217] 46 Comp. Gen. 191 (1966).

[218] 10 U.S.C. Sec. 2304(c)(2); 41 U.S.C. Sec. 253(c)(2).

[219] 10 U.S.C. Sec. 2304(e); 41 U.S.C. Sec. 253(e).

[220] 10 U.S.C. Sec. 2304(f); 41 U.S.C. Sec. 253(f).

do not tell the complete story. Award without discussions on the basis of urgency remains possible, but CICA constrains the contracting officer's discretion to do so by requiring a supporting rationale and approval from higher authority.

The more common exercise of contracting officer discretion occurs in determining the competitive range, that is, identifying those proposals which have a reasonable chance of receiving the award. As was stated earlier,[221] the agency has considerable discretion in conducting its evaluation. Once the evaluation is completed, the competitive range is determined. Both the General Services Board of Contract Appeals and the GAO have stated competitive range determinations lie within the agency's discretion. In Phoenix Associates, Inc.[222] the Board stated that contracting officers have discretion in determining whether a proposal falls within the competitive range, and "[w]e will not disturb that determination unless the protester can demonstrate that the determination is unreasonable."[223] The GAO has taken a similar position in High Plains Consultants,[224] where the GAO said,

> [W]e have held that determination of competitive range is primarily a matter of procurement discretion which will not be disturbed by our Office in the absence of a clear showing that such determination was an arbitrary abuse of discretion or in violation of procurement statutes or regulations.[225]

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[221] See Section 2, "Evaluation Criteria and Technical Evaluation", *supra*.

[222] GSBCA Nos. 9190-P, 9251-P, 88-1 BCA Para. 20,455 (1988).

[223] id. at 103,451.

[224] Comp. Gen. Dec. B-215383, 84-2 CPD Para. 418 (1984).

[225] id. at 3. See also Consolidated Eng'g, Inc., Comp. Gen. Dec. B-228142.2, 88-1 CPD Para. 24 (1988).

It is possible for a contracting officer, through the competitive range determination, to effectively reduce the competitive range to a single offeror and make award to that offeror without further discussions on the basis that only the single offeror was within the competitive range. The GAO has confronted this situation several times and has decided cases both in favor of the protester and in favor of the government. The major theme emerging from the cases is that while a competitive range determination of one is not *per se* improper, the GAO will examine such determinations closely.

In some instances, the GAO has upheld contract awards where the competitive range determination left only one offeror eligible for award. In United Computing Sys., Inc.,[226] a competitive range determination leaving only one offeror within the competitive range was supported. The Comptroller General said his office "very scrupulously reviews agency determinations that result in a competitive range of one since Federal procurement laws and regulations require maximum practical competition",[227] and found the agency's actions justifiable because the protester would have had to halve its price and significantly improve its technical score. The awardee received a score of 100 out of a possible 100, while the protester received a score of 67.4 and the only other offeror's score was 51.9. In such a classic case of clear superiority on the part of one offeror, the GAO's decision is understandable, since going forward with discussions and BAFOs would have been a waste of everyone's resources.

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[226] Comp. Gen. Dec. B-204045, 81-2 CPD Para. 247 (1981).

[227] id. at 3.

In All Star Dairies Inc.,[228] the GAO again upheld an agency competitive range determination which left only one offeror within the competitive range. The GAO once again stated it would more closely examine such determinations, but found the agency determination proper because the protester took exception to a material solicitation requirement (the size of the containers in which fruit drinks were to be delivered), and so was found to be technically unacceptable. While the decision is silent on the subject, it appears the protester and awardee were the only two offerors. Again, this decision is logical. If only one offeror meets the requirements of the RFP, then an agency competitive range determination of one is proper. An award to the only offeror found to be in the competitive range was also upheld in Convex Computer Corp.,[229] where the only other offeror took exception to a material RFP requirement, thus rendering its proposal unacceptable.

On the other hand, the GAO has also sustained protests where there was a competitive range determination of one. In National Health Services, Inc.,[230] the contracting officer never made a formal competitive range determination, but his actions appeared to create a competitive range of one. The GAO, again stating that it closely scrutinizes such determinations, found the agency actions improper. The lack of formal determination and the fact there were eight offerors had a major impact on the GAO's reasoning. By failing to follow the correct procedures, the GAO found the agency's contacts with the awardee constituted discussions,

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[228] Comp. Gen. Dec. B-209188, 83-1 CPD Para. 107 (1983).

[229] Comp. Gen. Dec. B-225583, 87-1 CPD Para. 296 (1987).

[230] Comp. Gen. Dec. B-186186, 76-1 CPD Para. 401 (1976).

and since the agency failed to conduct discussions with all offerors in the competitive range, the award was improper. A similar result occurred in ICF, Inc.[231] There ten offerors submitted proposals in response to the RFP, with the protester being rated first technically, but eighth in price. The contracting officer eliminated everyone but the second rated offeror from the competitive range, because it was the second low offeror (the tenth rated offeror had the lowest price) and was only eight points lower than the protester and 22 points higher than the third rated offeror. In sustaining the protest, the GAO said

> The principle [that price or cost becomes determinative where proposals are essentially equal] does not provide an appropriate rationale for eliminating a higher technically rated but higher priced proposal from the competitive range, particularly where it leaves only one offeror in the competitive range, since the very purpose of the flexible negotiation procedures is to secure the most advantageous contract for the Government, price and other factors considered. [citation omitted] The fact that technical ratings are not likely to change because there are no technical matters for discussions does not change the situation since, as ICF points out, proposed costs may indeed be reduced as a result of cost discussions and a request for best and final offers. ...[232]

In this case two offerors were very close technically but over seventy per cent apart on price. The GAO seems to have felt conducting discussions would have reduced the ultimate contract price. While this may be true, only two offerors were technically competitive, and one of those two was so much higher in price that it seems discussions would not have resulted in award to it. Therefore, it is difficult to see what purpose would be served by conducting cost discussions. It may be that throwing nine

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[231] 61 Comp. Gen. 347, 82-1 CPD Para. 339 (1982).

[232] 61 Comp. Gen. 347, 349, 82-1 CPD Para. 339 at 4.

offerors out of the competitive range was simply more than the Comptroller General was willing to accept. However, the GAO denied a protest where only one of five offerors submitted a proposal which was acceptable. The GAO approved the agency's decision to conduct negotiation to raise some of the other proposals to an acceptable level rather than set a competitive range of one.[233] This case seems to reflect the GAO's preference for conducting discussions and the distaste for a competitive ranges of only one offeror.

As has been pointed out earlier, the failure to eliminate an offeror from the competitive range resulted in a decision against the government before the GSBCA. In SMS Data Products Group, Inc.,[234] the Board criticized an agency for failing to exclude the protester from the competitive range sooner, in violation of FAR 15.609(c).[235] This failure proved costly to the agency, since the Board awarded the protester its attorney fees, the costs of filing and pursuing the protest, and any proposal preparation costs incurred after the time it should have been eliminated from the competitive range.[236] Thus it can be seen that the contracting officer's failure to exercise discretion can be as costly to the agency as the improper exercise of discretion. The GAO has yet to

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[233] Security Assistance Forces & Equip. Int'l, Inc., Comp. Gen. Dec. B-186428, 76-2 CPD Para. 293 (1976).

[234] GSBCA No. 8589-P, 87-1 BCA Para. 19,496 (1986).

[235] This section reads as follows:

> The contracting officer shall notify in writing an unsuccessful offeror at the earliest practicable time that its proposal is no longer eligible for award (see 15.1001(b)).

[236] 87-1 BCA Para. 19,496 at 98,539.

sustain a protest that a contracting officer improperly failed to eliminate an offeror from the competitive range.

The upshot of the decisions is contracting officers cannot make award on the basis of initial proposals by simply eliminating from the competitive range all offerors save the one to whom they wish to make award. Any decision to make wholesale deletions from the competitive range will be viewed suspiciously. If a competitive range of one is created, the contracting officer must document the reasons adequately in order to prevail in any protest.

4. Unacceptable Proposals

A fundamental rule of any negotiated procurement is that there is no requirement that the government conduct discussions with offerors whose proposals are unacceptable and so fall outside the competitive range.[237] The GAO put the reason behind the rule this way in Marvin Eng'g Co.:[238]

> Although a basic goal of negotiations is to point out deficiencies so that offerors in the competitive range may revise their proposals, there is no obligation on the agency's part to conduct discussions with an offeror whose initial proposal is so deficient that it is excluded from the competitive range.[239]

The GSBCA followed similar logic in Compuline Int'l, Inc.,[240] where it denied a protest against an award made on the basis of initial proposals in part because the protester's proposals contained technical

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[237] See FAR 15.609(b), which reads, "If the contracting officer ... determines that a proposal no longer has a reasonable chance of being selected for contract award, it may no longer be considered for selection."

[238] Comp. Gen. Dec. B-214889, 84-2 CPD Para. 15 (1984).

[239] Id. at 6.

[240] GSBCA No. 8966-P, 87-2 BCA Para. 19,938 (1987).

deficiencies.

Where a proposal contains deficiencies which cannot be remedied, the proposal may be found technically unacceptable and removed from the competitive range.[241] If correction of the deficiencies would require virtually a new proposal, the agency is justified in eliminating that offeror's proposal from the competitive range and awarding the contract to another offeror without further discussion.[242] The fact the proposal which is being eliminated represents a lower price than that of the eventual awardee does not mean the agency cannot remove it from the competitive range. For example, in Pease & Sons, Inc.,[243] the second lowest priced proposal was eliminated from the competitive range and award was made to a higher ranked, higher priced offeror. The protester argued that CICA requires discussions be held with "all" offerors.[244] The GAO rejected this argument, saying the agency did conduct discussions with the two offerors who were found to be in the competitive range, citing FAR 15.610(b), which requires the conduct of discussions with all responsible offerors who submit proposals within the competitive range. In some instances, the rankings can be quite stark, as was the case in Space Age Surveyors,[245] where the protester received a technical score of 18 out of

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[241] E.g., Mictronics, Inc., Comp. Gen. Dec. B-228404, 88-1 CPD Para. 185 (1988).

[242] Lake Hartwell Marine Constr. Co., Comp. Gen. Dec. B-226387, 87-1 CPD Para. 524 (1987).

[243] Comp. Gen. Dec. B-220449, 86-1 CPD Para. 288 (1986).

[244] The protester cited 41 U.S.C. Sec. 253b(d)(1)(B) for its proposition, however this section of CICA authorizes award without discussions and makes no mention of discussions with "all" offerors.

[245] Comp. Gen. Dec. B-199634, 80-2 CPD Para. 355 (1980).

a possible 100 but was the lowest price offeror, whereas the awardee received a score of 98.75. The GAO had no difficulty finding the agency's refusal to conduct discussions with the technically unacceptable protester was proper.

Application of this rule can lead to apparently harsh results. In All Star Dairies, Inc.,[246] the offeror's lower priced proposal was found technically unacceptable because it took exception to a material requirement of the RFP. With its elimination, there was only one offeror remaining within the competitive range. Nevertheless, the GAO upheld the award, saying discussions are only required to be held with those offerors within the competitive range. In Maschoff, Barr & Associates,[247] the otherwise low cost, highest evaluated proposal was found to be excluded properly from the competitive range because instead of offering four full-time counselors, as required by the solicitation, the offeror proposed to use only one full-time counselor. It seems that in cases such as these, the agency should have conducted discussions to resolve the problems in otherwise acceptable proposals which offer the lowest price to the government. While this may seem to be a reasonable course of action, the GAO says it is not required by either the statute or regulations, and denies the protests. These cases show that if the conditions for award without discussions do exist, then notwithstanding the fact a low cost, high rated proposal falls outside the competitive range, award on the basis of initial proposals is proper. Contracting officers should examine all proposals submitted in response to a solicitation to insure they meet

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[246] Comp. Gen. Dec. B-209188, 83-1 CPD Para. 107 (1983).

[247] Comp. Gen. Dec. B-228490, 88-1 CPD Para. 77 (1988).

all RFP requirements. Otherwise meritorious offers which fail to comply with all material solicitation requirements may be excluded from the competitive range and award may be made without discussions, although such a course of action may represent poor business judgment.

Further, it is not necessary for a proposal to be technically unacceptable to be removed from the competitive range. If the proposed price is so much higher than that of the other offerors as to have virtually no chance for award, a proposal may be eliminated for that reason. In Enviro Control, Inc.,[248] an offeror was excluded from the competitive range because of marginal technical acceptability and relative high cost. The GAO supported this decision as a reasonable exercise of agency discretion. An even stronger case is Informatics Gen. Corp.[249] There, the offeror's proposal was found technically acceptable, but was excluded from the competitive range because its price was so far out of line relative to the other offers that it was viewed as having no reasonable chance for award. The GAO supported the agency's decision, saying, "Even a technically acceptable proposal may be determined to be outside of the competitive range if there is no reasonable chance that it will be selected for award."[250] Finally, in Tracor Marine, Inc.,[251] the GAO stated that a technically acceptable proposal could be excluded from the competitive range when the proposed cost was substantially higher than the cost of the other technically acceptable proposals and the agency's

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[248] Comp. Gen. Dec. B-205722, 82-1 CPD Para. 333 (1982).

[249] Comp. Gen. Dec. B-210709, 83-2 CPD Para. 47 (1983).

[250] Id. at 3.

[251] Comp. Gen. Dec. B-222484, 86-2 CPD Para. 150 (1986).

cost estimate when the agency decides the proposal has no reasonable chance of being selected for award. Therefore an offeror who "gold plates" its proposal, running up the cost, runs a genuine risk of being found ineligible for award even though its proposal is technically acceptable. Offerors should keep this in mind when submitting proposals. Under the rules of award without discussions, it is not necessarily the best technical proposal which will receive the award; it is the best technical proposal within the competitive range and offering the lowest overall cost to the government which will win the competition.

It should be noted these same rules apply to the evaluation of alternate proposals. If an alternate proposal is not acceptable, the procuring agency is not required to conduct discussions with the offeror concerning that proposal.[252]

B. Ambiguities in Specifications and Amendments

Critical to the concept of award without discussions (and to fairness in general) is that all offerors understand what the solicitation requires. Everyone must be proposing to furnish the same goods or services. Therefore, if ambiguities exist, the proper course of action is not to award on the basis of initial proposals, but to conduct discussions. Few cases deal with specification ambiguities or solicitation amendments. This may be because if an amendment is issued to the specification, it can be argued discussions took place. Since offerors are given to opportunity to revise or modify their proposals as

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[252] Systems Eng'g Associates Corp., Comp. Gen. Dec. B-228047, B-228904, 87-2 CPD Para. 427 (1987).

a result of the amendment, discussions occur by definition.[253]

As for ambiguities, just as ambiguities in proposals require the conduct of discussions, so too should ambiguities in the specifications when they are discovered prior to contract award. Once a contract is awarded, alleged deviations from the specifications are a matter of contract administration which the GAO will not consider as part of a protest.[254] Prior to award, ambiguities must be addressed. The cases, however, all seem to deal with ambiguities in the proposals. The primary concern is that the government understand what it is that is being offered. For example, in Chemex Alaska,[255] the GAO said, "Where an offer is unclear, containing inconsistent or ambiguous responses to specific RFP requirements, it becomes uncertain what the offeror is proposing to furnish and what the government is contracting for."[256] In such instances the government is required to conduct discussions rather than award on the basis of the initial proposals. Similarly, if it is clear from the proposals that the offerors do not understand some material requirement of the solicitation, then discussions are appropriate. How the government is to know the offerors are confused depends on the circumstances. In Coventry Climax Engines, Ltd.,[257] the GAO said that a wide disparity in prices alone did not indicate that any offeror misconstrued the requirements. Thus it seems more than a wide range of offered prices is

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[253] See the discussion in Chapter II, Section A.1, above.

[254] Xtek, Inc., Comp. Gen. Dec. B-213166, 84-1 CPD Para. 264 (1984).

[255] Comp. Gen. Dec. B-212227, 83-2 CPD Para. 586 (1983).

[256] Id. at 2.

[257] Comp. Gen. Dec. B-228318, 88-1 CPD Para. 66 (1988).

needed before the contracting officer is put on notice that the specifications may be ambiguous. When an ambiguity is suspected, the contracting officer may conduct discussions to resolve it, or, if a mistake is suspected, use the mistake procedures of FAR 15.607, discussed in Chapter II, Section A.3 above, to attempt to resolve them. It should also be noted that specification ambiguities often result in increased costs to the government after award because if the contractor's interpretation of the ambiguous specification is reasonable, then it may be entitled to the extra costs it incurs if the government demands the contractor perform in accordance with the government interpretation.[258]

[258] See generally, J. Cibinic, Jr. and R.C. Nash, Administration of Government Contracts 311-312 (2d. ed. 1985).

Chapter IV. Lowest Overall Cost to the Government

Under CICA, award of a contract without discussions may be done only where

> it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the United States.[259]

This requirement is carried into the FAR, with the further requirement that the award be at fair and reasonable prices.[260] This requirement for award on the basis of initial proposals to be at the lowest overall cost to the government is one of the major changes CICA made to the rules concerning contract award on the basis of initial proposals. This chapter will explore what is meant by this requirement that award result in the lowest overall cost to the government. Various methods of determining whether an award will result in the lowest overall cost to the government will be examined, including the use of prior cost experience. Next, the differences between the CICA language quoted above and the previous ASPA language, which allowed for awards on the basis of initial proposals where

> it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices...[261]

The difference between "lowest overall cost to the United States" and "fair and reasonable prices" will be analyzed. Finally, the impact of late price modifications to proposals by offerors will be explored to see

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[259] 10 U.S.C. Sec. 2305(b)(4)(A)(ii); 41 U.S.C. Sec. 253b(d)(1)(B).

[260] FAR 15.601(a);(3).

[261] 10 U.S.C. Sec. 2304(g).

how they affect the ability of the contracting officer to make award without conducting discussions.

A. Definition

CICA requires that award without discussions be made where it is determined that such award will result in the lowest overall cost to the government, but the statute gives no definition of this term. The legislative history of the statute sheds no light on the meaning of "lowest overall cost". It is interesting to note that until the Conference Committee met, the Senate bill always required award at "fair and reasonable prices".[262] The House bill, as part of its definition of "full and open competition", required that the contract be entered into only after sufficient competition had been obtained "to ensure that the Government's requirements are filled at the lowest possible price given the nature of the product or service being acquired."[263] Apparently the Conference Committee picked up on this language as part of its adoption of the House language concerning "full and open competition" as opposed to the Senate language, which required "effective competition".[264]

Thus it is unclear whether an agency can look to factors other than the price quoted in the proposal in determining whether that proposal represents the lowest overall cost to the government. It has been up to the GAO, through its bid protest decisions, to decide that Congress intended to allow agencies to look at price-related factors as part of the

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[262] 130 Cong. Rec. S.5021 (daily ed. April 30, 1984). This was the last iteration of the Senate bill prior to its passage by the Senate.

[263] H.R. 5184, 98th Cong., 2d Sess Sec. 202(j)(1)(A)(iv) (1984).

[264] See H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1422, 1429 (1984).

agency evaluation of price. Aside from the quoted price, other items can have an impact upon the price the government ultimately pays for goods or services, such as transportation costs and the cost of maintaining an item over its life expectancy. This section will examine some of these price-related factors to see whether an agency can include them in determining which proposal actually embodies the lowest overall cost to the government.

1. Price

The simplest method to determine which proposal price is the lowest is to look only at the price quoted in the proposal. This is commonly done, but the GAO firmly requires that if award is to occur without discussions, then the award must be made to the lowest priced proposal within the competitive range. In Hall-Kimbrell Envtl. Services, Inc.,[265] the GAO stated,

> In our view, this provision of CICA [10 U.S.C. 2305(b)(4)(A)(ii) and 41 U.S.C. 253b(d)(1)(B)] prohibits agencies from accepting an initial proposal that is not the lowest considering only cost and cost-related factors listed in the RFP, where there is a reasonable chance that by conducting discussions, another proposal would be found more advantageous to the United States under the evaluation factors listed in the solicitation.[266]

This clear statement of what is meant by the "lowest overall cost" to the government has been followed consistently by the GAO. For instance, in Pride Computer Serv., Inc.,[267] an award to the third low offeror without

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[265] 66 Comp. Gen. ___, 87-1 CPD Para. 187 (1987).

[266] 66 Comp. Gen. ___, 87-1 CPD Para. 187 at 2-3. Award in this case was made to the fifth lowest priced offeror without discussions, and the GAO found this to violate CICA.

[267] Comp. Gen. Dec. B-227805, 87-2 CPD Para. 302 (1987).

holding discussions was held to be improper. In Meridian Corp.,[268] a protest against an award to the second low offeror was sustained. The GAO stated, "By its express use of the term 'lowest overall cost,' CICA prohibits an agency from accepting an initial proposal, ... where there is a lower cost technically acceptable proposal ... in the competitive range."[269] Thus it is readily apparent that the GAO will not support an award to anyone other than the low offeror where no other price-related evaluation criteria are set forth in the solicitation. Tradeoffs between cost and technical quality will not be supported by the GAO where award occurs on the basis of the initial proposals.[270]

In addition to the proposal offering the lowest overall cost to the government, there must also be full and open competition for there to be an award without discussions. This rule, using differing language, predates CICA. In 1973 the Comptroller General supported an agency's decision to hold discussions where adequate price competition was felt not to have existed.[271] More recently, the GAO upheld an award without discussions where five proposals were received, two of which were incomplete, finding adequate price competition existed.[272] In a decision under CICA, adequate price competition was found to exist when three

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[268] 67 Comp. Gen. ___, 88-1 CPD Para. 105 (1988).

[269] 67 Comp. Gen. ___, 88-1 CPD Para. 105 at 3-4.

[270] See, e.g., Pan Am Support Services, Inc. - Request for Reconsideration, 66 Comp. Gen. ___, 87-1 CPD Para. 512 (1987); Training and Information Services, Inc., 66 Comp. Gen. ___, 87-1 CPD Para. 266 (1987); Sperry Corp., 65 Comp. Gen. 195, 86-1 CPD Para. 28 (1986).

[271] 53 Comp. Gen. 5 (1973).

[272] Westvold & Associates, Comp. Gen. Dec. B-201032, 81-1 CPD Para. 354 (1981).

proposals were within the competitive range,[273] and adequate price competition appears to have been assumed to exist where two offerors submitted proposals in Maico Hearing Instruments, Inc.[274] Thus, as long as two offerors are competing independently for the contract, it appears that the GAO will assume there was adequate price competition. Regardless of the number of competitors, adequate price competition is a prerequisite to award on the basis of initial proposals.

Where cost contracts are contemplated, the GAO appears to go a step further. Before it will agree that a proposal offers the government the lowest overall cost, the GAO requires that the agency conduct an analysis of the proposal's cost realism. In GP Taurio, Inc.,[275] a protest was denied where the agency rescored the proposals to reflect their cost realism. This changed the dollar figures from those appearing in the proposals, and altered the rankings somewhat. The agency then awarded a cost plus award fee contract without discussions. The GAO upheld the agency's action, pointing out to the protester that the award was based not on the proposed costs, but those costs adjusted for cost realism, and did not object to this procedure.[276] The GAO adopted an even stronger position in Kinton, Inc.,[277] where an award of a cost reimbursement contract without discussions and without analysis of the proposals' cost realism was found to be improper. Citing GP Taurio, the Comptroller

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[273] ICSD Corp., Comp. Gen. Dec. B-222478, 86-2 CPD Para. 37 (1986).

[274] Comp. Gen. Dec. B-229925, 88-1 CPD Para. 42 (1988).

[275] Comp. Gen. Dec. B-222564, 86-2 CPD Para. 90 (1986).

[276] id. at 5.

[277] 67 Comp. Gen. ___, 88-1 CPD Para. 112 (1988).

General stated,

> [W]here, as here, the RFP contemplates the award of a cost-type contract, the agency is required to analyze each offeror's proposed costs for realism. [citing GP Taurio]
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> ***
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> Thus, we think that it was improper for the agency to make award without a more detailed cost analysis of proposals or without holding discussions regarding offerors' proposed staffhours and costs.[278]

The rationale behind this rule is to eliminate as much cost uncertainty as possible before contract performance begins. Thus it behooves an agency to conduct an analysis of the cost realism of each proposal within the competitive range where a cost type contract will result, and where the agency contemplates making the award without discussions.

Further, where it is unclear whether accepting the proposal will result in the lowest overall cost to the government, discussions are required. This is illustrated well in Hartridge Equip. Corp.[279] There prices could be quoted with and without first article testing. The protester quoted the lowest price without first article testing and made no offer with first article testing. The GAO sustained the protest against contract award without discussions to the offeror with the lowest price with first article testing, saying that discussions were necessary since acceptance of the protester's offeror would have resulted in a lower price. In Kinton, Inc., the GAO put it this way:

> When an agency is faced with circumstances where an initial proposal may not reflect the lowest overall cost, the agency should conduct discussions to enable it to obtain the actual lowest overall cost or to otherwise determine the proposal most advantageous to the government under the evaluation

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[278] 67 Comp. Gen. __, 88-1 CPD Para. 112 at 4-5.

[279] Comp. Gen. Dec. B-228303, 88-1 CPD Para. 39 (1988).

factors listed in the solicitation.[280]

This rule was recently followed in a case where the Veteran's Administration made award of a contract without discussions, but decided to hold discussions after a protest was filed. The problem was that the solicitation's prescribed fee structure was dependent on the total sales volume of services involved, and without that sales volume, it was not possible to determine which proposal would actually result in the lowest overall cost. The Veteran's Administration determined that as a result of this variable fee arrangement, award without discussions could not be made under CICA. The GAO agreed with this analysis.[281] Therefore, an agency should conduct discussions if there is any doubt as to the ultimate cost to the government, and this is most likely to occur with cost type contracts. Hence, where any cost type contract will result, at a minimum an analysis of the cost realism is necessary. Where other types of contracts are involved, if the pricing structure results in an indeterminate price (as can occur with indefinite quantity contracts, for example), then discussions are probably going to be required.

2. Price-Related Factors

By now it should be apparent that in some respects, award on the basis of initial proposals is similar to procurement by use of sealed bids. In both instances, award is made on the basis of the offerors' submissions without conducting discussions. The evaluation of the submissions is performed in accordance with the evaluation criteria set

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[280] 67 Comp. Gen. ___, 88-1 CPD Para. 112 at 5.

[281] Kaufman, Lasman, Associates, Inc; Larry Latham Auctioneers, Inc., Comp. Gen. Dec. B-229917, 229917.2, 88-1 CPD Para. 202 (1988), *aff'd on reconsid.*, Comp. Gen. Dec. B-229917.3, 88-1 CPD Para. 271 (1988).

forth in the solicitation and price is a major factor in the evaluation scheme, since award must be made to the lowest overall cost to the government in each case. When evaluating the price in an offer, the government can also examine price-related factors if they have been laid out in the RFP. Therefore, when examining price-related factors in the context of contract award without discussions, one must look to the regulations concerning sealed bids for guidance.

FAR Part 14 governs procurement by use of sealed bids and treats price-related factors as follows:

> The factors set forth in paragraphs (a) through (e) below may be applicable in evaluation of bids for award and shall be included in the solicitation when applicable. (See 14.201-5(c)).
>
> (a) Foreseeable costs or delays to the Government resulting from such factors as differences in inspection, locations of supplies, and transportation. If bids are on an f.o.b. origin basis (see 47.303 and 47.305), transportation costs to the designated points shall be considered in determining the lowest cost to the Government.
>
> (b) Changes made, or requested by the bidder, in any of the provisions of the invitation for bids, if the change does not constitute a ground for rejection under 14.404.
>
> (c) Advantages or disadvantages to the Government that might result from making more than one award....
>
> (d) Federal, State, and local taxes (see Part 29).
>
> (e) Origin of supplies, and, if foreign, the application of the Buy American Act or any other prohibition on foreign purchases (see Part 25).[282]

The first thing to note is that in order to evaluate a price-related factor, the solicitation must advise the offerors of the price-related factors which will be included in the evaluation scheme. Failure to so advise the offerors will result in an improper contract award. The GAO has held to this position in many instances. For example, in Fairchild

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[282] FAR 14.201-8.

Weston Systems, Inc.,[283] the Comptroller General found the contracting officer correctly did not evaluate five price-related factors the protester felt should have been evaluated, because the Invitation for Bids did not list those factors. The GAO stated, "While the Government may consider other factors (relating to costs) in addition to the bid prices in determining the low evaluated bid, and therefore, the bid most advantageous to the Government, the invitation must provide for the evaluation of those other factors."[284] Fairness dictates that the offerors know what price-related factors will be evaluated so they may prepare their proposals from the same information.[285]

The Comptroller General requires that any evaluation of price-related factors be made on an objective basis, with no subjectivity possible by the contracting agency. The requirement has been stated in this manner:

> The "basis" of evaluation which must be made known in advance to the bidders should be as clear, precise and exact as possible. Ideally, it should be capable of being stated as a mathematical equation. In many cases, however, that is not possible. At the minimum, the "basis" must be stated with sufficient clarity and exactness to inform each bidder prior to bid opening, no matter how varied the acceptable responses, of objectively determinable factors from which the bidder may estimate within reasonable limits the effect of the application of such evaluation factor on his bid in relation to other possible bids. By the term "objectively determinable factors" we mean factors which are made known to or which can be ascertained by the bidder at the time his bid is being prepared. Factors which are based entirely or largely on a subjective determination to be announced by representatives of the contracting agency at the time of or subsequent to the opening of bids violate the principle for the reason that they

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[283] Comp. Gen. Dec. B-211650, 83-2 CPD Para. 347 (1983).

[284] id. at 2.

[285] See Stewart & Stevenson Services, Inc., Comp. Gen. Dec. B-215899, 84-2 CPD Para. 172 (1984).

are not determinable at the time his bid is being prepared.[286] Thus it is improper to use price-related factors which are subjectively determined.[287]

Transportation costs are the most frequently used other price-related factor, since the FAR requires consideration of such costs whenever bids are made on an f.o.b. origin basis.[288] Where the destination is not known at the time the solicitation is issued, the agency must inform the offerors that transportation costs will not be evaluated by inserting into the solicitation the clause found at FAR 52.247-50, but if the general location can be identified, the solicitation should identify the area for evaluation purposes only.[289]

The cases and regulations discussed above all deal with Invitations for Bids. These rules can be applied to RFPs where award takes place on the basis of initial proposals because of their similarity with sealed bids. A contracting officer must exercise caution in transferring these sealed bid rules to negotiated procurements, however. For example, the concept of responsiveness does not apply to negotiated procurement, so the application of FAR 14.201-8(b), which deals with changes made or requested by the bidder so long as they do not constitute grounds for rejection under the rules governing responsiveness must be modified somewhat.

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[286] 36 Comp. Gen. 380, 385 (1956).

[287] See, e.g., Envirotronics, Inc., Comp. Gen. Dec. B-215622, 84-2 CPD Para. 18 (1984), where the GAO said price-related factors could include only objectively determinable elements of cost identified in the solicitation.

[288] FAR 14.201-8(a).

[289] FAR 47.305-5(b).

Instead of looking at the responsiveness of an offer, the contracting officer must look to see whether the deviation from the RFP renders it unacceptable.[290] However, in general, the FAR Part 14 rules will provide quite useful guidance on the evaluation of price-related factors.

3. Life Cycle Costs

Life cycle costs are a form of price-related factor. Life cycle costs can be defined as the costs of ownership of an item over its useful life. Such costs include the cost to operate the item and to repair and maintain it. As is the case with any other price-related factor, if an agency wishes to evaluate life cycle costs, it must notify the offerors by specifying in the solicitation just what costs will be evaluated. A good example of the evaluation of life cycle costs occurred in Olympia USA, Inc.,[291] which involved a solicitation for typewriters. Life cycle costs were to be evaluated, and the solicitation included each element of the life cycle costs which the agency intended to evaluate. These included the cost to the agency of lost productivity due to typewriter failures, the cost of repair parts and services, and replacement ribbons. From these costs, the residual value of the typewriter at the end of its expected ten year useful life would be subtracted. The GAO upheld the use of this fairly detailed formula, finding the agency's method of calculating these costs reasonable. A protest by two other bidders in this same procurement was also denied by the GAO for the same reason, i.e., the agency stated the formula it would use in evaluating the life

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[290] See Chapter III, Section A.1., *supra*, for a more detailed discussion of this issue.

[291] Comp. Gen. Dec. B-216509, 84-2 CPD Para. 513 (1984).

cycle costs, and that formula was not unreasonable.[292]

Neither FAR Parts 14 or 15 specifically address evaluation of life cycle costs as part of the procurement. However, the FAR part dealing with acquisition planning does allow for consideration of life cycle costs.[293] Therefore, as long as the solicitation notifies the offerors that life cycle costs will be a part of the evaluation as a price-related factor, and as long as the notice identifies the specific life cycle costs which will be evaluated, inclusion of life cycle costs as part of the pricing formula when awarding a contract on the basis of initial proposals is unobjectionable. Such costs, when quantifiable, should be included as part of the evaluation criteria. In fact they rarely are included, perhaps because they often are difficult to quantify on an objective basis.

B. Prior Cost Experience

In addition to permitting award without discussions when full and open competition is obtained, CICA permits award on the basis of initial proposals where "accurate prior cost experience with the product or service" demonstrates the government will obtain the lowest overall cost proposal.[294] The FAR also contains this same language.[295] This requirement also existed in the ASPA,[296] DAR,[297] and FPR.[298] Despite the fact that this

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[292] Swintec Corp.; Canon U.S.A., Inc., Comp. Gen. Dec. B-216106, B-216106.2, 84-1 CPD Para. 466 (1984).

[293] See FAR 7.105(a)(3)(i).

[294] 10 U.S.C. Sec. 2305(b)(4)(A)(ii); 41 U.S.C. Sec. 253b(d)(1)(B).

[295] FAR 15.610(a)(3).

[296] 10 U.S.C. Sec. 2304(g). The language there mentioned only products, not services.

language is relatively old, very few cases exist which deal with contract award on the basis of initial proposals in which award is made on the basis of prior cost experience to show either that the price was fair and reasonable, or that it represented the lowest overall cost to the government. There has been no real definition of the term.

The government's estimate of what the goods or services should cost seems to be the most frequently used barometer of prior cost experience. The cost estimate must be independently reached, and if the estimate is so made, the government may use it to determine whether an offered price is fair and reasonable.[299] The GAO accords the agency's methods used in reaching its estimate great weight, and will not decide whether an independent government estimate is valid or whether the proposal falls within a "reasonable range" of the estimate.[300] In an even earlier decision, the Comptroller General stated that prior cost experience could not be used to determine whether a price is fair and reasonable when that cost experience is based on prior noncompetitive procurements.[301] In such a case, the Comptroller General felt it was not clearly demonstrated that acceptance of the proposal without discussion would result in fair and

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[297] DAR 3-805.1(v). It is interesting to note that the DAR language added services to the list of what could be procured in negotiated procurements without conducting discussions if accurate prior cost experience existed, provided fair and reasonable prices were obtained.

[298] FPR 1-3.805-1(a)(5). This section also included services in the list of what could be procured in negotiated procurements without conducting discussions.

[299] Nickum & Spaulding Associates, Inc., Comp. Gen. Dec. B-182018, 74-2 CPD Para. 387 (1974).

[300] id. at 3-4.

[301] 48 Comp. Gen. 605 (1969).

reasonable prices. Thus, while the GAO will not question use of prior cost experience to determine whether a proposal offers the lowest overall cost to the government where that experience is based on prior competitive procurements, the GAO is less charitable when the experience was based on noncompetitive procurements. It remains to be seen whether the GAO will accept prior cost experience on the basis of acquisitions which were not based on full and open competition, but were based on "other than full and open competition" procedures where more than one offeror or bidder competed for the award. If the GAO refuses to allow the use of prior cost experience based on such procurements, then the language in CICA would effectively be read out of the statute, because CICA allows award without discussions only if, as the result of full and open competition or accurate prior cost experience, it can be shown that the proposal will result in the lowest overall cost to the government. While these pre-CICA cases are sensible since noncompetitive acquisitions may well not result in the lowest overall cost to the government, if the GAO adheres to this position, one must wonder what the prior cost experience language contained in the statute means. Instead of blindly looking to see whether full and open competition was used in the prior procurements, the GAO should look to see whether there was competition in those prior procurements, and if so, then the statutory requirement has been met. Whether the GAO will actually take this position remains problematical, since looking for full and open competition is an easy thing to do, but examining each procurement used in arriving at the prior cost experience is much more time consuming and involves more judgmental decisions concerning whether competition existed, and if so, whether it was adequate

to ensure that the prices obtained are reasonable and represent the lowest overall cost to the government.

If prior cost experience is used as the basis for awarding a contract without conducting discussions, then the GAO finds it persuasive that the proposal price in the current acquisition is less than the government's estimate. In Westvold & Associates,[302] an award on the basis of initial proposals was upheld where the offered price was $6000 below the government estimate. The GAO found in that instance that the price was fair and reasonable. A similar result was obtained in HSQ Technology,[303] where award was made to an offeror whose proposal was priced below the government estimate. An award made after the enactment of CICA was upheld in part on the basis of prior cost experience in ICSD Corp.,[304] where the agency pointed out that in addition to there being full and open competition due to the fact that three offerors responded to the solicitation, the unit price offered by the awardee was approximately twenty-one percent lower than the unit price on the current contract, and approximately sixty-seven percent lower than the unit price on the previous contract. Thus the GAO is willing to support an award on the basis of initial proposals when the price offered is less than the government estimate or less than the price of the previous purchase. Whether it would support an award if the price exceeded the government's estimate or current contract price seems less probable. In such instances, it appears more likely that discussions would be required.

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[302] Comp. Gen. Dec. B-201032, 81-1 CPD Para. 354 (1981).

[303] Comp. Gen. Dec. B-219410, 85-2 CPD Para. 300 (1985).

[304] Comp. Gen. Dec. B-222478, 86-2 CPD Para. 37 (1986).

C. Fair and Reasonable Price v. Lowest Overall Cost

As has been mentioned previously, one of the most significant changes made by the enactment of CICA was to change the basis for awarding a contract without discussions from demonstrating that fair and reasonable prices had been obtained to requiring a showing that the award would result in the lowest overall cost to the government. It is in this area that the GAO has been the most aggressive, sustaining protests whenever an award occurs on the basis of initial proposals where a lower priced offeror remained in the competitive range. This section will look first at the rules for award on the basis of initial proposals before the enactment of CICA and then at the rules under CICA, to see what changes have occurred.

1. Pre-CICA Rules

Under the ASPA, it was required that an award without discussions would result in fair and reasonable prices.[305] The GAO would allow the tradeoff of cost for technical quality under this formula. For instance, in Warren Management, Inc.,[306] the GAO said, "Here, award to a higher cost, technically superior offeror is clearly consistent with the RFP's evaluation criteria which indicated that technical factors would be given greater weight than cost."[307] This is not to say that price could be ignored in deciding whether to award without discussions. In a solicitation for a cost plus fixed fee contract, a decision to eliminate

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[305] 10 U.S.C. 2304(g).

[306] Comp. Gen. Dec. B-217257, 85-1 CPD Para. 407 (1985). While decided in 1985, after the enactment of CICA, the acquisition was carried out prior to CICA's effective date.

[307] id. at 4.

cost from the evaluation criteria and make the award based on technical superiority alone was found improper.[308] On the other hand, the GAO stated in A.R.& S. Enterprises, Inc.[309] that where price was listed as subordinate to technical factors in an evaluation scheme, an award without discussions to the lowest priced offeror was improper because the offerors could reasonably conclude that technical superiority was what the procuring agency was seeking. To award to the lowest priced offeror if that offeror was not the highest rated technically would be prejudicial to the other offerors who may have decided to improve the technical excellence of their proposals with a concomitant increase in price. Thus, even under the ASPA a tension existed between technical excellence and cost. If award without discussions was to occur, and if cost or price was not the paramount evaluation factor, an award to the lowest priced, but not highest technically rated offeror was improper. On the other hand, if the agency wished to award to the highest technically ranked offeror who was not the lowest in price, this action was considered proper because cost or price was usually lower in the evaluation scheme than technical quality.

The basic rules for award on the basis of initial proposals were clearly laid out in Development Associates, Inc.[310] There it was stated, "Determining that an award based on initial proposals will result in a fair and reasonable price requires an independent cost projection of the

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[308] 50 Comp. Gen. 16 (1970).

[309] Comp. Gen. Dec. B-196518, 80-1 CPD Para. 193 (1980).

[310] Comp. Gen. Dec. B-187756, 77-1 CPD Para. 310 (1977).

proposal cost."[311] Thus cost estimates were necessary under ASPA before an award without discussions could take place. However, while fair and reasonable prices were a requirement for such an award, the contracting agency had considerable discretion in making the award decision since it could trade technical excellence for price. This could be done because a technically superior product could justify a higher price. Thus the price for the superior product was fair and reasonable on the theory that the agency was getting a better item for the price. As will be seen below, this rationale is not possible under CICA.

2. Rules Under CICA

The ability to trade cost for technical quality was eliminated with the passage of CICA. The new statute requires that award without discussions occur only where it can be demonstrated that such award will result in the lowest overall cost to the government.[312] The GAO quickly seized upon this language to require agencies to award contracts on the basis of initial proposals only where the award is made to the lowest priced offeror within the competitive range. This position was first enunciated in Sperry Corp.,[313] where the GAO pointed out that prior to CICA, there was no statutory requirement for an award resulting in the lowest overall cost to the government.[314] The FAR adds to this requirement the additional proviso that the award be made at fair and reasonable

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[311] id. at 8. See also Westvold & Associates, Comp. Gen. Dec. B-201032, 81-1 CPD Para. 354 (1981) at 3.

[312] 10 U.S.C. Sec. 2305(b)(4)(A)(ii); 41 U.S.C. Sec. 253b(d)(1)(B).

[313] 65 Comp. Gen. 195, 86-1 CPD Para. 28 (1986).

[314] 65 Comp. Gen. 195, 198 n.2, 86-1 CPD Para. 28 at 5 n.2.

prices,[315] and the GAO has also used this language on occasion.[316]

As a result of this reading of the statute, the GAO will not allow a contracting agency to make tradeoffs between cost and technical quality regardless of the technical superiority of the higher priced proposal. This was discussed extensively in Pan Am Support Services, Inc - Request for Reconsideration.[317] This case involved a request for reconsideration of a previous decision, Aviation Contractor Employees, Inc.,[318] which sustained a protest because the award was made to a technically superior offeror who was not offering the lowest overall price. In the reconsideration, it was specifically argued that the term "overall" as used in CICA meant that quality as well as cost considerations should be factored into any source selection decision. The argument was that "lowest overall cost" was synonymous with "best value". The GAO rejected this argument, saying:

> However, cost/technical tradeoffs cannot be utilized in situations where award is to be made on the basis of initial proposals without discussions because the statutory language, which requires selection of the "lowest overall cost" offeror, clearly precludes such judgmental determinations. [citing 10 U.S.C. 2305(b)(4)(A)(ii)] Contrary to Pan Am's view, we believe the modifier "overall," preceding the word "cost" in the CICA language, only refers to those cost-related factors listed in the solicitation directly affecting total offered cost, and not to any form of price/quality analysis.
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> Accordingly, a cost/technical tradeoff made before discussions are held would be improper because the technical rankings and

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[315] FAR 15.610(a)(3).

[316] See Sperry Corp., 65 Comp. Gen. 195, 86-1 CPD Para. 28; Ingersoll-Rand Co., Comp. Gen. Dec. B-224706, B-224849, 86-2 CPD Para. 701 (1986). In both of these cases the GAO spoke of award resulting in the lowest overall cost to the government at fair and reasonable prices.

[317] 66 Comp. Gen. ___, 87-1 CPD Para. 512 (1987).

[318] Comp. Gen. Dec. B-225694, 87-1 CPD Para. 363 (1987).

> offered prices of the initial proposals submitted could be significantly altered upon the conduct of discussions. In other words, the parameters of any tradeoff made would not necessarily remain the same if those offerors with a reasonable chance of award were given the opportunity to revise their proposals as a result of such discussions.[319]

What the GAO seems to be saying is that if the agency wishes to make tradeoffs between price and quality, it must conduct negotiations because to do so prior to discussions would not allow the offerors the opportunity to rectify any deficiencies identified during the evaluation. Otherwise, there would be no reason to conduct the procurement by competitive negotiations. While this interpretation comports with the language of CICA, it can reduce a negotiated procurement in which the award is made on the basis of initial proposals appear to be little more than a sealed bid procurement. In both instances, award is made to the lowest responsible offeror meeting the specified requirements. By allowing no balancing of cost versus quality, the GAO has removed the flexibility of the agency to make the award to a higher priced, technically superior offeror without first conducting discussions, even if it is little more than to point out deficiencies (if any) to those in the competitive range in its call for BAFOs. In situations where one offeror is clearly superior to the other offerors, but is not offering the lowest cost or price, the agency is forced to conduct discussions with all offerors within the competitive range, even if to do so is a waste of everyone's time and effort because the superior offeror ultimately will win anyway. Nevertheless, this is what is required in procurements under CICA today.

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[319] 66 Comp. Gen. ___, 87-1 CPD Para. 512 at 3-4.

There have been a number of GAO decisions which have enforced these rules. Awards to offerors who were highly rated technically but were not offering the lowest overall price to the government without first conducting discussions have been held improper in Meridian Corp.,[320] Pride Computer Serv., Inc.,[321] Hall-Kimbrell Envtl. Services, Inc.,[322] and Training and Information Services, Inc.[323] On the other hand, if the highest technically rated offeror is also offering the lowest overall cost to the government, there is no prohibition against awarding the contract without conducting discussions. In SIMCO, Inc.,[324] an award was made in just such a situation. Unfortunately, the GAO found several other deficiencies with the procurement, including the failure of the agency to insert into the solicitation the required notice that award could be made without discussions. While the agency failed to adhere to all of the requirements for award on the basis of initial proposals in this case, the principle that award can be made without holding discussions to the highest rated, lowest priced offeror was never questioned, but rather was implicitly approved.

Further, an award without discussions is improper if it is unclear whether the proposal in fact offers the lowest overall cost to the government. For example, in Kinton, Inc.,[325] the GAO required the

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[320] 67 Comp. Gen. ___, 88-1 CPD Para. 105 (1988).

[321] Comp. Gen. Dec. B-227805, 87-2 CPD Para. 302 (1987).

[322] 66 Comp. Gen. ___, 87-1 CPD Para. 187 (1987).

[323] 66 Comp. Gen. ___, 87-1 CPD Para. 266 (1987).

[324] Comp. Gen. Dec. B-229964, 88-1 CPD Para. 383 (1988).

[325] 67 Comp. Gen. ___, 88-1 CPD Para. 112 (1988).

procuring agency to analyze the proposals for cost realism before making an award of a cost reimbursement contract. The GAO stated it was improper for the agency to make award without conducting the analysis or holding discussions because otherwise it would not be able to tell whether the proposed cost was actually low. It went on to say,

> When an agency is faced with circumstances where an initial proposal may not reflect the lowest overall cost, the agency should conduct discussions to enable it to obtain the actual lowest overall cost or to otherwise determine the proposal most advantageous to the government under the evaluation factors listed in the solicitation.[326]

In Kaufman Lasman Associates, Inc.; Larry Latham Auctioneers, Inc.,[327] the problem was in the fee structure. This case involved a contract for auctioneer services in which the fee was based upon the sales volume. Since it was unknown what the sales volume would actually amount to, it was not possible to determine accurately what the fee would be, and thus it became impossible to determine which offeror's proposal was really the lowest priced. As a result, the agency decided, after award was made on the basis of initial proposals, to hold discussions and, if necessary, terminate the awardee's contract and make award to the best offer resulting from the negotiations. The GAO agreed with this decision, finding the initial award without discussions improper under CICA because of the impossibility of determining which proposal was low. Thus whenever a cost type contract is contemplated, the agency must conduct a cost realism analysis to determine whether the proposal is actually offering the lowest overall cost to the government if award is to occur without

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[326] 67 Comp. Gen. ___, 88-1 CPD Para. 112 at 5.

[327] Comp. Gen. Dec. B-229917, B-229917.2, 88-1 CPD Para. 202 (1988), *aff'd on reconsid.*, Comp. Gen. Dec. B-229917.3, 88-1 CPD Para. 271 (1988).

discussions. Further, whenever the pricing formula in the solicitation or proposal makes the ultimate cost or price uncertain, an agency will not be able to make award without discussions unless somehow it can objectively determine what the ultimate cost or price of each proposal within the competitive range will be. Where there is uncertainty concerning the ultimate price, the agency should enter into discussions to attempt to resolve those uncertainties. This also will eliminate one ground for protest later on.

D. Late Price Modifications by Offeror

It often happens that after the time for submission of proposals or BAFOs an offeror will submit an unsolicited modification to its proposal, altering the price. Often a price reduction is involved. If the contracting agency is going to make award without discussions, it normally cannot consider the late modification. In this regard, a standard solicitation provision is the Late Submissions, Modifications, and Withdrawals of Proposals clause found at FAR 52.215-10. It provides, in part, as follows:

> (a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it--
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> (1) Was sent by registered or certified mail not later than the fifth calendar day before the date specified for receipt of offers ...;
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> (2) Was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or
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> (3) It is the only proposal received.
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> (b) Any modification of a proposal or quotation, except a modification resulting from the Contracting Officer's request for "best and final" offer, is subject to the same conditions as in subparagraphs (a)(1) and (2) above.
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> A modification resulting from the Contracting Officer's request for "best and final" offer received after the time and date specified in the request will not be considered unless

> received before award and the late receipt is due solely to mishandling by the Government after receipt at the Government installation.
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> (f) Notwithstanding paragraph (a) above, a late modification of an otherwise successful proposal that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

Similar clauses exist in a number of agency supplements.[328] What these clauses do is allow the agency to refuse to consider late price modifications by offerors and to go forward with the award without conducting any further discussions.

The GAO has been of two minds in this area. The apparently prevailing view is that agencies need not consider late price modifications. However, a few cases have gone the other way. Perhaps the most frequently cited case occurred in 1967, when an agency received a telegram after the time for submission of proposals which reduced the price of one offeror's proposal by twenty percent, making it the low offeror. The agency considered the telegram a late modification and refused to consider it. The protester argued that the contracting officer should have entered into negotiations with the offerors. The GAO, while highly critical of the agency's refusal to negotiate, denied the protest because no regulation or statute was violated. The GAO did say, however,

> [I]t need only be noted that merely because the RFP informed all offerors that the Government has reserved the right and may make an award on initial proposals without discussion, such advice and reservation of the right to do so can hardly be cited as *justification* for exercising the reserved right. Unitec [the protester] has not questioned the Government's right to make an award without discussion but does question the soundness of the discretion used by the contracting officer in exercising the right. On the facts presented in the record before us we also question the soundness of the decision to award without discussions.

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[328] See GSAR 552.270-3; NASA FAR Supp. 18-52.215-73.

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> Inasmuch as the actions taken by the contracting officer in this case are the result of what we believe to be only the unsound exercise of discretion and not in violation of law or regulation, and the record fails to indicate culpability or fault in the matter by the successful offeror, we do not question the legality of the contract as awarded. ...[329]

This decision set a rule which the GAO has since been loath to follow. Less than a year after this case, the GAO denied a protest concerning a late price reduction, saying the agency had the discretion to decide whether to conduct discussions or to make award without further discussions.[330] A few years later the Comptroller General stated that monetary savings alone did not suffice to bring a late price reduction within the meaning of "extreme importance to the Government" under ASPR 3-506, which governed the consideration of late modifications of proposals.[331] More recently, the GAO, in Rexroth Corp.,[332] found a six percent late price reduction, while not insignificant, not enough under the circumstances to require the contracting officer to open negotiations. In what appears to be a complete retreat from the caustic language of 47 Comp. Gen. 279, the GAO in Rexroth said,

> [W]e do not believe that offerors generally should be permitted to disrupt unilaterally, and thereby postpone, an orderly procurement procedure by offering late price reductions. To hold otherwise would defeat the purpose of the solicitation's late proposal provisions - to alleviate confusion, to assure equal treatment of all offerors, and to maintain the integrity of the competitive system.[333]

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[329] 47 Comp. Gen. 279, 285-286 (1967) (italics in original).

[330] Comp. Gen. Dec. B-162196, Aug. 15, 1968, Unpub.

[331] 52 Comp. Gen. 169 (1972).

[332] Comp. Gen. Dec. B-220015, 85-2 CPD Para. 505 (1985).

[333] id. at 3.

This position was reiterated word for word more recently in Marquardt Co.[334] Thus recent cases pay lip service to the principles enunciated in 47 Comp. Gen. 279, but have not followed them. In SRM Mfg. Co.[335] a late hand-delivered price reduction making the protester's proposal low was not considered by the agency under the late modification rules and award was made without conducting discussions. The GAO upheld the award, stating simply that the requirements of FAR 15.610(a) were met. In Wilson Concepts of Florida, Inc.,[336] a case involving a total small business set-aside, the fifth low proposer offered to reduce its price, making it the low offeror. The Army refused to consider the late offer, and instead made the award to the low offeror found to be responsible. The GAO upheld the award, saying the Army was not obligated to consider the late offer.

An even clearer statement of the current GAO position came in Microphor, Inc.[337] This case involved an oral modification by the protester over five weeks after the time for receipt of proposals. The Navy refused to consider the modification under the late modification rules. The GAO supported the Navy, stating,

> There may be circumstances where an offered price reduction, although late, so closely follows the receipt of initial offers and would confer such a substantial benefit to the government that it would be tantamount to an abuse of discretion not to ask for best and final offers in order to take advantage of it. This is not, we believe, such a case. Against the 7.5 percent cost saving which may be represented by the protester's offered price reduction must be weighted other considerations.

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[334] Comp. Gen. Dec. B-224289, 86-2 CPD Para. 660 (1986) at 3.

[335] Comp. Gen. Dec. B-222521, B-222522, 86-2 CPD Para. 138 (1986).

[336] Comp. Gen. Dec. B-224485, 86-2 CPD Para. 561 (1986).

[337] Comp. Gen. Dec. B-224264, 87-1 CPD Para. 148 (1987).

> First, ... it must be recognized that a "late modification" by a second-low offeror transmitted weeks after initial proposals have been received legally cannot be accepted and has no effect. The sender has taken no risk but has everything to gain if the receipt of the "late modification" stimulates a request for best and final offers as a result of which the anticipated savings may, or may not, be realized depending on what revised offers actually are made at that time.
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> Second, and perhaps more importantly, it must be kept in mind that the government has an interest in the timely award of a contract leading to the supply of the goods and services it is seeking to procure. ...[338]

Thus the GAO comes down squarely on the side of the agency in the interests of maintaining the integrity of the procurement process and, of even greater import, to insure the agency receives what it needs in a timely fashion.[339] Therefore the GAO takes a dim view of late price modifications in most instances because it appears to feel the late offeror may be "gaming" the system. Only if the deal offered is extraordinary will the GAO agree the agency should consider it and conduct negotiations.

On occasion the GAO has reviewed instances where the agency did consider a late modification. In one case, the agency determined that adequate price competition did not exist, so award on the basis of initial proposals was not possible. This amounted to a departure from the intent stated in the RFP to award without discussions, but the GAO said it was proper because where negotiation is used, the flexibility afforded by negotiated procurement should be used to enhance rather than limit

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[338] id. at 3.

[339] See also 50 Comp. Gen. 547, 552 (1971): "To continue to conduct additional rounds of negotiations to the point where the timeliness of the procurement is adversely affected does not appear to be in the Government's best interests."

competition. Therefore consideration of a late modification was proper.[340] On the other hand, the GAO found an agency improperly considered a late price reduction when it communicated with the ultimate awardee after receipt of BAFOs, and allowed it to remove a provision from its offer which deviated from a material RFP requirement. This was found to violate FAR 15.611(c), which prohibits reopening discussions after the receipt of BAFOs except in limited circumstances, and even then, only if all offerors still within the competitive range are given the chance to submit a new BAFO.[341] It seems from these cases that consideration of a late modification to a proposal should only occur where the competition requirements have not already been met, or where the offer is just too beneficial to the government to ignore. In most other instances, contracting officers can refuse to consider late proposal modifications with little fear of being reversed by the GAO.

Long delays between the receipt of proposals and the award have been found not to require opening or reopening discussions. In Gemma Corp.,[342] an award was made on the basis of initial proposals eleven months after their submission. The protester submitted a price revision two days prior to the award. The GAO denied the protest, saying that while the contracting officer should have considered events occurring during the eleven month period, "the passage of 11 months did not, as Gemma argues, in itself establish that the prices offered initially were no longer fair

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[340] 53 Comp. Gen. 5 (1973).

[341] SWD Associates, Comp. Gen. Dec. B-226956.2, 87-2 CPD Para. 256 (1987).

[342] Comp. Gen. Dec. B-218389.2, 85-2 CPD Para. 252 (1985).

and reasonable."[343] The GAO specifically stated that 47 Comp. Gen. 279 did not require the contracting officer automatically to hold negotiations when an offeror submits a late price modification.[344] A similar result occurred in Glar-Ban,[345] where the protester complained that the agency should have held discussions because of a long delay (almost four months) before making the award. The GAO denied the protest. It said the decision to open discussions is discretionary with the agency, and "Negotiations need not be opened unless a potentially significant proposed price reduction, or some other proposed modification, indicates that discussions would be highly advantageous to the government."[346]

One area in which the agency cannot consider a late modification unless it wishes to reopen discussions involves the extension of an offer beyond its stated expiration date. The Comptroller General dealt with this matter extensively in Corbetta Constr. Co. of Ill.[347] In this case, the agency awarded the contract to Towne after the agency had requested the offerors to extend their offers. Towne did so, but only on the condition that it could increase its price. The GAO sustained the protest because in effect Towne was given the opportunity to revise its proposal while no one else received the same opportunity. Since this was not a late modification which made the terms more favorable to the government

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[343] id. at 4.

[344] id. at 5.

[345] Comp. Gen. Dec. B-225709, 87-1 CPD Para. 406 (1987).

[346] id. at 3.

[347] 55 Comp. Gen. 201, 75-2 CPD Para. 144 (1975), *aff'd on reconsid.*, 55 Comp. Gen. 972, 76-1 CPD Para. 240 (1976).

and there was no other provision in the solicitation which could allow acceptance of a late modification, the agency was found to have improperly conducted discussions with Towne. In Automated Indus. and Associates, Inc.,[348] an agency's refusal to consider a proposal extension conditioned upon the right to adjust prices was held proper. The agency treated the extension as if it were a late modification, and the GAO found the agency's determination that it could not award the contract to the protester because of the condition was correct. Thus any condition attached to an extension of a proposal which alters any material term of the offer should be rejected by the agency if it does not intend to hold further discussions before making the award. An offeror attaches such a condition at its peril, given the consistent reasoning of the GAO concerning such conditions.

[348] Comp. Gen. Dec. B-225181.2, 86-2 CPD Para. 637 (1986).

Conclusion

As can be seen from the foregoing analysis, the rules governing the award of contracts without discussions have become increasingly strict and, since the passage of CICA, more closely resemble the rules governing sealed bid procurement. Agencies may no longer trade price for technical quality, even where one proposal clearly stands out from the others and is virtually certain to receive the award even if the contracting officer conducts discussions. Forcing the agency to hold discussions in such circumstances is unfair to the other offerors, and can expose the agency to considerable risk of being made to pay inferior offerors' proposal preparation costs and attorney fees, as was illustrated by SMS Data Products Group, Inc.[349] These increasingly rigid rules discourage agencies from making awards without first conducting discussions even where discussions will serve little useful purpose. While requirements for a notice in the solicitation, no deviation from material solicitation requirements, full and open competition and the actual absence of discussions contribute to the fairness of such awards, requiring that the award be to the lowest priced offeror in the competitive range does little to promote efficiency or fairness. If award must be made to the lowest priced offeror, there is little reason not to use sealed bids. In fact, what should be required is award at fair and reasonable prices, as was the case prior to CICA. Most negotiated procurements involve some tradeoff between price and technical quality, and there is no reason why negotiated procurements where award occurs on the basis of initial proposals should be any different, so long as the potential offerors are notified of this

[349] GSBCA No. 8589-P, 87-1 BCA Para. 19,496 (1986).

possibility. As matters currently exist, only if the contracting officer determines all offerors, except the one standing above all the others, are outside the competitive range, discussions must occur unless the standout offeror has also presented the lowest priced proposal. Since the GAO views competitive range determinations of one with suspicion, contracting officers ordinarily will not eliminate every offeror except the awardee. This forces needless discussions which will not materially change the ultimate rankings or ultimate winner of the competition, but do add to the time and cost of the procurement. The more flexible and more fair rules allowing tradeoffs of cost and technical quality which existed prior to CICA allow for greater use of award without discussions in appropriate circumstances, and a return to those rules is desirable.

Nevertheless, even under the current rules concerning the lowest overall cost to the government, contracting officers should consider making awards on the basis of initial proposals more frequently when the requisite conditions exist because of the efficiencies gained in the procurement process by the use of such awards. This technique can help to improve the integrity of the procurement process by reducing the amount of contact with the offerors and eliminate the risk of technical leveling or technical transfusion of offeror's concepts and methods. In this manner, confidence in the procurement process, as well as efficiency and fairness, will be enhanced.