
From: The LAB @ DOC
Subject: MMCB - Volume 7 - Discussions in FAR 8.4, Nov. 2019



Welcome to MMCB Volume 7! This Monday [Sunday Night Special] covers “discussions” in FAR subpart 8.4.

Matter of: JHC Technology, Inc.
File: [B-417786](#)
Link: <https://www.gao.gov/products/b-417786#mt=e-report>
Date: Oct. 23, 2019

Overall, this case illustrates how USCIS made things far more difficult than they needed to do for something simple like establishing a BPA. Everything but the discussions aspect was dismissed as it would have been a challenge to the solicitation but give this a read to understand how a team made what could have been relatively straight forward evaluation process, much more complicated than it needed to be as the decision is only 6 pages. I do believe that GAO puts processes and procedures into succinct, to the point, terms that make it easy understand and digest. That being said lets follow their logic all the way through on discussions in FAR subpart 8.4. Some of this will be elementary, where some will be more intriguing and thought provoking. Also I will take out the case references and paragraph numbers, etc., to make it easier to follow 😊.

I've provided some questions below to propel you through the decision. Some are helpful concepts in sharing with junior and mid-level contracting officers for educational purposes.

What are discussions?

“Under the negotiated procurement procedures of FAR part 15, discussions allow an agency to communicate with offerors to obtain information essential for determining the acceptability of proposals, or to provide offerors an opportunity to revise or modify their proposals...Clarifications, in contrast, are limited exchanges that allow offerors to explain certain aspects of their proposals or to resolve minor or clerical mistakes. *The “acid test” for deciding whether discussions, rather than clarifications, have been held is whether an offeror was provided the opportunity to modify or revise its proposal.* This distinction is critical because if an agency engages in discussions with an offeror, it must hold discussions with all other similarly situated offerors.”

Okay, but this is not FAR Part 15, what gives?

"As discussed above, the RFQ here was issued under the FSS provisions of FAR subpart 8.4. The FSS program is directed and managed by GSA, and provides federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. There is no requirement in FAR subpart 8.4, however, that agencies seek clarifications or otherwise conduct discussions with vendors in the same manner as negotiated procurements under FAR part 15. *If an agency engages in exchanges with a vendor pursuant to a FAR subpart 8.4 procurement, our Office will look to FAR part 15 for guidance in determining whether the exchanges were fair and equitable.*

Okay, so what must be done to have the protest ground sustained?

"To successfully protest a FAR subpart 8.4 procurement on the ground of unequal discussions, a protester must show: *(1) that discussions were in fact held; (2) that the discussions favored one vendor over another; and (3) that the protester was prejudiced by the unequal discussions.* For reasons discussed below, we find that the protester has failed to demonstrate prejudice, and thus, the protest cannot be sustained."

But what is competitive prejudice?

"Competitive prejudice is an essential element of every viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and *our Office will not sustain the protest, even if deficiencies in the procurement are found.* Where an agency conducts discussions with another unsuccessful vendor or offeror, but *does not conduct discussions with the protester or the awardee, the protester cannot demonstrate prejudice.*"

What if they were 'unequal discussions' in this case?

"Here, even assuming for the sake of argument that the protester's allegation of unequal discussions has merit and USCIS conducted discussions with Vendor F prior to selecting quotations to advance to step two of the competition, *we see no basis to conclude that, but for the agency's actions, JHC would have had a substantial chance of receiving the award.* Vendor F's quotation was found technically unacceptable, and was therefore not selected to advance to step two of the competition. *Because Vendor F's quotation was neither advanced to step two of the competition, nor selected for award, JHC could not have been prejudiced by the exchanges between USCIS and Vendor F during step one--even if they were discussions.* For this reason, we find no basis to sustain the protest.

This volume was authored in November 2019 by Trevor Wagner, who at that time was working at the Department of Homeland Security's Procurement Innovation Lab (PIL).

*Disclaimer: The information contained in this MMCB is merely an opinion of the author and does not constitute formal legal or policy guidance of any kind.