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Not-So Meaningful Discussions: The Hidden Peril of a "Good" Proposal

As the closing time for receipt of proposals approaches, controlled chaos starts to take over. For one reason or another, changes may be made to your Company's proposal that prevent it from putting its best foot forward. You are certain that the proposal meets the Solicitation requirements, but you also believe that one section of the proposal could have been better developed. While you would have liked further to have revised the proposal, you were forced to make sacrifices due to time constraints. You nevertheless were hopeful that the shortcomings would be addressed during discussions and in your final proposal revision (FPR). After several hectic days of red team review, your Company's proposal is submitted to the agency in the nick of time.

As you suspected, the agency, following an initial review of proposals, provides your Company with a series of Items For Negotiation (IFNs). Much to your surprise (and delight), your primary area of concern goes unmentioned in the IFNs. You assume that the agency does not take issue with that part of your proposal and you leave that section untouched when preparing your FPR. Several months later, the Agency issues its award decision and you learn from the award notification letter that someone else received the award. At your debriefing, you further learn that the primary discriminating factor between your Company's proposal and the awardee's proposal was the very area you initially perceived as "weak" and which the agency failed to mention during discussions. Frustrated by the agency's silence during discussions, you confidently file a bid protest at the Court of Federal Claims (COFC) alleging a lack of meaningful discussions. Unfortunately, you may be in for another surprise.

The Court of Federal Claims recently confronted a comparable issue and upheld the agency's award decision. *Structural Assocs. Inc. / Comfort Sys. USA (Syracuse) Joint Venture v. United States*, No. 09-372C, --- Fed. Cl. ---, 2009 WL 4609255, slip op. at 9-11 (Dec. 3, 2009). In that case, the agency did not raise its concerns about the contractor's lack of experience during discussions. *Id.* at 9. The agency subsequently downgraded the contractor's rating from "excellent" to "good" under one of the main evaluation factors and used the contractor's lack of experience as the primary discriminating factor in its best value decision. *Id.* The Court found no fault in the agency's conduct. *Id.* at 9-11. Since the area of concern was neither a significant weakness nor a deficiency, the agency was not required to raise the issue during discussions. *Id.* at 10-11. The Court also was not swayed by the contractor's assertion that it could have

elaborated upon its specialized experience if the agency raised the issue during discussions because the proposal as submitted was responsive to the Solicitation requirements. *Id.* at 11.

The COFC's decision reinforces the principle that an agency need not raise every item during discussions that could be improved. *See* FAR 15.306(d)(3). Per the FAR, the contracting officer (CO) is only required to raise significant weaknesses or deficiencies during discussions. *See id.* While the CO is "encouraged" to discuss other aspects of the proposal, the decision to do so rests within the CO's discretion and judgment. *See id.* Against this backdrop, the fact that your Company's proposal was "acceptable" could allow the agency to remain tight-lipped about an area of concern and could ultimately cost your Company the award. While such a turn of events must be squared against the FAR's direction that discussions should "maximiz[e] the Government's ability to obtain best value," it remains a very real possibility. Thus, it is certainly worthwhile to go the extra mile to ensure that your Company's proposal makes an "excellent" – and not just a "good" – first impression.

It is, of course, paradoxical that an inferior offer is entitled to more information from the Government than a “good” one, and thus to better insight into what must be done to cross the finish line ahead of the competition. But this paradox is the law. The late Erwin Griswold was often fond of saying that “Good is the enemy of excellence.” The Dean may have been speaking in general terms when he dispensed this sage advice to his students and colleagues. As *Structural Associates* demonstrates, however, his advice has direct applicability to proposal preparation. Maybe the former Dean of the Harvard Law School and Solicitor General of the United States under two Presidents was, at heart, a frustrated Government contracts lawyer.

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