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¶ 20 CONTRACT FORMATION WITHOUT CONVERSATION: How Do You Do That? Why Would You Want To?

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In *Our Competitive Negotiation Process: It's Expensive!*, 30 NCRNL ¶ 49, and *Overruling Egregious Contracting Officer Conduct: The Court Finds a Way*, 31 NCRNL ¶ 7, Ralph discussed protests filed by Level 3 Communications LLC against an acquisition conducted by the Defense Information Systems Agency (DISA) for telecommunications work in the Middle East. The company first protested to the Government Accountability Office, which denied its protest. *Level 3 Communications LLC*, Comp. Gen. Dec. B-412854, 2016 CPD ¶ 171, 2016 WL 3568223. The company then protested to the U.S. Court of Federal Claims on expanded grounds. *Level 3 Communications, LLC v. U.S.*, 129 Fed. Cl. 487 (2016). The court:

(1) granted Level 3's motion for judgment on the administrative record,

(2) issued an injunction to stop contract performance,

(3) awarded proposal preparation costs,

(4) advised the Government to show cause why it did not violate Rule 11(b) of the Rules of the U.S. Court of Federal Claims by making misleading statements to the court,

(5) ordered the agency to provide its acquisition files to the Inspector General of the Department of Defense for further investigation, and

(6) announced its intention to forward the public record in the case to the Senate Armed Services Committee.

BOOM!

The Level 3 Protest Decisions

DISA's solicitation stated that the agency intended to make an award without discussions. The solicitation also stated that the agency would make award on the basis of the lowest price, technically acceptable proposal as follows:

> After the receipt of quotes, the government will first evaluate the lowest price quote. If the lowest price quote is determined to be technically acceptable and otherwise properly awardable, no further evaluations will be conducted, and award will be made. If, however, the lowest price quote is determined to be technically unacceptable and/or otherwise not properly awardable, the next lowest price quote will be evaluated until a quote is deemed technically acceptable and otherwise properly awardable.

We described such a procedure in *Streamlining Source Selection: A Labor-Saving Approach to Lowest Price Technically Acceptable Source Selection*, 23 N&CR ¶ 26.

Level 3, the incumbent contractor, proposed the lowest price, but submitted a technical quote that did not provide a map in the required format. As a result, the quote was ambiguous with respect to whether the company would comply with a requirement. The missing map information would have resolved the ambiguity and proven that Level 3 would comply. But instead of seeking "clarification" in accordance with FAR 15.306(a) or conducting discussions in accordance with FAR 15.306(d), the Contracting Officer awarded the contract without discussions to the second-low quoter, Verizon, whose price was $38.5 million higher than the Level 3's. Level 3 complained about the evaluation of its proposal to the GAO. The GAO found Level 3's protest to be unfounded and denied it the on familiar ground that "[i]t is a vendor's responsibility to submit a well-written quotation, with adequately detailed information which clearly demonstrates compliance with solicitation requirements." See *Competing for Government Work: Perfection Demanded*, 29 NCRNL ¶ 42, and a *Postscript* at 29 NCRNL ¶ 47.

Level 3 then took its protest to the Court of Federal Claims. Thank goodness for Judge Braden:

> During the hearing on the parties' Cross–Motions For Judgment On The Administrative Record, the court asked why the Government did not seek any "clarification," about the concerns raised between the map and Level 3's written representations and past performance, in light of the $38.6 million difference between Level 3's and Verizon's offers:
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> THE COURT: The Government awarded a contract to Verizon, which was $30 million more than the people who had been doing the job—
> [THE GOVERNMENT]: That's correct.
> THE COURT:—based on the map. And no one bothered to think about picking up the phone and saying hmm, hmm—as my grandson [Roark] would say—I wonder if there's a problem with the map? Or was something else going on?

Unfortunately, the court did not report the agency's response, if there was one. But what could they have said that would have made any sense at all? The court held that DISA's decisions not to seek clarification and not to conduct discussions to resolve the ambiguity were "arbitrary, capricious, and an abuse of discretion." We agree—a $38.5 million abuse.

Why didn't DISA ask for the missing map? We can only speculate about the agency's reasons, and here goes: The RFQ stated that the agency would identify the quoter with the lowest price and evaluate its technical quote for acceptability. If it was acceptable, then source selection would be done and the agency would award without discussions. If not, then the agency would evaluate the technical quote of the next low offeror, and so forth, until the lowest-price technically acceptable quote was discovered and award could be made. We think the agency feared (1) that if they sought "clarification" from Level 3 by asking for the missing map they would have engaged in "discussion," not "clarification," and (2) that if they conducted discussions with Level 3 in order to get the map they would have failed to conduct the source selection in accordance with the procedure described in the RFQ. We think the agency feared that, either way, they would lose a protest. They had run up against the dread rules of "clarification" and "discussion."

The Rules Of "Clarification" And "Discussion"

The FAR Part 15 source selection process model has taken shape over the course of more than 40 years of legislation, regulation, litigation, and agency practice. Grounded in the Armed Services Procurement Act of 1947, Pub. L. No. 80-413, as amended, and the Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, as amended, the process was tinkered into existence by federal agencies, the GAO and the courts. It was documented in the Armed Services Procurement Regulation, the Federal Procurement Regulation, the Federal Acquisition Regulation, other agency regulations, agency regulation supplements, and countless agency policy issuances, handbooks, manuals, guides, and briefings. Congress enacted elements of it into the Truth in Negotiations Act of 1962, Pub. L. No. 87-653, as amended, and the Competition in Contracting Act of 1984, Pub. L. No. 98-369, Division B, Title VII, as amended. The process is not specified or described in FAR Part 15 in clear, step-by-step fashion; at best, a reader can only glimpse its outline. However, detailed descriptions can be found in various published sources, official and unofficial. See Cibinic et al., Formation of Government Contracts, 4th ed., Chapter 6, "Basic Negotiation Procedures"; and Feldman, Government Contract Awards: Negotiation and Sealed Bidding, Part III.

In the case of the *Level 3* protests, the problem arose from the rules about "exchanges" of information between the Government and offerors after receipt of proposals. Those rules—which include statutes, regulations, protest case law, and various agency guidance—are exceedingly complex. We think their complexity makes COs wary of seeking clarification or conducting discussions, and we think that is a bad thing. When process complexity has reached a point at which it leads to bad things, it's time for radical redesign. Tweaking just won't do. It will only make things worse.

The first rules about "written or oral discussions" in the context of competitive negotiations were added to the Armed Services Procurement Regulation § 3.805, "Selection of offerors for negotiation and award," in 1958, 23 Fed. Reg. 9209, 9211 (Nov. 29, 1958), and stated:

> The normal procedure in negotiated procurements, after receipt of initial proposals, is to conduct such written or oral discussions as may be required to obtain agreements most advantageous to the Government. Negotiations shall be conducted as follows:
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> (1) Where a responsible offeror submits a responsive proposal which, in the contracting officer's opinion, is clearly and substantially more advantageous to the Government than any other proposal, negotiations may be conducted with that offeror only; or
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> (2) Where several responsible offerors submit offers which are grouped so that a moderate change in either the price or the technical proposal would make any one of the group the most advantageous offer to the Government, further negotiations should be conducted with all offerors in that group.
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> Whenever negotiations are conducted with more than one offeror, no indication shall be made to any offeror of a price which must be met to obtain further consideration, since such practice constitutes an auction technique which must be avoided. No information regarding the number or identity of the offerors participating in the negotiations shall be made available to the public or to any- one whose official ditties do not require such knowledge. Whenever negotiations are being conducted with several offerors, while such negotiations may be conducted successively, all offerors participating in such negotiations shall be offered an equitable opportunity to submit such pricing, technical, or other revisions in their proposals as may result from the negotiations. All offerors shall be informed that after the submission of final revisions, no information will be furnished to any offeror until award has been made.

But by 1961, written or oral discussion was no longer just the "normal procedure"; it was mandatory. ASPR § 3.805-1 stated:

> (a) After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered, except that this requirement need not necessarily be applied to:
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> (1) Procurements not in excess of $2,500;
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> (2) Procurements in which prices or rates are fixed by law or regulations:
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> (3) Procurements in which time of delivery will not permit such discussions;
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> (4) Procurements of the set-aside portion of partial set-asides or by small business restricted advertising;
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> (5) Procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion 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.

In 1962, that rule was enshrined in statute by passage of the Truth in Negotiations Act, Pub. L. No. 87-653, which provided in part as follows:

> In all negotiated procurements in excess of $2,500 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 requirements 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 section with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or 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 discussions.

The rules became the subject of protests. The earliest protests complained that agencies were improperly making awards without discussions. But in the early 1970s the focus shifted to what kinds of communications constituted discussions. See, e.g., *To Murray Schaffer*, Comp. Gen. Dec. B-173703, 50 Comp. Gen. 479 (1972), 1972 CPD ¶ 17, 1972 WL 5877:

> We have reviewed several of our more recent decisions bearing on the question of what constitutes discussions and conclude that resolution 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 offeror. Consequently, an offeror's late confirmation as to the receipt of an amendment and its price constituted discussions (50 Comp. Gen. 202 (1970)), as does a requested

"clarification," which result in a reduction of offer price (48 Comp. Gen. 663 (1969)) and the submission of revisions in response to an amendment to a solicitation (50 Comp. Gen. 246 (1970)). On the other hand, an explanation by an offeror of the basis for its price reductions without any opportunity to change its proposal was held not to constitute discussions (B-170989, B-170990, November 17, 1971). We believe, therefore, that a determination that certain actions constitute discussions must be made with reference to the opportunity for revision afforded to offerors by those actions. If the opportunity is present, the actions constitute discussions.

By the publication of the first edition of the FAR in the *Federal Register* on September 19, 1983, effective on April 1, 1984, and after hundreds of protest decisions, the coverage of discussions in FAR 15.610, "Written or oral discussion," included a list of dos and don'ts:

(c) The contracting officer shall—

(1) Control all discussions;

(2) Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements;

(3) Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal;

(4) Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerors' proposals or the evaluation process (see 15.607 and Part 24); and

(5) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the discussions.

(d) The contracting officer and other Government personnel involved shall not engage in—

(1) Technical leveling (i.e., helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal);

(2) Technical transfusion (i.e., Government disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal); or

(3) Auction techniques, such as—

(i) Indicating to an offeror a cost or price that it must meet to obtain further consideration;

(ii) Advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its cost or price is considered by the Government to be too high or unrealistic); and

(iii) Otherwise furnishing information about other offerors' prices.

The clarification and discussion rules that we have today, now in FAR 15.306, were drafted in 1996–1997 during the FAR Part 15 Rewrite, 62 Fed. Reg. 51223 (Sept. 30, 1997). See *The FAR Part 15 Rewrite: A Final Scorecard*, 11 N&CR ¶ 63.

In the course of that process of development, the focus of concern shifted from price to "technical proposals." At first, technical proposals were rather informal, and the early editions of the ASPR made scant mention of them. (Most early references to technical proposals related to two-step formal advertising.) But as Government procurement of military research and development became more important, technical proposals became more formal, and preparation and evaluation of them became major undertakings. (For a description of the source selection process by the end of the 1950s, see Peck and Scherer, The Weapons Acquisition Process: An Economic Analysis 324-85 (Harvard 1962), and *TFX Contract Investigation: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Government Operations*, 88th Cong. 1st Sess., pt. 1 (1963)). By the late 1950s, competitions for such contracts were intense, and technical (and management) proposals voluminously addressed complex matters of system design and program management, contained priceless proprietary information, and cost millions of dollars to prepare. Source selection boards for important contracts included hundreds of persons, and it seemed essential to have strict rules about what Government personnel could and could not discuss with offerors during source selection. Protests decisions not only made distinctions between clarifications and discussions, they identified a number of species of fatal error in the conduct of discussions—discussions that were not meaningful, misleading discussions, unequal discussions, improper discussions, inadequate discussions, and unfair discussions.

Clarifications or discussions have been an issue in more than 2,400 GAO protest decisions, and we have addressed the is-

sues and problems associated with the rules of clarification and discussion in at least 30 articles in this publication. FAR 15.306(d) and its predecessor FAR 15.610 have figured in the holdings of 32 protest decisions of the Court of Federal Claims. The procedural distinction between clarification and discussions that is now expressly recognized in FAR 15.306 has been a source of considerable confusion and was, we suspect, one of the reasons why DISA did not seek clarification from Level 3. We have written extensively about this problem. See *Clarifications vs. Discussions: The Obscure Distinction*, 14 N&CR ¶ 29, which was followed by eight Postscripts, 15 N&CR ¶ 41, 16 N&CR ¶ 13, 17 N&CR ¶ 20, 18 N&CR ¶ 2, 21 N&CR ¶ 45, 23 N&CR ¶ 46, 26 N&CR ¶ 11, and 27 NCRNL ¶ 48.

Unfortunately, after passage of the Competition in Contracting Act of 1984, agencies that had been conducting mundane acquisitions of janitorial services, grounds maintenance, and the like by sealed bidding began to contract by negotiation and solicit "technical proposals." Thus, the issues reflected in the complex protest case law arose in acquisitions to which the rules about clarification and discussion need not have been applied—acquisitions of housekeeping services, simplified acquisitions, orders under GSA's Federal Supply Schedule, and orders against multiple award task order contracts. See *Simplified Acquisition: Avoiding the GAO's Clarifications/Discussions Mess*, 26 N&CR 21; *PricewaterhouseCoopers Public Sector*, LLP, Comp. Gen. Dec. B-413316.2, 2017 CPD ¶ 12, 2016 WL 7826642; and *Engility Corp.*, Comp. Gen. Dec. B-413120.4, 2017 CPD ¶ 67, 2017 WL 930351. A CO must be familiar not only with the regulations, but also with a considerable body of protest decisions in order to be comfortable engaging in any one-on-one communication with an offeror during source selection, and most CO's are not familiar with the case law. So it is no wonder that most COs prefer to award a contract without seeking clarification and without discussions whenever possible. Indeed, award without discussions is the Government's default procedure. See FAR 52.215-1(f)(4). To many COs, communicating with offerors during source selection can seem like walking a narrow plank across a pit of vipers.

Contractor Selection And Contract Formation Under FAR Part 15

Under the rules in Part 15, negotiation must precede contractor selection, presumably on the theory that the Government will get better terms if offerors know that it is also negotiating with their competition. Once the Government has selected its contractor, engagement in further discussion (reopening) before award is generally discouraged. This approach reflects the historical origin of the FAR Part 15 process in competitive bidding, which I discussed in *Essay-Writing Contests: How Did We Get Here?*, 30 NCRNL ¶ 47. It requires the Government to perfect its specification and other terms and stipulate them in a "model contract" before it solicits proposals. The model contract is presented to prospective offerors in the Government's solicitation. As a rule, the terms of the model contract are non-negotiable, and an offeror that proposes different terms risks being declared "unacceptable" and eliminated from further consideration, without advance notice and opportunity to reconsider. An agency may not select an offeror whose proposal does not conform to the material terms of the solicitation. Thus, agencies may not seek clarification of an ambiguity if doing so would permit an offeror to make an unacceptable proposal acceptable. *NuWay, Inc.*, Comp. Gen. Dec. B-296435.5, 2005 CPD ¶ 195, 2005 WL 3148359.

Once proposals are received, the rules about exchanging information and negotiating are designed to ensure fairness in the selection phase of the process. There are strict rules and formal procedures for amending solicitations (FAR 15.206) and for notifying prospective offerors of changes in requirements, including changes prompted by one or more alternate proposals (FAR 15.206(d)); rules about establishing a competitive range (FAR 15.306(c)); rules that distinguish "clarification" (FAR 15.306(a)), "communication" (FAR 15.306(b)), and "discussion" (FAR 15.306(d)); rules about what may and may not be said during "discussions" (FAR 15.306(d)), and rules about allowing offerors to "revise" their proposals (FAR 15.307). All of those rules have been interpreted and supplemented in protest case law. Violation of the rules can have a serious effect on the process outcome and agency operations. Thus, while "clarification," "communication," and "discussion" are permitted in theory, complex rules, misinformation, confusion, tradition, and fear effectively constrain communications.

The Wages Of Fear

Part 15 merges contractor selection and contract formation in single process. The consequence is that the parties to a Government contract are often virtual strangers to one another at the outset of performance. They have had little if any chance to get acquainted, talk, bargain, and seal the deal based on an open and frank exchange of views before binding themselves. In a world of complex contracts, this is, well, nuts.

> Communication, like goal and cost determination, is an integral process of any exchange. Anyone planning an exchange must always communicate in some fashion with the other party to accomplish the exchange. This process is not simply additive or sequential to determining goals and ascertaining the costs of attaining them; it is interwoven with those processes and affects them as they affect it. Even the party acting entirely alone, who plans his goals and ascertains their costs, has to take into account the effect that his desires will have on the other potential party; he is thereby engaging in what might be called anticipatory communication. And, of course, far more active mutuality of planning often occurs in which much actual communication shapes both parties' goals and costs. Finally, the parties must communicate in some way to determine that they have achieved a degree of harmony on the allocation of those goals and costs. (Note: The pervasiveness and scope of the need for communication expands in proportion to any increase in the complexity of the exchange relation and in the extent to which the exchange is projected into the future.)
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> Inadequate or inaccurate communication is familiar to us all. Who has not experienced situations where one party plans a transaction or relation differently from the other, each party thinking erroneously that the other understands "the plan"?

Macneil, Contracts: Exchange Transactions and Relations, Cases and Materials 20-21 & 22 (2d ed. 1978, The Foundation Press, Inc.).

It does no good to say that the FAR does not prohibit communication during source selection, that it encourages bargaining, and that COs err in choosing not to seek clarification and conduct discussions. It does no good because when the rules of a prospective course of action are confusing, and when confusion gives rise to a real risk, people will tend to avoid that course of action if there is what seems to be a viable, less risky option: Award now. Talk later. Policymakers can engage in "myth-busting," try to teach the existing rules to its thousands of COs, and urge them to communicate, or they can simplify the rules and adapt them to the needs of modern contracting. Assuming that they have the will to take action, which would be easier for them to do in the long run?

A Better Way

A more sensible approach to competitive contracting by negotiation would be to separate the acts of contractor selection and contract formation, shift from selection based on competitive proposals to selection based on qualifications, and permit one-on-one negotiations with the selection leading to assent to acceptable terms and a fair and reasonable price. By separating the steps, neither will take priority over the other. Each step will be executed on its own terms and in the way that is best. That is why we have been advocating a two-phase approach, with selection based on qualifications, not proposals. See *Changing the Rules of Source Selection: A Modest Proposal*, 30 NCRNL ¶ 42. *VJE*