Achieving Best Value in Source Selection

To discuss or not to discuss should not be the question.

By James Rich, MPA, PhD and Justin D. Ruth, Esq.

Acquisition rules for both defense and civilian agencies contain a clear preference for holding discussions with offerors during best-value source selections. While neither the Government Accountability Office (GAO) nor the courts have yet required discussions, it is hard to contend the government truly obtains best value without them.

On January 3, 2023, the U.S. Court of Federal Claims (COFC) issued a ruling in *SLS Federal Services (SLS) v. The United States* that sustained an SLS protest and enjoined the Naval Facilities Engineering Systems Command (NAVFAC) from proceeding with performance of six contracts previously awarded.[1]

Halting execution of a $5 billion indefinite-delivery, indefinite-quantity contract for global construction work awarded in July 2021 makes a powerful statement, but the message the court sent is not new.

Though the court noted a number of deficiencies in the evaluation process, a principal finding involved the agency's decision not to conduct discussions, which SLS contended was an abuse of discretion. The COFC agreed with SLS stating, "DFARS 215.306 creates a presumption in favor of discussions."[2]

The court went on to say that "discussions promote an important public interest. Among other things, discussions maximize the government's ability to obtain the best value by allowing the offeror to revise its proposal."[3]

While the court affirmed that the expectation of discussions during evaluation of a best value request for proposal (RFP) is grounded in law and regulation, it acknowledged that the DFARS language stops short of making discussions mandatory.[4]

DFARS 215.306(c)(1) states: "For acquisitions with an estimated value of $100 million or more, contracting officers should conduct discussions. Follow the procedures at FAR 15.306(c) and (d)." "Should" is the key term in this guidance.

FAR 2.101 states: "Should means an expected course of action or policy that is to be followed unless inappropriate for a particular circumstance." It is this robust expectation of discussions that the COFC emphasized in the SLS ruling.

Decisions, Decisions …

It is worth noting that contracting officers (COs) have a conscious decision to make when considering whether discussions will be permitted. That decision is reflected in the clauses inserted in the contract.

FAR Part 15 utilizes two separate clauses, FAR 52.215-1 and FAR 52.215-1 with Alternate 1, that distinguish whether the government intends to hold discussions or not. FAR 52.212-1 (when using commercial acquisition procedures) indicates that the default is that discussions will not be held, but that "the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary."

Electing to use the authorities of FAR Part 15 is purposeful. Contract managers select an RFP acquisition strategy over a sealed-bid strategy primarily for the opportunity to negotiate with offerors.

Negotiations allow the government to carefully examine and better understand proposals that have been determined to be in the competitive range. Equally important, negotiated procurements allow the offeror the opportunity to revise its proposal.

Thus, while a CO who feels capable of identifying an offer that provides a good deal might choose to award without discussion, the CO cannot say with certainty that the government received the best deal possible.

So, how did we get here? The policy that allows for award without discussion has an interesting near-term history. The 2011 *DoD Source Selection Guide*[5] stated:

*The SSA (source selection authority) may choose, **in rare circumstances**, to award a contract on the basis of the initial proposals received without conducting discussions… [t]o award without discussions the RFP must contain the solicitation provision at FAR 52.215-1, which notifies offerors that the Government intends to evaluate proposals and award a contract without discussions…. The process of engaging with industry after proposal submission affords the Government the opportunity to effectively understand and evaluate a proposal and permits industry the opportunity to clearly explain any aspects of a proposal that appear to be deficient, ambiguous or non-compliant. Such dialogue leads to more efficient, effective, and improved source selections. Therefore, **award without discussions shall occur in only limited circumstances**. **Discussions are highly recommended for source selections**. The primary objective of discussions is to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation.*[6]

The 2016 rewrite of the DoD Source Selection procedures incorporated the more direct language found in DFARS 215.306(c):

*In accordance with DFARS 215.306, Exchange with Offerors after Receipt of Proposals, discussions should be conducted for all acquisitions with an estimated value of $100 million or more. Award without discussions on complex, large procurements is discouraged and **seldom in the Government's best interest**. In appropriate circumstances subject to SSA review and approval, the PCO may decide to award to the offeror whose proposal is determined by the SSA to be the best value on the basis of the initial proposals received without conducting discussions. **Limited circumstances would include situations where there is no reasonable expectation that the offer(s) and their expected value to the Government would be improved through discussions**.*

A 2022 rewrite did not substantively change the language regarding awarding without discussions. At least for DoD contracts, compliance with the official guidance would suggest a reliance on discussions to accurately determine the best value alternative. And yet, the landscape is littered with examples, real and anecdotal, of organizations that routinely conduct negotiated procurements that result in award being made on the initial offer.[7]

The authority that permits the government to award without discussion in a best value source selection is not trivial. There may be instances where an offeror's technical scores and pricing are so clearly advantageous to the government that discussions would merely delay the inevitable. And the result would not improve the initial offer. It would seem the rationale for electing not to discuss would generally involve receiving offers that were exceptionally clear and well-priced. The truth is a good deal more complicated.

Examining Bid Protest Decisions

If you read bid protest decisions on the topic, you will learn that often the government's position simply is that its officials had what they needed to make an award, and the solicitation

allowed for an award without discussions.

The anecdotal evidence, however, points to influences that are only indirectly linked to the attributes of a single, particularly attractive proposal. Consider the following reasons offered for awarding without discussion:

1. Since the offerors know we may award without discussion, they give their best price up front.
2. Awarding without discussion reduces the chance of protest.
3. Awarding without discussion saves time.

There likely is some truth to each of these arguments, but none is supported by the language of DFARS 215.306. The argument for saving time is particularly pernicious as it dismisses the evidence that delays in proposal evaluation and contract award are the norm rather than the exception.

When delays occur, the options are to move the scheduled award date or to identify for elimination activities on the critical path. If program managers believe that determining a competitive range and holding discussions will result in proposals that are only marginally better than initial proposals, there is incentive to settle for the best you can do absent discussion, and cut time to save the award date.

Securing the best price on the initial proposal is fine. But that in no way offsets the existence of deficiencies or omissions in the proposal that would be correctable through discussion.

Best-value acquisition strategies that use a price/non-price trade-off frequently weigh the non-price factors, when considered cumulatively, to be more important than price. In those cases, the initial price, while important, is not determinative. (If it were, we would be conducting an LPTA acquisition.)

The question remains. How does the contracting officer truly know he or she could not have improved the value to the government through discussions? The GAO and the courts have not asked this question in a bid protest yet.

Procurement protests generally are filed when the government is thought to have failed to adhere to applicable law, regulation, policy guidance, etc. while conducting a procurement.

Awarding a contract on initial proposals will reduce the target area for a protest simply by reducing the number of actions and decision points required by the process. However, the assumption that not holding discussions reduces protest risk is itself a basis for protest. And the resulting decisions are informative.

Below is a sample of recent GAO, COFC, and Court of Appeals for the Federal Circuit decisions on the topic. We note that some support the use of discretion to not hold discussions. Others find that the "should" implies a strong expectation that discussions will be held unless there are compelling reasons not to do so.

***Booz Allen Hamilton, Inc*, B-405993, 2012:** The protester argued that the agency abused its discretion by failing to hold discussions with the offerors, despite the request for proposal's statement (issued in June of 2010) that the agency intended to award without discussions. Notably, this acquisition was for the Navy; however, the procurement was initiated prior to the DFARS rewrite establishing DFARS 215.306 in September 2011. The GAO concluded that "[a]n agency's decision not to initiate discussions is a matter we generally will not review."

***Science Applications International Corp. (SAIC)*, B-413501, 2016:** The protestor challenged an agency's decision not to hold discussions in a DoD procurement valued over $100 million. The GAO, in considering the same analysis of the word "should" as in DFARS 215.306 detailed above, adopted a three-part test posited by the agency to determine whether or not it was reasonable to forego discussions. The test, which was derived from previous decisions the GAO specifically recognized were decided prior to the DFARS rewrite, supported such a determination when: 1. there were deficiencies in the protestor's proposal; 2. the awardee's proposal was evaluated as being technically superior to the other proposals; and 3. the awardee's price was reasonable.

***Dell Federal Systems, L.P v. United States*, 2018:**[8] Unsuccessful offerors filed GAO protests, arguing "the Army should have engaged in discussions with offerors" as required by DFARS 215.306(c)(1). The contracting officer decided to take voluntary corrective action, explaining that "because the procurement was valued in excess of $100 million, the Army was likely required to conduct discussions with offerors pursuant to DFARS 215.306(c)(1)," but did not do so. The contract awardees filed suit at COFC seeking to enjoin the corrective action. COFC was persuaded and issued a permanent injunction preventing the agency from taking corrective action.

The government appealed this decision, and the court reversed the injunction, finding that the corrective action was rational. Specifically, the court held that, pursuant to DFARS 215.306(c)(1), "discussions normally are to take place in these types of acquisitions... the corrective action of conducting discussions is rationally related to the undisputed procurement defect of originally failing to conduct pre-award discussions."

In *IAP Worldwide Services, Inc.*, B-419647, 2021: The GAO held that "although DFARS 215.306(c) establishes an expectation that discussions will be conducted in Department of Defense procurement over $100 million, agencies retain discretion not to conduct discussions based on the particular circumstances of each procurement."

The solicitation clearly stated that the government intended to award without discussions. The SSA ultimately "concluded that, in light of the clear differentiation among the technically acceptable proposals, discussions would not result in any meaningful benefit to the government, or any changes to the apparent outcome of the source selection decision."

***Oak Grove Technologies, LLC v. United States*, 2021:**[9] The COFC found, by relying in part on the definition of "should" in FAR 2.101, that DFARS 215.306(c)(1) requires an agency to justify not engaging in discussions in FAR Part 15 acquisitions with an estimated value of $100 million or more. Judge Solomson, relying on *Dell Fed. Sys*, further stated that the Federal Circuit "removes any doubt that DFARS 215.306 generally requires an Agency to engage in discussions."

***IAP Worldwide Services, Inc. v. United States*, 2022:**[10] This is an appeal of the GAO bid protest cited above. The approximate value of this procurement was more than $1 billion. Five proposals were received, four of which were found awardable after initial evaluations. The unawardable proposal belonged to IAP. The Source Selection Advisory Council (SSAC) reviewed the evaluations and determined that it would be unlikely that IAP would be able to rectify the problem with its proposal through discussions.

Notably, the SSAC did not provide details about why this conclusion was reached. Judge Solomson (the judge in the *Oak Grove* case above) held that "should means an expected course of action or policy that is to be followed unless inappropriate for a particular circumstance ... the fact that DFARS 215.306 employs the term, 'should' does not mean that following the regulation is somehow optional for the Department of Defense or, by extension, the Army."

Citing *Oak Grove*, Solomson went on to say that the Army's task was "not to justify why discussions are necessary ... but rather why they are unwarranted." He criticized the record as it relates to this decision. The judge also criticized the GAO's three-part test discussed previously in *Science Applications International Corp.*, which the Army relied upon in its argument. Judge Solomon explained that the GAO's three-part test did not apply because it was derived from GAO decisions that predated DFARS 215.306(c).

Solomson explained that on remand, the agency could come to three different conclusions:

1. The Army correctly considers and applies DFARS 215.306 and deter-

mines, once again, that it will not engage in discussions. In that case, IAP will not receive the contract at issue.

2. The Army correctly considers and applies DFARS 215.306 and determines that it will form a competitive range for discussions, but IAP is excluded from the competitive range. In that case, IAP will not receive the contract at issue, but the Army would have to conduct discussions with the offerors remaining in the competitive range, none of which protested the outcome of the procurement.
3. The Army correctly considers and applies DFARS 215.306, determines that it will form a competitive range for discussions, and includes IAP in the competitive range. In that case, IAP will have a chance to submit a Final Proposal Revision. But the outcome of the procurement remains uncertain; IAP may win the contract or it may not.

Case History Creates Expectation of Discussions

Recent case history clearly establishes that DFARS 215.306 creates an expectation that DoD agencies will conduct discussions in procurements valued at more than $100 million. In such DoD procurements, contracting officers should advise that procurement timelines include time to conduct discussions. In the limited circumstances in which discussions are not held, the award timeline can be shortened.

What about non-DoD agencies? Absent an agency *FAR* supplement or other internal policy guidance, FAR 15.306 would apply. As previously discussed, FAR 52.215-1 and its alternate clause provide guidance to this exact issue.

The language in the *FAR* is much more deferential to the contracting officer than DFARS 215.306. Specifically, the *FAR* does not state that contracting officers "should" hold discussions. But should they? While neither the GAO nor COFC have imposed such a requirement on a nondefense agency during a bid protest, an argument could be made that FAR 15.306(d)(2) suggests such a requirement.

This *FAR* section states that "[t]he primary objective of discussions is to maximize the government's ability to obtain best value." If the purpose of discussions is to aid the government in obtaining the best value, can we say that foregoing discussions truly results in the best value? A contracting officer can come to such a conclusion in a carefully crafted determination. Such determinations have been upheld in bid protests many times by giving deference to the agency.

The question remains. How does the contracting officer truly know he or she could not have improved the value to the government through discussions? The GAO and the courts have not asked this question in a bid protest yet. The DoD revisions to DFARS 215.306 argue strongly that they should. CM

Justin D. Ruth, **Esq.,** is an attorney with more than 10 years of federal government procurement and contract management experience. He currently works for Army Materiel Command, representing the United States Army's Communications-Electronics Command (CECOM), Army Contracting Command (ACC), and a variety of program managers. He is an Adjunct Professor at the University of Maryland Global Campus and an instructor in the University of Virginia, Procurement and Contract Management graduate certificate program.

James Rich, MPA, PhD, retired after 35 years of contract management experience at the Department of Defense. He is currently the Program Coordinator for the University of Virginia Procurement and Contract Management graduate certificate program. Active in NCMA, he sits on the NCMA Board of Advisors and serves as a career mentor in the NCMA Contract Management Leadership Development Program. He also is a Senior Advisor at Dawson & Associates.

ENDNOTES

1 SLS Federal Services, LLC, v. The United States, Court of Federal Claims 22-1215 filed January, 2023, re-filed January 10, 2023. Protest of solicitation N62470-20-R-5003
2 Oak Grove v. United States, 155 Fed. Cl. 84, 108 (2021)
3 CliniComp Int'l, Inc. v. United States, 117 Fed. Cl. 722, 744 (2014)
4 DFARS 215.306(c)(1)
5 The original DoD Source Selection Guide was developed prior to the DFARS re-write that added DFARS 215.306.
6 In solicitations where the government wishes to notify offerors that they intend to award without discussion, the provision at 52.215-1 Instructions to Offerors-Competitive Acquisition, should be included. If the intent is to hold discussions with offerors in the competitive range, Alternate I (October 1997) should be incorporated. If alternative proposals will be accepted, Alternate II (October 1997) should be inserted.
7 The cases examined in this article are DoD-specific. The FAR supplements of civilian federal agencies are generally silent on the topic.
8 Dell Federal Systems, L.P. v. United States, 906 F.3d 982 (Fed. Cir. 2018). Prior history includes Dell Fed. Sys., L.P. v. United States, 133 Fed. Cl. 92 (2017).
9 Oak Grove v. United States, 155 Fed. Cl. 84 (2021).
10 IAP Worldwide Servs. Inc. v. United States, 159 Fed. Cl. 265 (2022)