Legal News

Simplified Acquisition Procedures

Use of FAR Part 13 Procedures Must Be Clear in Solicitation; Opportunity for Final Proposal Revisions Must Follow Discussions, COFC Rules

The U.S. Court of Federal Claims, in sustaining a bid protest of an Air Force procurement March 31, made it clear that "simplified acquisition procedures relax many of the FAR requirements and grant contracting officers broad discretion, but they do not grant a contracting officer unfettered discretion" (*Dubinsky v. United States*, Fed. Cl., No. 98-884C, 3/31/99).

"An agency must, as a matter of fundamental fairness, inform offerors in the solicitation whether it is invoking the subpart 13.5 test program and simplified acquisition procedures," even though there is no such express requirement in the Federal Acquisition Regulation, the court held in a 62-page opinion.

This marks the first postaward protest the court has sustained this year.

Although it ultimately rejected the agency's contention that the protested procurement was conducted under a test program for the simplified acquisition procedures under FAR Part 13, the court ruled alternatively that if it was, the solicitation did not provide the required notice.

Further, when a contracting officer opts to hold discussions under a FAR Part 13 procurement, the CO must comply with the FAR 15.307(b) requirement that all offerors still in the competitive range at the conclusion of discussions be given the opportunity to submit a final proposal revision, the court said.

"Without this opportunity, discussions with offerors readily would be subject to abuse, merely becoming a cover for an agency's discussions with the offeror it has selected to receive the contract prior to the formal source selection decision," Judge Eric G. Bruggink explained.

Here, the U.S. Air Force Academy failed to seek a final proposal revision from protester Meir Dubinsky and offerors other than the awardee. It sought and accepted repeated revisions only to the technically unacceptable proposal submitted by awardee Daktronics Inc., and did so after the deadline for revised proposals.

Finding that the procurement was "mishandled from start to finish," and "riddled with violations of procurement regulations and arbitrary and capricious conduct by the contracting officer," the court ruled that the Academy must resolicit the procurement for two electronic scoreboards for its Colorado football stadium.

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JUDGE ERIC G. BRUGGINK,
U.S. COURT OF FEDERAL CLAIMS

Procurement Was Not Conducted Under FAR 13. Dubinsky, the sole proprietor of Nu-Way Signs Co., first filed a protest with the General Accounting Office. The agency report to GAO did not refer to simplified acquisition procedures or FAR Part 13, but said the request for proposals was issued "using FAR 12 and 15 procedures." When Dubinsky filed this action in the COFC, GAO dismissed the protest.

The Academy argued for the first time at the COFC evidentiary hearing that the procurement was conducted under FAR Part 13, and the protester's concerns about the conduct of discussions in the procurement were therefore inapplicable. However, the court held that the procurement was not conducted under simplified acquisition procedures.

Labeling the Part 13 argument an "afterthought," the court observed that the record contains no documentation of the CO's decision to use simplified acquisition procedures—as required by FAR 13.501.

Further, the court said the CO seems to have tried to follow FAR Part 15 procedures, including:

- identifying the solicitation as an RFP,
- incorporating the technical requirements subfactors and their relative weights in the solicitation,
- scoring the technical requirements factor and the 23 underlying subfactors before establishing the competitive range,
- conducting discussions with competitive range offerors,
- requesting written proposal revisions submitted by a common cutoff date, and
- providing the protester with a postaward debriefing.

None of these actions was necessary if simplified procedures were used, the court pointed out.

Adequate Notice Not Provided. Alternatively, the court held that if simplified acquisition procedures were employed, the agency failed to give adequate notice to offerors. The RFP made no mention of the simplified procedures, FAR Part 13, or the test program for such procedures authorized under subpart 13.5.

While simplified acquisitions are exempted from the full and open competition requirement of the Competition in Contracting Act, agencies conducting these procurements must promote competition "to the maximum extent practicable," the court said.

"Making offerors aware of the rules of the game in which they seek to participate is fundamental to fairness and open competition," it stressed.

The absence of a FAR Part 13 notice requirement is "especially troubling" because the test program—available where, as here, the agency proposes to conduct a procurement for commercial items that exceeds the $500,000 simplified acquisition threshold—is a temporary phenomenon, and offerors are unlikely to be aware of its invocation absent a notice in the solicitation, the court observed.

Improper Discussions. The Academy conceded that if the procurement was not conducted under simplified acquisition procedures, the CO's discussions with the awardee after the submission of amended proposals violated FAR Part 15. The court agreed.

Once the request for proposal revisions has been issued at the end of discussions, an agency generally may not engage in further discussions with any offerors. "Moreover, discussions with one offeror after the issuance of a request for final proposal revisions that enable it to make its proposal technically acceptable—as was the case here—are prohibited," the court said.

Rejecting the agency's labeling of the challenged discussions as "clarifications," the court said "clarifications . . . are exchanges conducted in procurements where discussions are not expected to be held; the term has no application to exchanges that occur after discussions have been conducted with offerors."

Likewise, the court was unmoved by the CO's contention that his request for amended proposals did not constitute a request for final proposal revisions and thus did not reach the stage of discussions.

While this may be "arguably legally correct," it also establishes that the CO violated FAR 15.307(b), the court said.

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