Classifying Proposals
&
Conducting Discussions

Training Materials

Issued: April 25, 2008
Subject to Revision

THIS DOCUMENT IS NOT AN OFFICIAL AGENCY INTERPRETATION OR POLICY STATEMENT. RATHER, THIS DOCUMENT IS INTENDED MERELY AS TRAINING MATERIAL. THIS DOCUMENT IS NOT INTENDED TO COVER EVERY ASPECT OF THE SUBJECT MATTER.

Outline of Contents

I. Legal Basis

The rules governing IFBs, as stated in section 11-35-1520, apply to RFPs except to the extent section 11-35-1530 provides otherwise.[1] Section 11-35-1520 severely limits the modification of offers after opening. For example, section 11-35-1520(6) provides that "[b]ids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code." Similarly, section 11-35-1520(7) provides that "[a]fter bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted." Absent express authorization, e.g., correction of minor informalities, offers cannot be changed after opening.

The authority to conduct discussions during the RFP process is a limited exception to this general rule. This authority rests on three laws, one statute and two regulations. Section 11-35-1530(6) provides as follows:

> (6) Discussion with Offerors. As provided in the request for proposals, and under regulations, discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. All offerors whose proposals, in the procurement officer's sole judgment, need clarification must be accorded that opportunity.

Consistent with this provision, the Board adopted Regulation 19-445.2095(I), which explains how discussions are conducted:

> I. Discussions with Offerors
>
> (1) Classifying Proposals. For the purpose of conducting discussions under Section 11-35-1530(6) and item (2) below, proposals shall be initially classified in writing as:
>
> (a) acceptable (i.e., reasonably susceptible of being selected for award);
>
> (b) potentially acceptable (i.e., reasonably susceptible of being made acceptable through discussions); or
>
> (c) unacceptable.
>
> (2) Conduct of Discussions. If discussions are conducted, the procurement officer shall exchange information with all offerors who submit proposals classified as acceptable or potentially acceptable. The content and extent of each exchange is a matter of the procurement officer's judgment, based on the particular facts of each acquisition. In conducting discussions, the procurement officer shall:
>
> (a) Control all exchanges;
>
> (b) Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive;

[1] § 11-35-1530(1) ("[A] contract may be entered into by competitive sealed proposals subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided in this section.").

(c) Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any;

(d) Resolve in writing suspected mistakes, if any, by calling them to the offeror's attention.

(e) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer during discussions under items (2)(b) through (2)(d) above.

(3) Limitations. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. Ordinarily, discussions are conducted prior to final ranking. Discussions may not be conducted unless the solicitation alerts offerors to the possibility of such an exchange, including the possibility of limited proposal revisions for those proposals reasonably susceptible of being selected for award.

(4) Communications authorized by Section 11-35-1530(6) and items (1) through (3) above may be conducted only by procurement officers authorized by the appropriate chief procurement officer.

Lastly, R. - 2095(J)(1) expressly recognizes that proposals need not be accepted unconditionally without alteration and that the decision on whether to reject a proposal may be tied to the potential to cure a defect through discussions.

J. Rejection of Individual Proposals.

(1) *Proposals need not be unconditionally accepted without alteration or correction, and to the extent otherwise allowed by law, the State's stated requirements may be clarified after proposals are submitted.* This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:

(a) the business that submitted the proposal is nonresponsible as determined under Section 11-35-1810;

(b) the proposal ultimately (that is, *after an opportunity, if any is offered, has passed for altering or clarifying the proposal*) fails to meet the announced requirements of the State in some material respect; or

(c) the proposed price is clearly unreasonable.

(2) The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.

In your effort to understand discussions, refer to these laws often.

II. Discussions - Appropriate Use

Discussions are an exchange of information between the procurement officer and an offeror.

Discussions occur only in a competitive sealed proposal (RFP) procurement.[2]

Discussions need not be conducted. Whether to conduct any discussions is a matter largely within the procurement officer's discretion.

Generally, discussions are discouraged for most competitive sealed proposals. Often, discussions are time consuming, labor intensive for procurement staff, and expensive for vendors. In addition, discussions increase the risk of improprieties (unintentional or intended) and the risk of errors by the procurement officer. Nevertheless, discussions provide a very valuable tool - in appropriate circumstances. Usually, discussions should be reserved for procurements for the largest or most complex procurements. Discussions are especially suited for such procurements when the solicitation defines an agency's needs, rather than defining an exact scope of work.

Before conducting discussions, a procurement officer must be individually approved in writing by the relevant CPO. Those approvals expressly limit the use of that authority to procurements with an expected total potential value in excess of $500,000.

III. Classifying Proposals

As provided in Section 11-35-1530(8), discussions are authorized "for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements." Regulation 19-445.2095(I)(2)(e) allows such discussions to result in proposal revisions, but such revisions are strictly limited to those necessary to address concerns raised by the procurement officer regarding suspected mistakes, uncertainties, or non-responsiveness. In large measure, such communications are intended to facilitate evaluation and ranking because only responsive offers can be ranked. [11-35-1530(7)] Such communications are not designed to address any other deficiencies in a proposal or to create an opportunity for offerors to expand, strengthen, enlarge, enhance, or further develop their proposals. Likewise, such communications are not intended to involve bargaining. They are only for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Discussions are not negotiations.

A. When to Classify

If discussions will be conducted pursuant to Section 11-35-1530(6) and Regulation 19-445.2095(I)(2), the proposals must first be classified in accordance with Regulation 19-445.2095(I)(1).

B. Why Classify

As submitted, a vendor's initial proposal may be non-responsive or contain ambiguities that negatively effect its evaluation. Discussions present a significant opportunity for vendors to address such defects. Fundamental fairness requires that all competitors have an equal chance to benefit from such discussions.

[2] The term "discussions," as used herein, does not include "clarifications" conducted under Section 11-35-1520(8).

Despite the potential benefits, discussions are often expensive for everyone involved; they involve both demanding communications and proposal revisions. If a vendor's initial proposal is not acceptable - and is not reasonably susceptible of being made acceptable through discussions, incurring such costs is unwarranted.

Accordingly, if discussions are conducted, they are conducted with all proposals classified as acceptable or potentially acceptable. They are not conducted with those classified as unacceptable.

C. How to Classify

Before discussions can be conducted, regulation 19-445.2095(I)(1) requires that each proposal be classified as acceptable, potentially acceptable, or unacceptable.

> I. Discussions with Offerors
> (1) Classifying Proposals. For the purpose of conducting discussions under Section 11-35-1530(6) and item (2) below, proposals shall be initially classified in writing as:
> (a) acceptable (i.e., reasonably susceptible of being selected for award);
> (b) potentially acceptable (i.e., reasonably susceptible of being made acceptable through discussions); or
> (c) unacceptable.

To properly classify a proposal, use the following analysis: (1) Is the proposal acceptable as submitted. If yes, classify it as "acceptable" (2) If the proposal is not "acceptable" as submitted, determine whether the proposal is "reasonably susceptible of being made acceptable through discussions." If it is, classify it as "potentially acceptable." If it is not, classify it as "unacceptable." Stated differently, a proposal is "unacceptable" if it is not initially acceptable and limited discussions can't make it acceptable.

1. Is the proposal acceptable as initially received?

First ask, is this proposal acceptable as initially received? To be acceptable for purposes of discussions, the proposal need not be ready for contract execution. Rather, it needs only to be "reasonably susceptible of being selected for award." In other words, a proposal is initially acceptable, i.e., "reasonably susceptible of being selected for ward," if you have no grounds for rejection. Generally, a proposal will be acceptable if (i) the offeror is responsible, (ii) the proposal is responsive,[3] (iii) the proposed price may be reasonable[4], and (iv) the procurement officer does not suspect a material mistake. [5]

---

[3]Formerly, rejection of individual proposals was governed by R. 19-445.2070. Under the revised regulations (2007), rejection is governed by R.19-445.2095, which reads as follows:

> J. Rejection of Individual Proposals.
> (1) Proposals need not be unconditionally accepted without alteration or correction, and to the extent otherwise allowed by law, the State's stated requirements may be clarified after proposals are submitted.

When in doubt, leave it in.

If the proposal is not "acceptable" as initially received, go to item #2 below.

2. Is the proposal "*reasonably* susceptible of being made acceptable *through discussions*" - Potentially Acceptable

Because discussions involve limited proposal revisions, they provide an opportunity for proposals to be "made acceptable." Under R.19-445.2095(I)(1)(b), a proposal is classified as potentially acceptable only if it is *reasonably* susceptible of being made acceptable *through discussions*. Given the strict limitations on proposal revisions, a proposal cannot be *reasonably* susceptible of being made acceptable through discussions unless the revisions needed to make the proposal acceptable are within the allowed scope of proposal revisions. Accordingly, how a proposal is classified depends, in large measure, on the degree to which a proposal can be revised.

Regulation 19-445.2095(I)(2)(b)-(e) provides the only authority for revising a proposal after opening.

> (b) Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive;
> (c) Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any;
> (d) Resolve in writing suspected mistakes, if any, by calling them to the offeror's attention.
> (e) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer during discussions under items (2)(b) through (2)(d) above.

As subparagraph (2) reflects, if discussions are conducted, the procurement officer must advise the offeror of the following: (a) any deficiencies in its proposal that would result in rejection as non-responsive, (b) any uncertainties concerning the cost or price, technical proposal, and other

---

> This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. *Reasons for rejecting proposals include but are not limited to*:
> (a) the business that submitted the proposal is nonresponsible as determined under Section 11-35-1810;
> (b) the proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the announced requirements of the State in some material respect; or
> (c) the proposed price is clearly unreasonable.
> (2) The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.

S.C. Code Ann. Regs. § 19-445.2095(J) (emphasis added).

[4] See Footnote #3 above, paragraph (1)(c) of R. 19-445.2095(J).

[5] This list is not exhaustive. Neither is the regulation, which recognizes that the list is not limiting. For example, a proposal could be rejected if the procurement officer identifies a material misrepresentation. Refer to the examples of unacceptable proposals provided below in part III.C.3.b of these training materials.

terms and conditions of the proposal, and (c) any suspected mistakes in its proposal. Under subparagraph (2)(e), once the procurement officer provides the required information, the procurement officer must give each of those offerors a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer. Stated simply, a proposal can be *revised* only to the extent necessary to resolve significant uncertainties, suspected mistakes, and deficiencies that will result in rejection as non-responsive.[6]

With these limits in mind, a proposal is classified as potentially acceptable if it is initially not "acceptable" and its defects can be cured with a reasonable degree of explanation and proposal revision - of the type allowed by this regulation.

3. Summary

Because discussions provide a limited opportunity for defective proposals to be cured, the choice of how you classify a proposal hinges, in large measure, on whether you believe that - as a practical matter - the defects in a proposal can be cured with a reasonable degree of explanation and proposal revision of the type allowed by the rules. To over generalize, a proposal will not be classified as unacceptable for mere non-responsiveness. Likewise, a proposal should be classified as unacceptable if major revisions would be required, i.e., if the revisions required would be tantamount to a new proposal.

Stated differently:

- Classify a proposal as acceptable if the proposal, as received, need not be rejected.
- Classify a proposal as unacceptable if the proposal, as received, must be rejected and you believe that - as a practical matter - reasonable discussions (including limited proposal revisions) *cannot* cure the proposal's defects.
-Classify a proposal as potentially acceptable if the proposal, as received, must be rejected and you believe that - as a practical matter - reasonable discussions (including limited proposal revisions) *can* cure the proposal's defects.

Several examples of potentially acceptable and unacceptable proposals may help to illustrate.

a. Potentially Acceptable, i.e., reasonably susceptible of being made acceptable through discussions

(1) Proposal is acceptable except for exceptions taken to the choice of law clause. Discussions can easily resolve this issue. Either an offeror submits proposal revisions to remove the exception or it does not. Clearly, this proposal is reasonably susceptible of being made acceptable through discussions.

[6] As explained elsewhere, not all discussions result in proposal revisions. Accordingly, discussions are not limited to uncertainties, mistakes, and issues of non-responsiveness. But, proposal revisions are.

(2) Proposal is acceptable except for the price, which is excessive. Discussions might resolve this issue. Procurement officer identifies this fact. Offer either submits a lower price or not.[7]

(3) Solicitation requests a fixed price. Proposal states a fixed price, except that all travel charges will be billed at actual cost. Discussions might resolve this issue. Offeror could revise its pricing to factor its travel costs into a fixed price.

(4) Solicitation seeks an energy performance contract. An otherwise acceptable proposal offers numerous energy savings measures. One such measure regards transportation services, which are outside the scope of the solicitation - such that award could not be made without addressing this issue. Discussions could lead to a proposal revision in which that option was deleted and the price modified accordingly.

(5) A proposal is received that provides a technically acceptable solution. However, the proposal takes express exception to dozens of the solicitation's mandatory terms and conditions and states that the contractor is only willing to do business using its standard form contract, a copy of which is enclosed. Arguably, this proposal could be classified as potentially acceptable. The defect could be resolved by withdrawing the requested changes to the solicitation's terms and conditions.

b. Unacceptable, i.e., not reasonably susceptible of being made acceptable through discussions

(1) Solicitation seeks proposals for an internet based service. One proposal is structured around offering a hardware based solution, such that the proposal would need to be almost entirely re-written and re-priced to be responsive. Classify the proposal as unacceptable.

(2) Three proposals are received on a campus-wide food service contract. Technically, all three are responsive, but one proposal is vastly inferior. The RFP expressly seeks, but does not mandate, a substantial initial capital investment. Where the first two comply, the third proposal offers almost none. The RFP clearly seeks a system-wide solution (all campuses), but does not mandate services at all campuses. Where the first two proposals agree to cover all the satellite campuses, the third proposal offers services only for the main campus and one of 4 satellite campuses. Since all offerors are responsive, discussions may not be worth the effort. Nevertheless, if discussions are conducted, the third proposal would probably warrant classification as unacceptable because the revisions required to make it competitive would be tantamount to a new proposal.

(3) Three proposals are received on a large design-build construction project. All offerors are responsive. None of the proposals take express exception to the solicitation requirements. Two proposals provide in-depth, detailed proposals that provide the type of information required. One

[7] Note: Generally, the procurement officer should not provide information regarding how unreasonable the price may be or otherwise suggest a target price. The procurement officer must not provide any information regarding any other offeror's price or how the offeror's price relates to another offeror's price. If the solicitation established an estimated budget, price-not-to-exceed, or other indication of a maximum price, the procurement officer might indicate that the offer is unacceptable based on price because the price exceeds the previously published maximum.

proposal does little more than parrot back the solicitations stated requirements; no explanation is provided regarding how the offeror will perform. To effectively compete, the offeror would have to totally overhaul its proposal. Classify the third proposal as unacceptable.

(4) Three proposals are received. The solicitation included mandatory minimum experience requirements, i.e., special standards of responsibility. After additional inquiry (which is not "discussions"), the procurement officer concludes that Offeror "A" lacks the required experience. Classify the proposal from Offeror "A" as unacceptable. Discussions simply cannot resolve the defect.

D. How to Communicate

Depending on the circumstances, discussions may be verbal or written.

Discussions conducted under items (2)(b) through (e) of R. 19-445.2095(I) must be conducted only in writing. Other discussions need not be in writing *and cannot result in proposal revisions*.

In conducting verbal discussions, procurement officers should take special care to accord fair and equal treatment to all offerors.

Generally, procurement officers should conduct all significant discussions in writing.

E. When to Conduct Discussions (timing)

Different procurements present different circumstances. The timing of discussions will depend on the facts involved. Examples may help illustrate:

(1) Procurement officer does an initial review and finds all proposals responsive. No discussions are conducted. During the evaluation, one evaluator identifies an item on which a highly ranked offeror is non-responsive. You conduct discussions in hopes of keeping that offeror's proposal in play.

(2) Procurement officer does an initial review. Of seven proposals, five are non-responsive. Those five were submitted by the five leading companies in the market. The procurement officer - prior to the evaluations - classifies the proposals. Six are classified as either acceptable or potentially acceptable. Discussions are conducted with those six. The seventh proposal, which was classified as unacceptable, was incurably defective. After discussions are complete, the six proposals are circulated for evaluation and ranking.

(3) Same facts as number (2). During evaluation, the sixth proposal (which was initially classified as acceptable) is determined to be materially non-responsive on an issue the procurement officer did not identify during the initial review. Even though discussions have been conducted once, the procurement officer must make a choice. Does the issue of non-responsiveness render the proposal "unacceptable" or "potentially acceptable". In other words, can appropriate discussions resolve the issue. If the procurement officer classifies the proposal as potentially acceptable, the procurement officer must conduct discussions again. Potentially,

additional discussions are required only on that single point and only with that one offeror, but that will depend on whether any other "uncertainties" or "mistakes" have surfaced thus far.

(4) Procurement officer does an initial review and finds all proposals have material issues of nonresponsiveness. However, none of the deficiencies identified will preclude a sound initial evaluation. All proposals are distributed to the evaluation panel. At the second meeting of the evaluators, numerous additional questions arise, including some regarding the evaluator's understanding of what is being offered. Some identify new issues of non-responsiveness, uncertainty, and suspected mistake. Based on the initial evaluations, and in light of the issues identified, the procurement officer classifies the proposals. Discussions are then conducted with all offerors classified as acceptable or potentially acceptable. After proposal revisions have been received and other questions answered, the revisions are circulated to the evaluators for consideration prior to another meeting for final scoring and ranking.

As these examples illustrate, the timing of discussions will depend on the circumstances of the procurement. Ultimately, your timing should be driven by the method most calculated to assist in a sound acquisition decision.

IV. Conducting Discussions

A. Control of Exchanges

Procurement officers are not subject matter experts for every procurement they manage. Rather, the using agency brings needed expertise to issues like financial capability and technical solution. Likewise, agency staff are not experts in the rules governing discussions. To insure that the rules governing such exchanges are followed, all exchanges **must** be controlled by the procurement officer.[8] Such control includes prior approval and direct participation in all exchanges. Unwritten communications, if any, must be conducted by the procurement officer or directly observed and supervised by the procurement officer. Written communication should be sent and received only by the procurement officer.

Do not allow the occasional informality of email to lead you into improper discussions. Electronic communications can bind you just as easily (sometimes easier) than paper and ink.

B. Material Deficiencies in Responsiveness

In Regulation 19-445.2095(I)(2), item (b) requires the procurement officer to advise every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive. If the deficiency does not require rejection, do not address it through this item (b).

As noted earlier, the rules for rejecting proposals used to be identical to those governing rejection of bids. For example, rejection of individual bids and proposals was governed by R. 19-445.2070. With the 2007 revision of the regulations, rejection of individual proposals is governed by R.19-445.2095, which reads as follows:

[8] R. 19-445.2095(I)(2)(a).

> J. Rejection of Individual Proposals.
> (1) Proposals need not be unconditionally accepted without alteration or correction, and to the extent otherwise allowed by law, the State's stated requirements may be clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:
> (a) the business that submitted the proposal is nonresponsible as determined under Section 11-35-1810;
> (b) the proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the announced requirements of the State in some material respect; or
> (c) the proposed price is clearly unreasonable.
> (2) The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.

S.C. Code Ann. Regs. § 19-445.2095(J) (emphasis added).

A comparison with Regulation 19-445.2070 reflects the significance of the differences. For example, R. -2070(E) allows rejection of any bid if the procurement officer determines that the bid is "unreasonable as to price." In contrast, R. -2097(J)(1)(C) allows rejection if "the proposed price is clearly unreasonable." Likewise, R. -2070(D)(1)(f) requires rejection when a bidder "limits the rights of the State under any contract clause." In contrast, R. -2095(J)(1)(b) requires rejection only if "the proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the announced requirements of the State in some material respect . . .."

C. Uncertainties

According to section 11-35-1530(6), discussions are conducted for the purpose of *clarification*[9] to assure full understanding of, and responsiveness to, the solicitation requirements." If discussions are conducted, R. -2095(I)(2)(c) requires that the procurement officer "[a]ttempt in writing to resolve *uncertainties*[10] concerning the cost or price, technical proposal, and other

---

[9] The dictionary defines the term "clarify" as follows:

> **clar·i·fy** *v.* **clar·i·fied**, **clar·i·fy·ing**, **clar·i·fies**. --*tr.* **1.** To make clear or easier to understand; elucidate: *clarified her intentions.* **2.** To clear of confusion or uncertainty: *clarify the mind.* **3.** To make clear by removing impurities or solid matter, as by heating gently: *clarify butter.* --*intr.* To become clear.

American Heritage Dictionary 351 (3d ed. 1994).

[10] The dictionary defines the term "uncertain" as follows:

> **un·cer·tain** *adj.* **1.** Not known or established; questionable: *domestic changes of great if uncertain consequences.* **2.** Not determined; undecided: *uncertain plans.* **3.** Not having sure knowledge: *an uncertain recollection of the sequence of events.* **4.a.** Subject to change; variable: *uncertain weather.* **b.** Unsteady; fitful: *uncertain light.*

American Heritage Dictionary 1942 (3d ed. 1994). While the term "ambiguity" is not a synonym of "uncertain," the two are closely connected, as the following definition reflects:

> **am·big·u·ous** (²m-b¹g“y›-…s) *adj.* **1.** Open to more than one interpretation: *an ambiguous reply.* **2.** Doubtful or uncertain: *“The theatrical status of her frequently derided but constantly revived plays remained ambiguous”* (Frank Rich). [From Latin *ambiguus*, uncertain, from *ambigere*, to go about : *ambi-*, around; see AMBI- + *agere*, to drive; see **ag-** below.]

terms and conditions of the proposal, if any" and to "[p]rovide the offeror a reasonable opportunity to submit . . . revisions to its proposal . . . to the extent such revisions are necessary to resolve" the uncertainty identified by the procurement officer. Section -1530(6) and R. -2095(I) provides both the state and the vendor a limited opportunity to clear up these uncertainties with proposal revisions.

To use this authority properly, two questions need to be answered. First, what are "uncertainties"? For any given proposal, that question will be very fact specific. Generally, an "uncertainty" is the lack of clarity that results from the use of language or the presentation of information in a way that is ambiguous, equivocal, obscure, or vague.[11]

The second question relates to which uncertainties to identify. Turning to the law, section -1530(6) tells us that discussions are conducted "for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements." R. -2095(I) requires the procurement officer to address "uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any." These rules provide little guidance. Language is invariably imprecise. Even with unlimited discussions, some ambiguity will always remain. Obviously, insignificant uncertainties need not be addressed; however, substantial defects should be. In the end, the procurement officer must exercise business judgment in deciding which "uncertainties" warrant resolution and which do not. In exercising that judgment, the procurement officer should consider, among others:
- the time and cost involved in resolving the question;
- the significance of the uncertainty - both for the evaluation and for contract performance;
- the degree of uncertainty; and,
- the type / degree / level to which uncertainties have been addressed in competing proposals, as a matter of fairness.

In technical areas of a proposal, the procurement officer may need to rely on subject matter experts to identify areas of uncertainty. Likewise, the evaluators may play a key role in identifying questions that need to be resolved.

Because discussions do involve an opportunity for proposal revisions, discussions may include new information or revisions to existing information. However, discussions are not designed to

---

American Heritage Dictionary 58 (3d ed. 1994).

[11] Notations following the definition of "ambiguous" explain that the term has a number of synonyms:

> *ambiguous, equivocal, obscure, recondite, abstruse, vague, cryptic, enigmatic.* These adjectives mean lacking clarity of meaning. *Ambiguous* indicates the presence of two or more possible meanings: *Frustrated by ambiguous instructions, the parents were never able to assemble the new toy.* Something *equivocal* is unclear or misleading, sometimes as a result of a deliberate effort to avoid exposure of one's position: *"The polling had a complex and equivocal message for potential female candidates at all levels"* (David S. Broder). *Obscure* implies that meaning is hidden, either from lack of clarity of expression or from inherent difficulty of comprehension: *Those who do not appreciate Kafka's work say his style is obscure and too complex. Recondite* and *abstruse* connote the erudite obscurity of the scholar: *"some recondite problem in historiography"* (Walter Laqueur). *The professor's lectures were so abstruse that students tended to avoid them.* What is *vague* is unclear because it is expressed in indefinite form or because it reflects imprecision of thought: *"Vague . . . forms of speech . . . have so long passed for mysteries of science"* (John Locke). *Cryptic* suggests a puzzling terseness that is often intended to discourage understanding: *The new insurance policy is written without cryptic or mysterious terms.* Something *enigmatic* is mysterious, puzzling, and often challenging: *I didn't grasp the meaning of that enigmatic comment until much later.*

American Heritage Dictionary 58 (3d ed. 1994). One might conclude that "uncertainties" in a proposal result from an offeror's use of language, or presentation of information in a way, that is ambiguous, equivocal, obscure, or vague language.

allow unrestrained enhancements to or further development of proposals. Accordingly, the extent that new information or revisions to existing information is allowed should be limited to addressing the ambiguity. The procurement officer can exercise some control by carefully phrasing any questions sent to an offeror.

D. Suspected Mistakes

Item (d) requires the procurement officer to resolve "suspected mistakes" in a proposal by calling them to the offeror's attention. Unless you have objective reasons to suspect a material mistake, do not address it through this Item (d).

As with bids, proposals can involve mistakes. While item (d) does not define mistakes, the concept is well settled in the procurement context.[12] Mistakes include only unintended errors, defects, or omissions that the procurement officer has reason to suspect are based solely on examining the proposal document.[13] Examples include apparent clerical errors, suspected errors in pricing, and inadvertent omissions (e.g., perhaps a missing numbered page).

The principle difference between mistakes in an IFB and an RFP lies not in what constitutes a mistake, but in whether the mistake can be corrected. In bids, mistakes can be corrected only if the mistake can be corrected from the information in the bid.[14] In RFPs, any mistake can be corrected if the correction is made through the process of discussions - even if correction of the mistake requires additional information. (Of course, this assumes that discussions are held and that the proposal is classified as either acceptable or potentially acceptable.)

Since R. -2085 applies to IFBs and RFPs, you can allow correction of a mistake in an RFP without conducting discussions - but only to the same extent you can allow corrections in a bid. But, if you conduct discussions, reliance on R. -2085 might be unnecessary, since the latitude available under R. -2095(I) is broader.

Regardless of which regulation you use, both require that you first identify a mistake - and a "mistake" does not include anything and everything. Rather, the category of mistakes is rather narrow, including only unintended errors, defects, or omissions that the procurement officer has reason to suspect based solely on examining the proposal document. In any context, you must justify in writing why the item is a mistake. Under R. -2085, a bid correction must be supported with a written determination. In the context of discussions, communications with a vendor that identifies a mistake must identify the suspected mistake and the reason for the suspicion.[15] (See the form letter.) However, when identifying the reasons you suspect the mistake, do not suggest correct answers, solutions, or improvements.

---

[12] Steven W. Feldman, 2 *Government Contract Awards, Negotiation & Sealed Bidding* § 14:11, at p. 14-29 - 14-35, § 16:7 at p. 16-32 (Thompson / West 2006) (explaining that the concept of mistakes is essentially the same in both competitive sealed bidding and competitive sealed proposals).

[13] Regulation 19-445.2085(B) (requiring that mistakes be "clearly evident from examining the bid document; for example, extension of unit prices or errors in addition."). See, generally, John Cibinic, Jr., et al., *Formation of Government Contracts* 682 - 685 (3d ed. 1998); Steven W. Feldman, 3 *Government Contract Awards, Negotiation & Sealed Bidding* §§ 27:22 - 27:24 (Thompson / West 2006). See also footnote #14.

[14] E.g., Protest of Millers of Columbia, Inc., Case No. 1989-3 ("Although it was evident on the face of the bid that a mistake had been made, that mistake could not be corrected from the information available.") and Protest by Ohmeda Company, Case No. 1987-5.

[15] The suspected error could relate to an offeror's pricing. You may suspect a defective price based on how the offeror's price compares with other prices. When communicating to the offeror the reason for the suspicion, do not indicate how the offeror's price compares with any other offeror's pricing.

To state the obvious, the opportunity to identify mistakes must not be used to identify areas an agency may wish for an offeror to improve or further develop. Likewise, discussions to correct mistakes should not be used to alter elements of a proposal that were intended by the offeror but later found to be disadvantageous because, in that situation, there was no mistake. Failure to address an issue is not a mistake.

V. Integrity

Section 11-35-20 expressly identifies the key purposes and policies underpinning the procurement code. *Three* of these address the fundamental importance of integrity and fairness:

> (a) to provide increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing values of funds *while ensuring that procurements are* the most advantageous to the State and *in compliance with the provisions of the Ethics Government Accountability and Campaign Reform Act*;
> . . .
> (f) *to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement*;
> (g) *to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process. . .*

Discussions and the opportunity for post-opening proposal revisions provide an enormous opportunity for favoritism, unfairness, and manipulation of the process. The statute and regulations expressly recognize the risk of such mischief. Section 11-35-1530(6) mandates fairness by stating that "[a]ll offerors whose proposals, in the procurement officer's sole judgment, need clarification must be accorded that opportunity." The regulations go further by (1) requiring CPO approval to conduct discussions, (2) requiring procurement officer control over all discussions, (3) severely limiting the scope of allowed proposal revisions, and (4) expressly providing that all "[o]fferors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals." R. 19-445.2095(I).

Inevitably, people will be tempted and/or pressured to conduct illegal discussions - intentionally or unintentionally. The most obvious example would involve telling one offeror another vendor's price and asking that offeror (directly or indirectly) to adjust their price to improve their position. No doubt, any experienced procurement officer can think of numerous possible abuses.

<u>Only you - the procurement officer charged with controlling all such communications - can minimize the risk and take those steps necessary to insure integrity and fairness.</u>

While we are still developing appropriate strategies to avoid abuse, the following points and suggested processes are strongly recommended:

A. Proposal Document Control

Improper disclosures and communications are difficult if you haven't seen the proposals. Accordingly, vigorous control should be exercised over proposals. The new regulations make this imperative by allowing access only to those with a "need to know":

> Proposals and modifications shall be shown only to State personnel having a legitimate interest in them and then only on a “need to know” basis. R. 19-445.2095(C)(1).

Even for those with a need to know, the regulations require a signed written agreement before the procurement officer can release them.

> Prior to the issuance of an award or notification of intent to award, whichever is earlier, the procurement officer shall not release a proposal to a person without first obtaining from that person a written agreement, in a form approved by the responsible chief procurement officer, regarding restrictions on the use and disclosure of proposals. Such agreements are binding and enforceable. R. 19-445.2010(E).

Lastly, only the procurement officer can authorize a release.

> Prior to the issuance of an award or notification of intent to award, whichever is earlier, state personnel involved in an acquisition shall forward or refer all requests for information regarding the procurement to the responsible procurement officer. The procurement officer will respond to the request. R. 19-445.2010(D).

Such controls should severely limit who has access to the information in an RFP, and thus, who has the ability to conduct discussions.

B Restrictions on Release of Information

Improper disclosures are difficult if you don't know who has submitted proposals or what is in the proposals. Accordingly, vigorous control should be exercised over the release of any information regarding proposals. Again, the new regulations make this imperative. The release of information regarding how many proposals were received and who submitted proposals is prohibited.

> Throughout the competitive sealed proposal process, state and non-state personnel with access to proposal information shall not disclose either the number of offerors or their identity, except as otherwise required by law. R. 19-445.2010(D).

Closely related, another regulation cautions against exposing such information during opening.

> Contents and the identity of competing offers shall not be disclosed during the process of opening by state personnel. R. 19-445.2095(C)(1).

A third regulation requires that all requests for information be directed to the procurement officer.

> Prior to the issuance of an award or notification of intent to award, whichever is earlier, state personnel involved in an acquisition shall forward or refer all requests for information regarding the procurement to the responsible procurement officer. The procurement officer will respond to the request. R. 19-445.2010(B).

Yet another provides a broad restriction on the release of information not otherwise made available publicly.

> C. Prior to the issuance of an award or notification of intent to award, whichever is earlier, state personnel involved in an acquisition shall not engage in conduct that knowingly furnishes source selection information to anyone other than the responsible procurement officer, *unless otherwise authorized in writing by the responsible procurement officer*. "Source selection information" means any of the following information that is related to or involved in the evaluation of an offer (e.g., bid or proposal) to enter into a procurement contract, *if that information has not been previously made available to the public or disclosed publicly*:[16] (1) *Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices*, (2) *source selection plans*, (3) technical evaluation plans, (4) *technical evaluations of proposals*, (5) *cost or price evaluations of proposals*, (6) *information regarding which proposals are determined to be reasonably susceptible of being selected for award*, (7) *rankings* of responses, proposals, or competitors, (8) reports, evaluations of source selection committees or evaluations panels, (9) other information based on a case-by-case determination by the procurement officer that its disclosure would jeopardize the integrity or successful completion of the procurement to which the information relates. R. 19-445.2010(C) (emphasis added).

Taken together, the information available regarding proposals should be so limited that improper discussions will be difficult - whether intentional or unintentional.

C. Procurement Officer Control

The solicitation documents and the code make clear that, for any given solicitation, the "procurement officer" is the official charged with responsibility for the procurement in question.

[16] "The release of a proposal to non-state personnel for evaluation does not constitute public disclosure or a release of information for purposes of the Freedom of Information Act." R. 19-445.2010(F).

As these materials have already discussed, the regulations mandate that the procurement officer control all discussions. R. 19-445.2095(I)(2)(a). Moreover, only procurement officers expressly approved by a CPO can participate in such discussions. R. 19-445.2095(I)(4).

Taken in conjunction with the other regulations, these requirements effectively create a single point of information control. Such control allows the potential for abuse to be further mitigated.

D. Limitations on Scope of Proposal Revisions

The regulations strictly limit the scope of proposal revisions. First, the regulation only allows proposal revisions on three specific items, issues of nonresponsiveness, uncertainties, and suspected mistakes. Second, the regulations only allow those proposal revisions necessary to respond to those matters raised by the procurement officer.

These limitations are a key element to maintaining the integrity of discussions. An example helps to illustrate. After opening, an offeror may improperly acquire information regarding another offeror's price. When given an opportunity to make proposal revisions, the offeror is unable to use that information to revise its price because the revisions are limited to responding to the questions asked. For example, a lack of responsiveness regarding a choice of law provision shouldn't have an impact on the price proposal. Similarly, if an offeror got improper information regarding another offeror's technical solution, such information would be difficult to use during proposal revisions unless the procurement officer asked a question going to that issue - because revisions must be limited to addressing the questions raised.

E. Other Possible Measures

1. Offeror Certification

Prior to award, a vendor selected for award could be asked to certify that no communications have taken place other than those conducted under the direct control of the procurement officer.

2. Agency Certification

Prior to award, agency staff - particularly evaluators, key management, and procurement staff - could be asked to certify that no communications have take place.

3. Education

Steps could be taken to identify relevant program staff at the agency and inform them of the applicable restrictions. Such restrictions could be built into the agreement signed for release of proposal information.

VI. Limits on Exchanges

Regulation 19-445.2095(G) provides that "[t]he appropriate Chief Procurement Officer may develop and issue procedures which *shall* be followed by all agencies using the competitive sealed proposal method of acquisition." The guidance entitled "Guidance & Best Practices for Permissible Communications in a Competitive Sealed Proposal After Opening but Prior to Award" establishes the following limits on all communications, including discussions:

> (e) Limits on exchanges. Prior to the issuance of an award or notification of intent to award, whichever is earlier, state personnel involved in an acquisition shall not engage in conduct that—
>
> (1) Favors one offeror over another;
>
> (2) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror;
>
> (3) Reveals an offeror's price without that offeror's permission. However, the procurement officer may inform an offeror that its price is considered by the State to be too high, or too low;
>
> (4) Reveals the names of individuals providing reference information about an offeror's past performance;

A. Favoring One Offeror Over Another

{under development}

B. Revealing Technical Solution / Intellectual Property

{under development}

C. Revealing Price

Prior to the issuance of an award or notification of intent to award, whichever is earlier, do not reveal one offeror's cost or pricing information to another offeror. You may inform an offeror that its price is considered by the State to be too high, or too low. For recommendations on how, please refer to footnotes #7 and #15 and the related text.

D. Revealing References

Prior to the issuance of an award or notification of intent to award, whichever is earlier, do not reveal to one offeror the names of individuals providing reference information about another offeror's past performance. Of course, in all circumstances, such information should be released after complying with internal rules regarding release of confidential information.