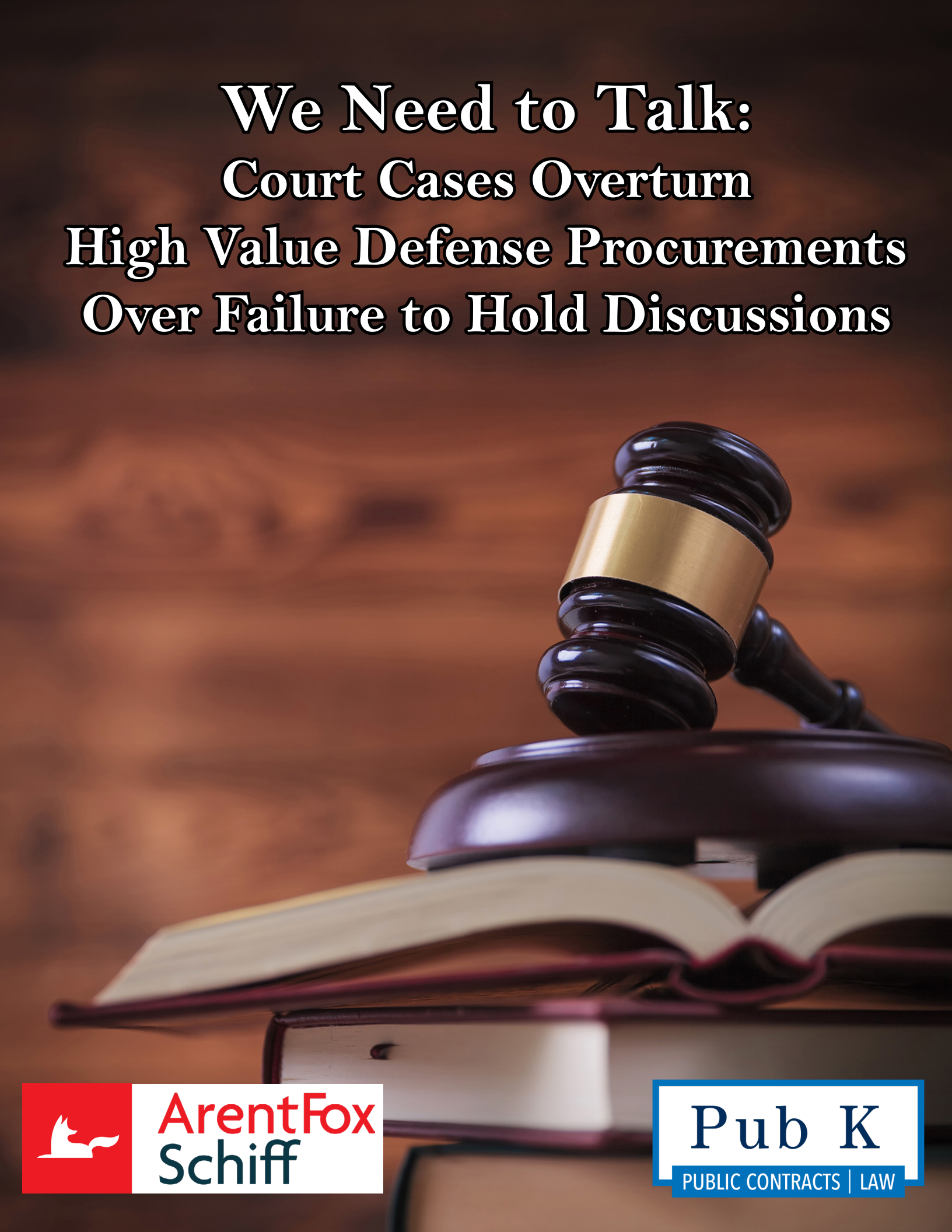
We Need to Talk:
Court Cases Overturn High Value Defense Procurements Over Failure to Hold Discussions



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We Need to Talk: Court Cases Overturn High Value Defense Procurements Over Failure to Hold Discussions

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Once again, in the third such decision in fewer than two years, the U.S. Court of Federal Claims ("CFC") in January issued a decision granting a protest of, and thereby upending, a major Department of Defense ("DoD") award decision on the basis that the procuring officials failed to conduct discussions in a high value defense procurement. Specifically, the court found that the agency had run afoul of DFARS [1] 215.306, which directs that contracting officers should conduct discussions for procurements valued over $100 million. While this provision seems to have had little or no impact on DoD's procurement practices for nearly a decade after it was enacted in 2011, the three recent CFC decisions depart significantly from the approach taken by the Government Accountability Office ("GAO") and raise continuing questions as to the requirements for holding discussions going forward. It remains unclear, for example, on what basis the DoD might justify not holding discussions in these procurements, whether not doing so might constitute harmless error in some instances, and whether the FAR 15.306(c) and (d) procedures on discussions (referenced in the DFARS provision) might limit the significance of the DFARS provision, among other things.

This article reviews the origin and meaning of DFARS 215.306; the GAO, Federal Circuit, and CFC cases that have addressed it; and the issues that remain.

I. How Discussions Arise in a Negotiated Procurement

Discussions occur in the context of contracting by negotiation. As described in FAR 15.306, contracting by negotiation involves "exchanges" with the government at various times in the procurement process. [2] Depending on the timing and substance of the exchanges, they may be classified as a "clarification," "communication," "negotiation," or "discussions." [3] "Clarifications" are limited exchanges where an offeror is given the opportunity to resolve minor or clerical errors or to clarify certain aspects of its proposal.[4] "Communications," on the other hand, are exchanges after receipt of proposals leading to the establishment of the competitive range. [5] While they cannot be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal, "communications" are permitted to allow reasonable interpretation of the proposal or to facilitate the Government's evaluation process. [6]

"Negotiations," on the other hand, are exchanges between the Government and offerors

that are undertaken with the intent of allowing the offeror to revise its proposal. [7] These negotiations may include bargaining, which includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.[8] When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called "discussions." [9]

As prescribed in the FAR, "discussions" are "tailored to each offeror's proposal, and must be conducted by the contracting officer with each offeror within the competitive range." [10] Where discussions are conducted, "[a]t a minimum, the contracting officer must. . . discuss with each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond." [11] "The contracting officer also is encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award." [12] "However, the contracting officer is not required to discuss every area where the proposal could be improved."[13] "The scope and extent of discussions are a matter of contracting officer judgment." [14] The FAR contemplates that award may be made without discussions if the solicitation states that the Government intends to evaluate proposals and make award without discussions. [15]

II. DFARS 215.306 and the Expectation of Discussions

We have found that contracting officers prefer not to conduct discussions in most procurements. Discussions extend the time and effort required for the procurement; they can be difficult to handle properly; and they add to the possible areas of risk in post-award protests. The natural aversion manifests commonly in a provision stating that "[t]he Government intends to evaluate proposals and award a contract without discussions," while reserving the right to seek clarifications and "to conduct discussions if the Contracting Officer later determines them to be necessary." [16]

Effective September 20, 2011, however, DoD reduced the discretion of contracting officers to avoid discussions in high value procurements, with its new DFARS 215.306 regulation's direction that "[f]or acquisitions with an estimated value of $100 million or more, contracting officers should conduct discussions," and instructing further to "[f]ollow the procedures at FAR 15.306(c) and (d)." [17] As used in the FAR, the word "should" indicates "an expected course of action or policy that is to be followed unless inappropriate for a particular circumstance." [18]

While the FAR describes the primary purpose of discussions as "maximiz[ing] the Government's ability to obtain best value",[19] the DoD has explained that the DFARS provision's expectation of discussions was intended to reduce protests:

> [F]ailure to hold discussions in high-dollar value, more complex source selections has led to misunderstandings of Government requirements by industry and flaws in the Government's evaluation of offerors' proposals, leading to protests that have been sustained, and ultimately extending source-selection timelines. DoD proposes to decrease the possibility of this outcome by making such discussions the default procedure for source selections for procurements at or

above $100 million. However, use of the term "should," as defined in FAR part 2, provides that the expected course of action need not be followed if inappropriate for a particular circumstance.[20]

Considering the recent spate of protests directed at the DFARS provision itself, however, it is not clear the provision achieved this purpose.

III. Cases Reflect Split Between GAO & CFC

A. GAO Finds DFARS 215.306 Affords Agencies Discretion in Whether To Conduct Discussions.

Not until 2016 did GAO issue its first published decision considering whether an agency abused its discretion by failing to conduct discussions required by the DFARS provision.[21] The details of the *Science Applications International Corporation* ("*SAIC*") case are interesting in light of the CFC's subsequent disagreement with that decision's treatment of the DFARS provision.

The SAIC protest involved a procurement for specially constructed vehicles for the Special Operations Command, a unified combatant command under the DoD that oversees component commands of the Army, Marine Corps, Navy, and Air Force of the United States Armed Forces. As a DoD procurement, it was subject to various provisions of the FAR and DFARS. The solicitation incorporated FAR 52.215-1, providing that the agency intended to make award without discussions, but the expected value of the procurement also exceeded the $100 million threshold that invokes DFARS 215.306. The technical evaluation of SAIC's proposal found five significant weaknesses and three deficiencies, whereas the awardee's proposal (Battelle) found no significant weaknesses or deficiencies. SAIC's proposal was, further, found to be "unacceptable" in two areas of evaluation. [22]

The agency's Source Selection Advisory Council ("SSAC") recommended an award to Battelle without discussions, stating its belief "that the benefit of setting a competitive range and opening discussions" did not "outweigh[] the benefit of awarding without discussions to a clearly superior Technical/Management proposal ...." [23] The Source Selection Authority ("SSA") agreed and made the award without discussions.

SAIC protested, arguing that the agency was required to conduct discussions pursuant to DFARS 215.306. SAIC argued that, had the agency conducted discussions, SAIC "could have corrected the deficiencies assessed to its proposal and addressed other adverse evaluation findings." [24] The GAO, however, reasoned that while "DFARS 215.306(c) is reasonably read to mean that discussions are the expected course of action in DoD procurements valued over $100 million," nevertheless, "agencies retain the discretion no to conduct discussions if the particular circumstances of the procurement dictate that making an award without discussions is appropriate." [25] To uphold the agency's determination, the GAO required only a "reasonable basis for the agency's decision not to conduct discussions." [26]

In analyzing whether the agency's decision not to conduct discussions was reasonable, GAO outlined a three-part test, assessing whether the record shows: "[1] there were deficiencies in the protester'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." [27]

GAO found a reasonable basis not to conduct discussions based on the solicitation's statement

of intent not to conduct discussions, the disparity of the ratings in the evaluated technical proposals, and Battelle's reasonable price. *Id.* GAO concluded that "we view as reasonable the agency's decision to exercise the discretion it is afforded under DFARS §215.306(d) to forgo discussions."[28] [29] For GAO, then, discussions remain a matter of discretion, even for high value defense procurements.

B. Federal Circuit Upholds Corrective Action Based on Failure to Hold Discussions

In 2018, the Federal Circuit weighed in on the issue, by upholding agency corrective action that was justified, in part, by the agency's acknowledgement that its failure to conduct discussions before award was likely a violation of DFARS 215.306. [30]

In *Dell Federal Systems*, the Army sought to procure computer hardware on a lowest price, technically acceptable basis under an Indefinite Delivery Indefinite Quantity ("IDIQ") contract vehicle with an estimated value of up to $5 billion. [31] The Army evaluated 55 responsive proposals, but only nine were found technically acceptable. [32] The Army did not open discussions because to do so "would significantly delay award." [33] After the Army awarded nine contracts, there were multiple GAO protests asserting that the Army had illegally failed to conduct discussions, and that the agency spreadsheets to be completed and submitted with proposals were ambiguous and resulted in misunderstandings that explained why many offerors were deemed to have submitted unacceptable proposals. [34] To resolve the protests, the Army proposed corrective action consisting of correcting its spreadsheets, conducting discussions with all offerors and making new award determinations. [35]

The Army's decision to take corrective action, in turn, led to protests in the CFC by several of the awardees, arguing that the corrective action was overbroad. The CFC agreed and issued an injunction, which was then reversed by the Federal Circuit on appeal in which the Government agreed that its failure to conduct discussions likely violated its DFARS mandate. *Id.*

Of relevance here, the Court agreed with the CFC's decision below that the Army's "decision 'to forego discussions' with at best 'threadbare and conclusory reasons' likely 'failed the reasonableness test articulated in SAIC.'" In addition, the Court found that discussions could have had a significant effect on the procurement, noting:

> Had the Army conducted pre-award discussions, several of the lower-priced offerors deemed unacceptable – either as a result of ambiguous Solicitation requirements or otherwise – might have revised their initial proposals, which then might plausibly have been found technically acceptable. [36]

Thus, the operative precedents, before the three recent CFC decisions to be discussed below, were the *SAIC* decision where the GAO found the agency reasonably to have justified its decision not to conduct discussions, and the Dell Federal decision, where the Federal Circuit concurred with the Government that the Army's reason for not conducting discussions was an insufficient justification.

C. In Oak Grove, CFC Finds Agency Insufficiently Justified Failure To Conduct Discussions

In the first of three recent CFC decisions on this topic, the CFC in the 2021 case of *Oak Grove Technoloy* considered DFARS 215.306 and the expectation to hold discussions. [37] In a procure-

ment for training to support the Special Operations Command, the solicitation sought services with a value well in excess of $100 million. The solicitation stated that the Army intended to award without discussions, but reserved the right to hold discussions in its discretion. [38]

Ten offerors submitted proposals, seven of which were evaluated as being marginal or unacceptable. Oak Grove's proposal was among the seven, having been found to have numerous deficiencies. The agency evaluated the remaining three as acceptable or better and found the awardee, F3EA, to have the best technical proposal with the lowest price. [39]

After first protesting to the GAO on other bases, [40] Oak Grove's protest before the CFC alleged, among other things, that the Army had abused its discretion by failing to engage in discussions. [41] In addressing that allegation, the Court first described the requirements of FAR 15.306(d) (which the DFARS provision instructs agencies to follow when holding discussions). The Court cited Federal Circuit case law for the proposition that "[u]nder [FAR] section 15.306(d)(3), whether discussions should be conducted lies within the discretion of the contracting officer." [42] The Court also noted that "the general rule is that once offerors are warned that the agency intends to award without discussions, absent special circumstances, the contracting officer has the discretion to award without discussions," while offering that this "does not mean that such discretion is plenary." [43] Instead, the Court noted that "wherever a regulation provides the government with discretion to take (or not to take) an action, such discretion must be exercised reasonably and not in an arbitrary and capricious manner." [44]

The Court then discussed the impact of DFARS 215-306 on the analysis. Specifically the Court found that that "the DFARS provision's plain language suggests that an agency must justify not engaging in discussions where the provision applies" and further that "the DFARS provision's plain language would seem to create a presumption in favor of an agency's conducting discussions." [45] The Court found the critical question to be whether the Agency had sufficiently justified its decision not to engage in discussions. [46] On that question, the Court found that the Government's explanation for its failure to conduct discussions "[fell] woefully short" of justifying why it was inappropriate to do so; indeed, there was essentially no explanation, just the best value determination. [47] By relying on FAR 15.306 as the basis for awarding without discussions, the agency had "improperly reversed the regulatory presumption." [48] The Court sustained Oak Grove's protest as a result. [49] [50]

In reaching its decision, the Court addressed the issue of prejudice arising out of the failure to conduct discussions only in passing, noting that "[d]iscussions, of course, would have enabled [Oak Grove] (and presumably all of the offerors) to fully revise their respective proposals to address any deficiencies in a final proposal revision." [51] This conclusion, however, may not be as apparent as the Court suggests, as it does not account for the relationship between DFARS 215.306 and FAR 15.306(c). As a reminder, DFARS 215.306 instructs to "[f]ollow the procedures at FAR 15.306(c) and (d)," and FAR 15.306 requires discussions only after the establishment of a competitive range of the most highly rated proposals. It is not clear that Oak Grove (or any of the other proposals deemed unacceptable) would have been included in the competitive range – raising a question as to whether the requirement of discussions should apply. The competitive range issue was addressed more squarely

in the next CFC decision to follow.

D. In IAP Worldwide Services, CFC Explicitly Rejects GAO Three Part Test

In the second of the Court's recent decisions applying DFARS 215.306, *IAP Worldwide Services*, the protester brought a CFC protest only after having previously protested and lost in the GAO. [52] The difference in results between the GAO and CFC protests highlights the rift that has opened between the two fora.

In the GAO, IAP protested an award by the Army to Vectrus Systems Corporation for certain overseas operation and maintenance services valued at approximately $1 billion. IAP challenged the evaluation of the proposals and the Army's decision to make award without discussions. [53] The solicitation stated that proposals evaluated as unacceptable in a subfactor rating under the technical factor of mission support/technical approach would not be considered for award. The solicitation stated that the agency intended to make award without discussions, but reserved the right to decide later to do so.

The Army evaluated IAP's proposal as unacceptable. Vectrus' proposal was evaluated as outstanding, and the proposals of three other offerors were evaluated as good. The GAO found no merit in IAP's challenge to the evaluation of its proposal.

The GAO also rejected IAP's assertion that the Army had improperly failed to hold discussions pursuant to DFARS 215.306. The GAO acknowledged the expectation of discussions created by the DFARS provision, but stated that "agencies retain the discretion not to conduct discussions based on the particular circumstances of each procurement." [54] The GAO's opinion noted that when analyzing whether an agency had properly exercised its discretion, GAO would look to at least three factors (similar to the *SAIC* three-part test) including: "notification in the solicitation of that intent [to forgo discussions]; existence of clear technical advantages/disadvantages in initial proposals; and submission of initial proposals offering fair and reasonable prices." [55] GAO further noted that " an agency generally need not conduct discussions with a technically unacceptable offeror." [56] Concluding that those facts existed in that procurement, the GAO agreed that the Army was not required to hold discussions.

After losing at the GAO, IAP took its protest to the CFC, which came to a different conclusion. While similarly denying all of IAP's allegations regarding the evaluation, the Court found that the Government failed to justify its decision not to conduct discussions pursuant to DFARS 215.306, and granted the protest on that basis.

In rejecting the Government's basis for not conducting discussions, the Court focused on the Army's conclusions that it was "unlikely" that IAP's unacceptable subfactor 2 proposal "can be rectified with discussions" and that "discussions would not result in any meaningful benefit to the Government, or any changes to the apparent outcome of the source selection decision." [57] The Court found these statements to be "threadbare, conclusory," without "reasoned agency judgment" based on "facts substantiated in the administrative record." [58] The Court also found that Evaluation Notices prepared for possible discussions included some that addressed the deficiencies and weaknesses in IAP's proposal. [59] And, the Court opined that "the FAR's operating premise is that providing offerors with an opportunity to address 'deficiencies' and 'significant weaknesses" via discussions may 'enhance ma-

terially the proposal's potential for award," but that the Army improperly assumed that this was untrue of IAP. [60]

In reaching its decision, the Court expressly rejected GAO's three-part test set forth in the SAIC protest discussed above "as not capturing the DFARS presumption favoring discussions" and "swallowing the DFARS §215.306 presumption whole." [61] According to the Court, the "crucial factor" for the GAO is the existence of deficiencies in the protester's proposal, "[b]ut where a plaintiff challenges an agency's decision not to conduct discussions under DFARS §215.306, the agency will have by definition, assessed the plaintiff's proposal with deficiencies (or significant weaknesses) – because the very point of discussions is to address such findings." [62] The Court further noted that "where an agency has not assessed a proposal with a deficiency or significant weakness, the government is not required to engage in discussions with that offeror in any event." [63]

Lastly, unlike in Oak Grove, the Court expressly held that the Army's failure to conduct discussions constituted prejudicial error. While acknowledging that an agency can set a competitive range, and that here a competitive range of the most highly rated offerors might have excluded IAP, the contracting officer was required to make that determination in the first instance.[64]

The disparity between the GAO and CFC decisions seems implicitly tied to this concept of prejudice. The GAO appears to hold that the contracting officer may deem discussions unwarranted where the disappointed offeror had deficiencies and would otherwise have fallen out of a hypothetical competitive range based on "clear technical advantages and disadvantages between the competing proposals." [65] In such case, the offeror presumably would not have been prejudiced because it would not have had a substantial chance of award, even if the agency had followed DFARS 215.306 by establishing a competitive range and conducting discussions with those offerors within the competitive range. The CFC, on the other hand, appears to require that the agency have actually established (and reasonably supported) a competitive range that excluded the disappointed offeror in order to justify having withheld discussions due to an offeror's purported deficiencies.

Here, for example, one or more of the three offerors other than Vectrus, with ratings of acceptable or better, might well be included in a competitive range and have the possibility of improving their proposals. The Army presumably could have established a competitive range, followed by discussions, with only such offerors, and be in compliance with the DFARS provision. By contrast, IAP submitted the lowest-rated proposal among the five, and the only one that was found to be unacceptable. While it is virtually inconceivable that the contracting officer would have included that proposal in the competitive range of the most highly rated proposals per FAR 15.306(c), the CFC nevertheless appears to require the contracting officer at least to go through that process and demonstrate how it arrived at this conclusion.

The CFC's approach reflects an emphasis on form and process despite the result that a significant procurement was upended and delayed with very little prospect that it would change the outcome for IAP.

E. The Court's SLS Federal Decision Follows Earlier Court Precedents While Addressing Novel Prejudice Argument

In the Court's most recent decision addressing DFARS 215.306, *SLS Federal Services*, the CFC again rejected the Government's purported justification for failing to conduct discussions, while simultaneously dispensing with a novel prejudice argument. In that case., a disappointed offeror protested six IDIQ awards by the Naval Facilities Engineering Systems Command for global construction and engineering services.[66] The maximum contract value was $5 billion, easily exceeding the $100 million threshold for DFARS 215.306 applicability. The Navy received nine offers, and SLS Federal was not one of the six that were successful. [67]

The solicitation stated that the agency would evaluate both cost and price reasonableness, but only cost data was requested. In addition, the solicitation stated that the Navy intended to make awards based on initial proposals, though reserving the right later to decide to conduct discussions.

SLS Federal initially protested before the GAO, alleging that the agency's price reasonableness evaluation was flawed and that the agency improperly failed to hold discussions. The agency advised GAO that it would take corrective action focused on the price reasonableness argument, and the GAO dismissed the protest as moot.[68] After the passage of nearly a year, however, the Navy reaffirmed its awards, having taken no action with regard to price reasonableness and conducting no discussions. SLS Federal filed a second protest with the GAO, but then moved the protest to the Court due to disputes over document production.[69]

At the CFC, the Court agreed with SLS Federal that the Navy had not performed a proper price reasonableness evaluation – and had not even requested price data necessary to do the evaluation.[70] Though this conclusion meant that the solicitation would have to be amended and new proposals received, the Court also addressed the allegation that the agency had violated DFARS 215.306 by not holding discussions.

Relying on the Dell Federal and the earlier CFC decisions discussed above, the Court held that the Navy had failed to overcome the regulatory presumption that discussions would be held. According to the Court, the agency appeared to argue "that the regulation does not apply if the agency simply chooses from the start not to conduct discussions." [71] The agency also argued that the decision not to conduct discussions was "adequately documented," but the only documented reason the Court found was the agency's statement that the "'six highest ranked proposals … [were] clearly awardable without discussions [and] presented the best value' to the government." [72]

In a seemingly novel take on the prejudice argument, the Navy also contended that SLS Federal had no deficiencies or significant weaknesses, and so the agency would not have been required to conduct discussions with SLS Federal pursuant to FAR 15.306(d), even if a competitive range had been selected. [73]

The Court found that none of these reasons sufficed to overcome the presumption. Regarding the prejudice argument, the Court noted that FAR 15.306(d) encourages contracting officers to go beyond deficiencies and significant weaknesses in discussions, and that doing so would potentially enhance the value of the proposals – the objective of DFARS 215.306.[74] For the CFC at least, this objective is served by requiring agencies to go through the process of establishing a competitive range and considering how broad that range should be.

IV. Conclusion

There are a number of takeaways from the Court cases that apply DFARS 215.306.

First, protesters seeking to challenge a DoD award without discussions will likely fair better at the Court than at GAO.[75] Indeed, the cases suggest it will be a rare case in the Court where the agency will succeed in overcoming the presumption favoring discussions.

Second, the cases suggest what an agency must do to avoid running afoul of DFARS 215.306. In most procurements the safest course for the agency will be to establish a competitive range, advise offerors of who is in it and who is not, and proceed to discuss, at least, any deficiencies and significant weaknesses of those in the range. Justifiable reasons not to engage in discussions sufficient to overcome the presumption will be few and far between. Perhaps a time emergency – where the contract work must proceed for any number of reasons such as national security, and arguably cannot wait for discussions to occur – might justify a failure to hold discussions. Or, the agency might argue that discussions would be a meaningless exercise, as the competitive range would not include any offer that had a deficiency or significant weakness, and the contracting officer goes on record stating that discussions with those in the range would not be expanded beyond the requirement of FAR § 15.306(d). If the agency seeks to overcome the presumption, it would likely need to document that determination in detail, including one or more affidavits stating, for example, why discussions would serve no purpose. In none of the Court cases to date has such a written justification been available to the Court in the administrative record.

Third, the GAO and Court cases further suggest that agencies' aversion to conducting discussions remains unchanged by DFARS 215.306. Moreover, because contracting officers have broad discretion to determine the competitive range, choosing what constitutes the highest rated proposals, and then to limit discussions of those proposals to deficiencies and significant weaknesses, of which there may be none, the DFARS provision may have little or no substantive impact on the procurement, and thus may fail to achieve the purpose of enhancing the quality of proposals. Because DoD thought it worthwhile to promulgate the regulation, it would seem logical that DoD would wish to maximize the regulation's effectiveness by encouraging its contracting officers to go beyond the FAR's minimum requirements for discussions.

Footnotes

1. Title 48 of the Code of Federal Regulations is known as the "Federal Acquisition Regulation" or "FAR" and "DFARS" refers to the "Defense FAR Supplement," which appears as Chapter 2 of Title 48.
2. *See* FAR 15.306.
3. *Id.*
4. *Id.* at (a)(1)&(2).
5. *Id.* at (b).
6. *Id.*
7. *Id.* at (d).
8. *Id.*
9. *Id.*
10. *Id.* at (d)(1).
11. *Id.* at (d)(3).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at (a)(3).
16. See, e.g., FAR 52.215-1(f)(4).
17. DFARS 215.306.
18. FAR 2.101.
19. See FAR 15.306(d)(2).
20. 75 Fed. Reg. 71,647-48 (Nov. 24, 2010).
21. See *Science Applics. Int'l Corp*. B-413501 et. al., Nov. 9, 2016, 2016 CPD ¶ 328.
22. See *Id.* at *3.
23. *Id.* at *4.
24. *Id.* at *7.
25. *Id.* at *8.
26. *Id.*
27. *Id.* at *9.
28. *Id.*
29. The GAO did, however, find that SAIC's allegation based on DFARS 215.306 remained timely, even though it was not raised in a pre-award protest. The agency had argued that its solicitation statement that the agency intended to make award without discussions, while reserving the right to conduct discussions if it later decided to do so, should have prompted a protest if deemed to be inconsistent with the DFARS provision. The GAO held that the reservation of the right to conduct discussions avoided any inconsistency. See *Id.* at *8, n.8.
30. See *Dell Fed. Sys., L.P.*, 906 F.3d 982 (Fed. Cir. 2018).
31. *Id.* at 986.
32. *Id.* at 987.
33. *Id.*
34. *Id.* at 988-89.
35. *Id.*
36. *Id.* at 996.
37. See *Oak Grove Techs., LLC*, 155 Fed. Cl. 84 (2021)
38. *Id.* at 91.
39. *Id.* at 93.
40. Oak Grove's CFC action was preceded by two post-award GAO protests (with a corrective action in-between) that were not focused on the discussions issue. *Id.* at 93-94;see also *Oak Grove Techs., LLC,* B-418427.6 et al., Dec. 18, 2020, 2021 CPD ¶ 8, at *3, n.7 (noting Oak Grove's protest had challenged the agency's conduct of discussions, but withdrew the allegation in its comments).
41. See supra n. 27, *Oak Grove Techs., LLC*, 155 Fed. Cl. at 94-95.

42. See *Id.* at 108 (citing *JWK Int'l Corp. v. United States*, 279 F.3d 985, 988 (Fed. Cir. 2002)).
43. *Id.* (citing *Chenega Healthcare Servs., LLC v. United States*, 138 Fed. Cl. 644, 653 (2018).
44. *Id.* (citing *Day & Zimmermann Servs., a Div. of Day & Zimmermann, Inc. v. United States*, 38 Fed. Cl. 591, 604 (1997)).
45. *Id.* at 108.
46. *Id.* at 109.
47. *Id.*
48. *Id.* at 110.
49. *Id.*
50. The decision also held that Oak Grove's protest was not untimely when it first raised the discussions issue after the award, finding that the solicitation's reservation of the right to conduct discussions was sufficient to remove any necessary conflict with DFARS 215.306. *Id.* at 111-13.
51. *Id.* at 113-114.
52. See *IAP Worldwide Servs.,Inc.,* 159 Fed. Cl. 265 (2022); *IAP Worldwide Servs., Inc.,* B-419647, B-419647.3, June 1, 2021, 2021 CPD ¶ 222.
53. See 2021 CPD ¶ 222 at *1.
54. *Id.* at *11.
55. *Id.*
56. *Id.*
57. 159 Fed. Cl. at 309-310.
58. *Id.*
59. *Id.* at 311.
60. *Id.* at 311-12.
61. *Id.*, at 314-15
62. *Id.* at 315.
63. *Id.*
64. *Id.* at 316-17.
65. See *Science Applics. Int'l Corp.* supra n. 21 at __; *IAP Worldwide Servcs.,Inc.*, 2021 CPD ¶ 222 at *__.
66. See *SLS Fed. Servs., LLC*, 163 Fed. Cl. 596 (2023).
67. *Id.* at 599-600.
68. *Id.*
69. *Id.*
70. *Id.* at *601-03.
71. *Id.* at 605.
72. *Id.*.
73. *Id.* at 606.
74. *Id.*
75. Protesting before the CFC might also avoid a timeliness trap inherent in GAO procurements. If it becomes clear before award that no discussions will occur - e.g., the agency confirms that it will not conduct discussions or announces that award is imminent, without having conducted discussions – then the ten-day period for filing a protest at the GAO might begin to run at that point. And, the award itself would begin a ten-day clock if the protester fails to make a timely request for debriefing.

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