



# CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance and Litigation



## A Lawyer's View of FAR Part 15 Rewrite

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### A Lawyer's View of the FAR 15 Rewrite - Discussions Revisited

by Amy Freeman

#### Overview

With the January 1, 1998, clock ticking for the mandatory implementation of the new FAR 15 for all Department acquisitions, procurement officials need to become up-to-speed on how to conduct negotiations under the new rules.

One goal of the FAR 15 rewrite is to permit greater communications between offerors and the Government. Under the current rules, the COs focus on whether a communication constitutes a clarification or a discussion. And, in a prior Lawyer's View article on discussions, we emphasized that the discussion versus clarification distinction depended on the substance of the communication, not on the stage of the solicitation process or the label placed on the communication. The new FAR 15 substantially changes the rules on communications after receipt of proposals, with the focus on whether the communication takes place pre-competitive range or post-competitive range. Under the new rules, the stage of the acquisition process is important, and will determine what areas of inquiry the Government can cover with offerors.

#### Competitive Range Determination

The competitive range standard received much attention during the FAR 15 rewrite comment period. Under the current rules, all offerors with a reasonable chance for award are included in the competitive range. The new rules, however, permit COs to significantly narrow the playing field. Under the new regulations, the competitive range shall be comprised of the most highly rated proposals. In addition, if stated in the solicitation, the CO may further reduce the competitive range for purposes of efficiency. FAR 15.306(c)(1). Thus, the old advice, "when in doubt, leave them in," has gone by the wayside, and the new, catchier phrase to remember is "when in doubt, throw them out!"

#### Clarifications, Exchanges, and Discussions

##### •Clarifications

The decision to award with discussions or award without discussions will dictate the type of communication that can take place. As before, if the solicitation states that award will

be made without discussions, the Government's ability to communicate with offerors is limited, but not entirely precluded. The Government may still request clarifications, which the new FAR 15 defines as "limited exchanges" to clarify certain aspects of the proposal, or to resolve minor or clerical errors. The new rules permit greater communication between the Government and offerors when award without discussions takes place. For example, under the new rules, certain types of past performance inquiries will be regarded as clarifications. The Government will be able to ask offerors about relevant past performance information, or give offerors a chance to explain adverse past performance information to which they have not had a previous opportunity to respond. FAR 15.306(a)(2).

When award with discussions is contemplated, the type of communication the new FAR 15 permits between the Government and offerors depends on whether or not the competitive range has been established. The new FAR 15 imposes significant restrictions on pre-competitive range communications.

##### •Exchanges

Communications after receipt of proposals but before the establishment of the competitive range are called exchanges. These exchanges are used for the purpose of establishing the competitive range, and permit COs to engage in more substantive communications than clarifications. Unlike discussions, which occur after the competitive range has been established, the CO may not engage in this type of communication with all of the offerors. The new FAR 15 limits the Government's exchanges before the competitive range with the following offerors: (1) offerors whose past performance information is a determining factor preventing them from being placed within the competitive range; and (2) offerors whose exclusion from, or inclusion in, the competitive range is uncertain. FAR 15.306(b)(1).

These communications, or exchanges, may be conducted for the following reasons: (1) to enhance the Government's understanding of proposals; (2) to allow reasonable interpretation of the proposal; (3) to facilitate the Government's evaluation process; or (4) to address adverse past performance information to which the offeror has not had a prior opportunity to respond. These communications are **not** to be used to cure

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deficiencies or material omissions, or materially alter technical or cost elements of the proposal. FAR 15.306(b)(2). Although offerors are not allowed to revise their proposals, these exchanges may resolve ambiguities in the proposals and address relevant past performance information. FAR 15.306(b)(3).

### •Discussions

The new FAR 15 defines discussions as negotiations in a competitive acquisition that begin after the competitive range has been established. Once the competitive range has been established, the Government has an opportunity to engage in a more “robust” exchange of information with offerors. COs must hold discussions, tailored to each offeror’s proposal, with each offeror within the competitive range. FAR 15.306(d).

During discussions, offerors have an opportunity to revise their proposals. The new regulations require the CO to discuss a broader range of information with each offeror to gain a better understanding of the proposals. For example, the CO is required to identify significant weaknesses and deficiencies, and any aspect of an offeror’s proposal that could be altered or explained to enhance materially the proposal’s potential for award. This includes aspects of the proposal such as cost, price, technical approach, past performance, and terms and conditions. The new FAR 15 empowers COs to engage in greater communications with offerors, but with this empowerment comes the responsibility of providing substantive comments to help each offeror understand the Government’s requirements and make appropriate revisions to their proposals.

After discussions have begun, if the CO determines that an offeror is no longer among the most highly rated offerors, the CO may eliminate the offeror from the competition regardless of whether or not all material aspects of the offeror’s proposal have been discussed. FAR 15.306(c)(3).

### Cautions

Although a greater exchange of information is permitted during negotiations, there are still certain parameters in place. The Government may not favor one offeror over another; reveal an offeror’s technical solution; reveal an offeror’s price without permission; reveal the names of the individuals who provide the reference information on an offeror’s past performance; and knowingly furnish source selection information. FAR 15.306(e).

### Conclusion

This Lawyer views the FAR 15 rewrite dealing with communications after receipt of proposals as a step in the right direction. The new competitive range standard will encourage offerors to submit competitive proposals in the first instance. Greater communication between the Government and offerors will provide COs with the opportunity to work with the most highly rated offerors to find creative, cost effective solutions that will fulfill the Government’s requirements.

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FAR 15.306 Exchanges with offerors after receipt of proposals.

(a) Clarifications and award without discussions. (1) Clarifications are limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated.

(2) If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror’s past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors.

(3) Award may be made without discussions if the solicitation states that the Government intends to evaluate proposals and make award without discussions. If the solicitation contains such a notice and the Government determines it is necessary to conduct discussions, the rationale for doing so shall be documented in the contract file (see the provision at 52.215-1 (10 U.S.C. 2305(b)(4)(A)(ii) and 41 U.S.C. 253b(d)(1)(B)).

(b) Communications with offerors before establishment of the competitive range. Communications are exchanges, between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range. If a competitive range is to be established, these communications—

(1) Shall be limited to the offerors described in paragraphs (b)(1)(i) and (b)(1)(ii) of this section and—

(i) Shall be held with offerors whose past performance information is the determining factor preventing them from being placed within the competitive range. Such communications shall address adverse past performance information to which an offeror has not had a prior opportunity to respond; and

(ii) May only be held with those offerors (other than offerors under paragraph (b)(1)(i) of this section) whose exclusion from, or inclusion in, the competitive range is uncertain;

(2) May be conducted to enhance Government understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the Government’s evaluation process. Such communications shall not 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. Such communications may be considered in rating proposals for the purpose of establishing the competitive range;

(3) Are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range. Such communications shall not provide an opportunity for the offeror to revise its proposal, but may address—

(i) Ambiguities in the proposal or other concerns (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes (see 14.407)); and

(ii) Information relating to relevant past performance; and

(4) Shall address adverse past performance information to which the



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offeror has not previously had an opportunity to comment.

(c) Competitive range. (1) Agencies shall evaluate all proposals in accordance with 15.305(a), and, if discussions are to be conducted, establish the competitive range. Based on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range comprised of all of the most highly rated proposals, unless the range is further reduced for purposes of efficiency pursuant to paragraph (c)(2) of this section.

(2) After evaluating all proposals in accordance with 15.305(a) and paragraph (c)(1) of this section, the contracting officer may determine that the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency (see 52.215-1(f)(4)), the contracting officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals (10 U.S.C. 2305(b)(4) and 41 U.S.C. 253b(d)).

(3) If the contracting officer, after complying with paragraph (d)(3) of this section, decides that an offeror's proposal should no longer be included in the competitive range, the proposal shall be eliminated from consideration for award. Written notice of this decision shall be provided to unsuccessful offerors in accordance with 15.503.

(4) Offerors excluded or otherwise eliminated from the competitive range may request a debriefing (see 15.505 and 15.506).

(d) Exchanges with offerors after establishment of the competitive range. Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining 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. When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions.

(1) Discussions are tailored to each offeror's proposal, and shall be conducted by the contracting officer with each offeror within the competitive range.

(2) 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.

(3) The contracting officer shall, subject to paragraphs (d)(4) and (e) of this section and 15.307(a), indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. The scope and extent of discussions are a matter of contracting officer judgment. In discussing other aspects of the proposal, the Government may, in situations where the solicitation stated

that evaluation credit would be given for technical solutions exceeding any mandatory minimums, negotiate with offerors for increased performance beyond any mandatory minimums, and the Government may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the offered price decreased.

(4) If, after discussions have begun, an offeror originally in the competitive range is no longer considered to be among the most highly rated offerors being considered for award, that offeror may be eliminated from the competitive range whether or not all material aspects of the proposal have been discussed, or whether or not the offeror has been afforded an opportunity to submit a proposal revision (see 15.307(a) and 15.503(a)(1)).

(e) Limits on exchanges. Government personnel involved in the 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 contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion. It is also permissible, at the Government's discretion, to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable (41 U.S.C. 423(h)(1)(2));

(4) Reveals the names of individuals providing reference information about an offeror's past performance; or

(5) Knowingly furnishes source selection information in violation of 3.104 and 41 U.S.C. 423(h)(1)(2).