EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL PROCUREMENT POLICY

February 2, 2011

MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES
CHIEF INFORMATION OFFICERS

FROM: Daniel I. Gordon
Administrator for Federal Procurement Policy

SUBJECT: "Myth-Busting": Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process

With expenditures of over $500 billion annually on contracts and orders for goods and services, the federal government has an obligation to conduct our procurements in the most effective, responsible, and efficient manner possible. Access to current market information is critical for agency program managers as they define requirements and for contracting officers as they develop acquisition strategies, seek opportunities for small businesses, and negotiate contract terms. Our industry partners are often the best source of this information, so productive interactions between federal agencies and our industry partners should be encouraged to ensure that the government clearly understands the marketplace and can award a contract or order for an effective solution at a reasonable price. Early, frequent, and constructive engagement with industry is especially important for complex, high-risk procurements, including (but not limited to) those for large information technology (IT) projects. This is why increasing communication, in the form of a "myth-busters" educational campaign, is one of the key tenets of the Office of Management and Budget's 25 Point Implementation Plan to Reform Federal IT Management.[1]

The Federal Acquisition Regulation (FAR) authorizes a broad range of opportunities for vendor communication[2], but agencies often do not take full advantage of these existing flexibilities. Some agency officials may be reluctant to engage in these exchanges out of fear of protests or fear of binding the agency in an unauthorized manner; others may be unaware of effective strategies that can help the acquisition workforce and industry make the best use of their time and resources. Similarly, industry may be concerned that talking with an agency may create a conflict of interest that will preclude them from competing on future requirements, or industry may be apprehensive about engaging in meaningful conversations in the presence of other vendors.

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[1] 25 Point Implementation Plan to Reform Federal Information Technology Management available at http://cio.gov/documents/25-Point-Implementation-Plan-to-Reform-Federal%20IT.pdf

[2] For example, FAR 10.002(b)(2) authorizes a wide range of techniques for conducting market research, including participation in interactive, online communications with industry.

In light of these challenges, the purposes of this memorandum are to:

1) identify common misconceptions about vendor engagement that may be unnecessarily hindering agencies' appropriate use of the existing flexibilities, and provide facts and strategies to help acquisition professionals benefit from industry's knowledge and insight;

2) direct agencies to remove unnecessary barriers to reasonable communication and develop vendor communications plans, consistent with existing law and regulation, that promote responsible and constructive exchanges; and

3) outline steps for continued engagement with agencies and industry to increase awareness and education.

Nothing in this memorandum should be read to alter, or authorize violations of, applicable ethics rules, procurement integrity requirements, or other statutes or regulations that govern communication and information sharing. However, all methods of communication that are not prohibited, either by those rules or otherwise, should be considered, if they would be helpful.[3] In addition, contracting officers, program managers, and other acquisition officials should continue to exercise appropriate discretion to balance the practical limitations of frequent vendor engagement, including the demand such engagement places on the time of the acquisition workforce, with the need to better understand the market and make decisions in the best interest of the government.

<u>Top 10 Misconceptions and Facts</u>

The Office of Federal Procurement Policy (OFPP) held a series of outreach sessions with industry representatives, acquisition professionals, agency procurement attorneys, and others to identify and address core misconceptions about communication between the government and industry during the pre-award acquisition process. While these conversations will continue, as discussed later, ten misconceptions were mentioned frequently, and so are addressed by this memorandum. Attachment 1 lists these issues, and provides additional information and strategies to help agencies promote fair and appropriate engagement during various acquisition phases.

<u>Vendor Communication Plan</u>

Some agencies have developed policies for communicating with industry while others have not, resulting in disparate practices and confusion. To provide better direction to the workforce and to clarify the nature and schedule of engagement opportunities for industry, each agency should develop a high-level vendor communication plan. The plan should discuss how the agency will reduce unnecessary barriers, publicize communication opportunities, and prioritize engagement

[3] See FAR Part 1.102(d) stating that if a specific strategy, practice, policy or procedure is in the best interests of the government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive Order or other regulation, then the strategy, practice, policy or procedure is a permissible exercise of authority.

opportunities for high-risk, complex programs or those that fail to attract new vendors during re-competitions. Details on the required elements of this plan are included in Attachment 2.

The 24 Chief Financial Officer (CFO) Act agencies are required to develop a vendor communication plan; to make these plans available to their workforce and the public, as appropriate; and to update them at least annually. These agencies shall submit their draft plans, by June 30, 2011, for review by the Office of Management and Budget. The draft plans will be reviewed by the Administrator for Federal Procurement Policy and the Federal Chief Information Officer (CIO) to ensure that agencies are encouraging more communication, taking advantage of existing authorities, and educating their workforce on communication opportunities. Based on this review, the agencies will finalize their plans and make them available to their workforce and to the public, as appropriate, no later than 30 days after the completion of OMB's review. Small agencies are encouraged to review their existing vendor communication guidance in light of the principles discussed in this memorandum and make appropriate modifications to encourage more communication, or develop guidance if none exists.

Increasing Awareness

Throughout 2011, OFPP will work with the Federal Acquisition Institute (FAI), the Defense Acquisition University (DAU), and agency training practitioners to conduct an awareness campaign to eliminate unnecessary barriers to engagement. As agencies work to develop and refine their vendor communications plans, they will be supported by a number of efforts:

Continued Discussion

Expansion of the conversation between industry and government and the education on both sides must continue in an open, transparent forum. To support this discussion, agencies and industry are invited to join a moderated, online dialogue starting in mid-February to help identify additional misconceptions, concerns, perceived conflicts in policies, and success stories that will help improve communications between government and industry. Additional information on how to participate in this and other discussions will be made available on www.caoc.gov and www.cioc.gov.

Community of Practice (COP)

To help agencies increase and improve vendor engagement, OFPP and E-Gov will launch an online COP no later than June 2011 that will provide additional strategies, do's and don'ts for agencies and for vendors, frequently asked questions, agency and industry success stories, case studies, and other tools to improve engagement. Next month, OFPP will convene a working group of federal acquisition professionals to help define the requirements of this site. If you are interested in participating in this working group, please identify your agency's point of contact by February 14 to Mindy Connolly of OFPP at mconnolly@omb.eop.gov.

Training and Outreach

FAI will develop a continuous learning module that contracting officers, program managers, procurement attorneys, and others can utilize to develop a better understanding of the types of permissible communication. This is scheduled to be available early in the third quarter of FY 2011 on the FAI website – www.fai.gov. Additionally, FAI and OFPP will provide sessions at widely-attended procurement conferences throughout 2011 to increase awareness of the need for more industry engagement. Agencies should provide similar training or outreach efforts, especially to their front line acquisition and program personnel.

Acquisition Communication Platform

In accordance with the 25 Point Implementation Plan to Reform Federal IT Management, the General Services Administration is seeking input from agencies, industry, and other stakeholders on developing a communication platform that would facilitate exchanges for specific planned acquisitions. This platform will allow the government to more easily engage the vendor community during the pre-solicitation stage, and may be further developed to facilitate communication during other stages of the acquisition. Development of the requirements will consider existing platforms and functionality and will be developed in collaboration with the Integrated Acquisition Environment. Additional details will be communicated to the community as they become available.

Conclusion

While agencies do not have the resources, and are not required, to meet with every vendor at every step of the acquisition process, information gathered from industry sources plays an invaluable role in the acquisition process. For this reason, agencies must develop practices that will ensure early, frequent, and constructive communication during key phases of the process. The federal government's ability to achieve successful program outcomes, effectively and efficiently, depends upon agencies establishing effective strategies for industry engagement and supporting those strategies with senior-level commitment.

Thank you for your commitment to this important matter. Please contact Mindy Connolly on (202) 395-7724 or mconnolly@omb.eop.gov if you have any questions.

Attachments
Attachment 1 –Misconceptions and Facts about Vendor Communication
Attachment 2 - Vendor Communication Plans

cc:

Agency General Counsels and Solicitors
Agency Ethics Officers

Misconceptions and Facts about Vendor Communication

1.	**Misconception – "We can't meet one-on-one with a potential offeror."**
	Fact – Government officials can generally meet one-on-one with potential offerors as long as no vendor receives preferential treatment.

Prior to issuance of the solicitation, government officials – including the program manager, users, or contracting officer – may meet with potential offerors to exchange general information and conduct market research related to an acquisition. In fact, the FAR, in Part 15, encourages exchanges of information with interested parties during the solicitation process, ending with the receipt of proposals. There is no requirement that the meetings include all possible offerors, nor is there a prohibition on one-on-one meetings. Any information that is shared in a meeting that could directly affect proposal preparation must be shared in a timely manner with all potential offerors to avoid providing any offeror with an unfair advantage (FAR 15.201(f)).

The government ethics rules and Competition in Contracting Act, (10 U.S.C. § 2304), prohibit preferential treatment of one vendor over another. Where vendor interaction is expected to include contract terms and conditions, any one-on-one meetings should include, or at least be coordinated with, the contracting officer (FAR 15.201).[4] After the solicitation is issued, the contracting officer shall be the focal point for these exchanges. (Special rules govern communications with offerors after receipt of proposals; that situation is not addressed here.)

Some vendors have expressed concern that involvement in pre-solicitation discussions might lead to exclusion resulting from organizational conflict of interest (OCI) concerns. This should not be the case. While a vendor who, as part of contract performance, drafts the specification for a future procurement will almost certainly be barred by OCI rules from competing for that future procurement, pre-solicitation communications are generally less structured, less binding, and much less problematic. When a vendor, in its role supporting the government, is drafting specifications for a future acquisition, the government is relying on the vendor to provide impartial advice regarding the requirements needed to meet the government's future needs. Ensuring that the vendor will not be motivated by a desire to win the future contract is the way we try to ensure that this advice will be impartial. This differs dramatically from the pre-solicitation context. In the latter context, the government is not looking for impartial advice from one source, but is instead looking for a variety of options from a variety of sources, each one understandably, and reasonably, attempting to demonstrate the value of its own approach. These marketing efforts, in themselves, do not raise OCI concerns.

[4] Under sealed bidding procedures, in accordance with FAR Part 14, only the contracting officer, superior, or other authorized individual can transmit this information.

2.	**Misconception – "Since communication with contractors is like communication with registered lobbyists, and since contact with lobbyists must be disclosed, additional communication with contractors will involve a substantial additional disclosure burden, so we should avoid these meetings."**
	Fact – Disclosure is required only in certain circumstances, such as for meetings with registered lobbyists. Many contractors do not fall into this category, and even when disclosure is required, it is normally a minimal burden that should not prevent a useful meeting from taking place.

Disclosure is an important tool that ensures public trust in our contracting process, but it should not be an impediment to meeting with contractors and is not required in every circumstance. In the case of meetings where registered lobbyists are employed, contractors are required to track the costs and activities of their lobbying activities, as required by FAR Part 31, but that obligation places the disclosure burden on the contractor and does not require the government to take any steps. In this "standard" case, additional communication with contractors will not involve an additional disclosure burden, though conduct of all communications should be consistent with the principles of fairness and accountability. Moreover, this rule only applies in those circumstances where a contractor or one or more of its employees are registered lobbyists, which will not be the case in every meeting.

There have been additional requirements for disclosure regarding spending under the American Recovery and Reinvestment Act (ARRA). Government officials are required by the March 2009 Presidential memorandum on "Ensuring Responsible Spending of Recovery Act Funds"[5] to disclose discussions with registered lobbyists related to ARRA procurements. Any ARRA procurement that was conducted with involvement from registered lobbyists does carry this additional disclosure requirement (only a small number of all procurements during this period were obligated using funding from ARRA).

Another source of concern might be the additional ethical commitments required of political appointees by Executive Order 13490, "Ethics Commitments by Executive Branch Personnel." While the ethics pledge required by this Executive Order does extend and strengthen certain limitations on actions by government personnel, most notably with respect to pre- and post-employment restrictions, the pledge does not create general barriers to meeting with industry to discuss procurements. The pledge prohibits some contact with former clients and former employers for two years, which might create a specific limitation in some circumstances, but it does not establish a general prohibition on meeting with registered lobbyists, even in one-on-one circumstances.

Finally, even in the special situations where disclosure is required, that should not be a reason for avoiding communication in situations where the communication will improve the procurement and provide better value to the taxpayer.

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[5] Available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-20-09/.

3.	**Misconception – "A protest is something to be avoided at all costs - even if it means the government limits conversations with industry."**
	Fact – Restricting communication won't prevent a protest, and limiting communication might actually increase the chance of a protest – in addition to depriving the government of potentially useful information.

Protests are, in fact, quite rare. At least 99 percent of procurements are never protested, although high dollar procurements, of course, are more likely to be protested. The overriding goal of the agency and its program managers, contracting officers, and attorneys should be the best procurement solution, and industry engagement can improve the supplies or services received or can reduce the price paid by the government. If contracting officers conduct responsible, meaningful, and constructive communications during the course of a procurement, issues that could give rise to a bid protest are likely eliminated. Trying to make a procurement 'protest-proof' is rarely a good use of agency resources, and it may lead to decisions that aren't in the interest of the government. Moreover, restricting communication for fear of protests may actually increase the likelihood of a protest – for example, by a vendor that hopes to get more information through 'discovery' during the protest.

4.	**Misconception – "Conducting discussions/negotiations after receipt of proposals will add too much time to the schedule."**
	Fact – Whether discussions should be conducted is a key decision for contracting officers to make. Avoiding discussions solely because of schedule concerns may be counter-productive, and may cause delays and other problems during contract performance.

Although the government often states it intends to award without discussions/negotiations, the clause at FAR 52.215-1[6] reserves the government's option to conduct discussions and it is usually a good practice to retain that option.

While discussions may add time to the acquisition schedule, the contracting officer should make a thoughtful decision as to whether to conduct discussions and, if so, what the scope and extent of discussions required should be. Schedule pressures should generally not be the primary, or even a strong, driver in the contracting officer's decision on whether or not to hold discussions. One consideration the contracting officer should take into account is that conducting robust pre-solicitation communications with industry may actually minimize the need for discussions and result in a better technical solution and improved contract performance. Other considerations include the complexity of the procurement, and the history of change orders on previous or related contracts that were due to lack of a clear understanding of the requirements and contract terms and conditions by the parties. In situations where discussions are not held, post-award contract

[6] When preparing solicitations, contracting officers should carefully evaluate whether to include the clause at 52.215-1 or its Alternate 1.

modifications that increase the government's costs are often required. These costly changes are negotiated after the government has lost the benefits of a competitive environment.

When discussions are considered helpful to obtaining the best outcome in a procurement, the schedule should be developed accordingly. Contracting officers should be empowered by their management to make these judgment calls on a case-by-case basis and should have the full support of their customers.

5.	**Misconception – "If the government meets with vendors, that may cause them to submit an unsolicited proposal and that will delay the procurement process."**
	Fact – Submission of an unsolicited proposal should not affect the schedule. Generally, the unsolicited proposal process is separate from the process for a known agency requirement that can be acquired using competitive methods.

All acquisition officials should be familiar with FAR Subpart 15.6 and their agency's procedures for receiving and evaluating an unsolicited proposal. Receipt of unsolicited proposals should not cause delay in an acquisition.

6.	**Misconception – "When the government awards a task or delivery order using the Federal Supply Schedules, debriefing the offerors isn't required so it shouldn't be done."**
	Fact – Providing feedback is important, both for offerors and the government, so agencies should generally provide feedback whenever possible.

Although debriefings are not required when using the Federal Supply Schedules (FSS) under FAR Part 8.4 procedures, even in those situations, agencies are instructed to "provide a brief explanation of the basis for the award decision" where the award was based upon factors other than price (FAR 8.405-2(d)). Agencies that order from FSS contracts regularly are missing an important feedback opportunity if they do not take time to explain to FSS offerors how to improve their offers in the future. For newer contracting officers, the less structured explanation required for FSS offerors can be a valuable learning opportunity to prepare for structured debriefings. In both FSS and FAR Part 15 procurements, agencies are encouraged to provide the maximum amount of relevant information to offerors, rather than focusing on sharing only the minimum that is legally required.

7.	**Misconception – "Industry days and similar events attended by multiple vendors are of low value to industry and the government because industry won't provide useful information in front of competitors, and the government doesn't release new information."**
	Fact – Well-organized industry days, as well as pre-solicitation and pre-proposal conferences, are valuable opportunities for the government and for potential vendors – both prime contractors and subcontractors, many of whom are small businesses.

Industry days, as well as pre-solicitation and pre-proposal conferences, directly benefit the government by promoting a common understanding of the procurement requirements, the solicitation terms and conditions, and the evaluation criteria. These events also benefit industry – especially small businesses – by providing prime contractors and subcontractors an opportunity to meet and develop relationships or teaming agreements that benefit contract performance. However, the value of these events derives from the government providing the maximum information to potential offerors on its requirements, answering questions, and improving the solicitation based on feedback from the potential offerors. In that way, the requirements can be made as clear as possible to assist potential offerors in providing the best solution to the government.

Strategy - where appropriate, use interactive web-based technology to expand the reach of the exchange, such as a live webinar with streaming video to immediately address questions from stakeholders. Consider combining this with immediate one-on-one meetings with vendors to make these engagements more useful, especially for large, complex requirements.

8.	**Misconception – "The program manager already talked to industry to develop the technical requirements, so the contracting officer doesn't need to do anything else before issuing the RFP."**
	Fact – The technical requirements are only part of the acquisition; getting feedback on terms and conditions, pricing structure, performance metrics, evaluation criteria, and contract administration matters will improve the award and implementation process.

Issuing a high quality solicitation requires engaging with industry on issues that go beyond the government's technical requirements. In order to appropriately price proposals and reduce the number of potential change orders, industry needs information about any unique terms and conditions, small business set-aside requirements, subcontracting goals, and other matters about which the contracting officer is the expert. Although industry may have had their best technical representatives engaged with the program manager, the contracting officer should communicate to vendors as much information as possible about the government's needs as early as possible. As a result of early communication, the contracting officer may learn some things that suggest that an approach somewhat different than planned may cause increased competition, more small business participation, lower prices, or even a better definition of the government's technical requirements.

Strategy – Issue an RFI to make sure the government not only understands the capabilities of industry, but can develop or improve its acquisition strategy regarding contract type, performance requirements, performance work statements/statements of work, and performance metrics. Release a draft request for proposal, including sections L and M, to be sure the solicitation instructions are clear.

9.	**Misconception – "Giving industry only a few days to respond to an RFP is OK since the government has been talking to industry about this procurement for over a year."**
	Fact – Providing only short response times may result in the government receiving fewer proposals and the ones received may not be as well-developed - which can lead to a flawed contract. This approach signals that the government isn't really interested in competition.

While the FAR does contain some requirements on the length of time between issuance of solicitations and proposal due dates, often task and delivery orders do not have these requirements. Contracting officers should consider that allowing offerors additional time to prepare their proposals will likely yield better proposals, streamlined evaluations, and a reduction in the need for (or scope of) discussions. While the workforce is stretched thin and requirements often arise unexpectedly, shortcutting the proposal development process often results in fewer proposals, and/or proposals that are more difficult to evaluate. This situation can lead to expensive outcomes. Providing adequate time for vendor communication throughout the procurement process – including adequate time for proposals – indicates that the government is interested in obtaining the best outcomes. Contracting officers should have the full support of their customers in determining the right amount of time for receipt of proposals.

10.	**Misconception – "Getting broad participation by many different vendors is too difficult; we're better off dealing with the established companies we know."**
	Fact – The government loses when we limit ourselves to the companies we already work with. Instead, we need to look for opportunities to increase competition and ensure that all vendors, including small businesses, get fair consideration.

FAR Section 10.002 expressly allows for participation in interactive, online communications among industry, acquisition personnel, and customers. While agencies should ensure that these tools can be used securely and appropriately, their use should be encouraged to the maximum extent practicable. In accordance with OMB's 25 Point Implementation Plan to Reform

Federal IT Management, GSA and OMB will be developing an acquisition communications platform for launch in June 2011 that will increase collaboration on RFIs and draft RFPs, improve communication during question and answer periods, and otherwise support better engagement. Agencies may also have similar tools, and their use should be encouraged.

Strategy – Use the procurement forecast to generate interest and publicize those opportunities available to small businesses. Ensure that the points of contact on the forecast are aware of the content and timing of the release of the document so they can address any inquiries, consider holding an outreach session or webinar to announce the release or update, and don't bundle or overpromise requirements. Hold industry days, public meetings, or small business conferences, and consider hosting multiple outreach sessions for large or complex requirements.

Vendor Communication Plans

Agencies should provide clear, consistent direction to their workforce and industry partners about how to engage with industry prior to the award of contracts and task and delivery orders under the Federal Supply Schedule, government-wide acquisition contracts, and other indefinite delivery/indefinite quantity contracts.

To ensure this, agencies shall develop high-level plans that include the core elements listed below. These plans should be general in nature and can build on existing guidance. OFPP will work with the agencies in the development of the community of practice discussed earlier to identify best practices, training opportunities, samples of guidance, and other information that may be helpful in developing these communication plans.

1) Statement of agency commitment to:

   a) Communicate early, frequently, and constructively with industry;
   b) Include small businesses and subgroups of small businesses in communications with industry;
   c) Include vendors that the agency has not worked with in the past;
   d) Identify, in the agency's published procurement forecast, which procurements are likely to involve opportunity for additional communication with industry; and
   e) Protect non-public information including vendors' confidential information and the agency's source selection information.

2) Identification of senior agency and bureau (if applicable) official responsible for promoting vendor engagement;

3) Brief description of efforts undertaken or planned to reduce barriers and promote engagement;

4) Criteria for identifying which acquisitions must include vendor input in the pre-award phase and the extent of the required engagement as a condition of approval by the agency's investment review board (or similar body). At a minimum, acquisition plans for high-risk, large-dollar, and complex programs, such as those for major IT systems and for re-competitions that need to attract new entrants to ensure adequate competition, should include a comprehensive vendor engagement strategy that:

   - includes at least one industry day or a pre-solicitation or pre-proposal conference; and
   - allows for a reasonable amount of one-on-one engagement; and
   - allows time for discussions, as needed and in accordance with FAR Part 15, during the proposal evaluation process; or
   - requires a written justification as to why those steps are unnecessary.

5) Publication of engagement events to include industry days, small business outreach sessions, pre-solicitation conferences, RFP question and answer sessions, etc. These shall be posted and updated regularly using the existing "special notices" function on www.fedbizopps.gov and on other sites as identified by the agency.[7]

6) Brief description of roles and responsibilities of the –

   a) Contracting Officer
   b) Program Manager
   c) COR/COTR
   d) General Counsel
   e) Ethics Officers
   f) OSDBU
   g) Other Officials[8]

7) Training and awareness efforts for employees and contractors;

8) Links to existing policies; and

9) Plans to follow-up with employees and industry representatives within 6 months of posting the vendor engagement plan, to further refine and improve communication, (e.g., post-award surveys of the contracting officers, program managers, and offerors for large, complex procurements, focus group meetings for general feedback).

[7] Instructions for posting such events on www.fedbizopps.gov will be provided to agency points of contact for vendor communication as needed.

[8] Such as those identified in the procurement forecast.