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Author: Ralph C. Nash, Professor Emeritus of Law, The George Washington University
Contributing Authors: Vernon J. Edwards and Nathaniel E. Castellano

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¶ 70 THE REVOLUTIONARY OVERHAUL OF FAR PART 15: A Review

Vernon J. Edwards

We think Federal Acquisition Regulation Part 15, *Contracting by Negotiation*, is the single most important part of the regulation, because it states the rules for the selection of contractors and the pricing and formation of contracts for the largest and most important acquisitions the Government makes. We have withheld comment on the products of the overhaulers until we could see what they did to that part. The overhaul of Part 15 has now been posted to Acquisition.gov, and in this article we will comment on the organization and content of Subparts 15.1 through 15.3, which would regulate contractor selection and contract formation. We will comment on Subpart 15.4, which would regulate contract pricing, in a future article.

First, let's briefly review the president's objectives as stated in Executive Order No. 14275, *Restoring Common Sense to Federal Procurement* (Apr. 15, 2025), 90 Fed. Reg. 16447 (Apr. 18, 2025):

> Section 1. Purpose. The Federal Government is the largest buyer of goods and services in the world—yet conducting business with the Federal Government is often prohibitively inefficient and costly. More than 40 years ago, the Federal Acquisition Regulation (FAR) was implemented to establish uniform procedures for acquisitions across executive departments and agencies (agencies). The "vision" of the Federal Acquisition System, codified at section 1.102 of the FAR, is to "deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives[,]" but since its inception, the FAR has swelled to more than 2,000 pages of regulations, evolving into an excessive and overcomplicated regulatory framework and resulting in an onerous bureaucracy.
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> Sec. 4. Reforming the Federal Acquisition Regulation. Within 180 days of the date of this order, the Administrator, in coordination with the other members of the Federal Acquisition Regulatory Council (FAR Council), the heads of agencies, and appropriate senior acquisition and procurement officials from agencies, shall take appropriate actions to amend the FAR to ensure that it contains only provisions that are required by statute or that are otherwise necessary to support simplicity and usability, strengthen the efficacy of the procurement system, or protect economic or national security interests.

Neither the Executive Order nor the Office of Management and Budget implementation guidance said anything about making the FAR more readable and understandable. See OMB Memorandum M-25-26, *Overhauling the Federal Acquisition Regulation* (May 2, 2025).

The Organization Of The Overhauled Part 15

In the left-hand column of the table below we show the table of contents for the current FAR Part 15 *as it pertains to source selection and contract award* and in the right-hand column, we show the table of contents for the overhauled Part 15 pertaining to those topics.

CURRENT FAR PART 15	OVERHAULED FAR PART 15
15.000 Scope of part.	**15.000 Scope.**
15.001 Definitions.	15.001 Definitions.
15.002 Types of negotiated acquisition.	15.002 Types of negotiated acquisition.
Subpart 15.1—Source Selection Processes and Techniques	**Subpart 15.1—Presolicitation and Solicitation**
15.100 Scope of subpart.	15.100 Scope.
15.101 Best value continuum.	15.101 Early exchanges with industry.
15.101-1 Tradeoff process.	15.102 Structuring a request for proposals.
15.101-2 Lowest price technically acceptable source selection process.	15.103 Developing a competitive source selection approach.
15.101-3 Tiered evaluation of small business offers.	15.103-1 Tradeoff approach.
15.102 Oral presentations.	15.103-2 Lowest price technically acceptable approach.
Subpart 15.2—Solicitation and Receipt of Proposals and Information	15.103-3 Highest technically rated with a fair and reasonable price approach
15.200 Scope of subpart.	15.103-4 Phased acquisition.
15.201 Exchanges with industry before receipt of proposals.	15.104 Establishing competitive evaluation factors and significant subfactors.
15.202 Advisory multi-step process.	15.105 Other considerations.
15.203 Requests for proposals.	15.105-1 Oral presentations.
15.204 Contract format.	15.105-2 Negotiations disclosure.
15.204-1 Uniform contract format.	15.105-3 Limitation on tiered evaluations for multiple award contracts.
15.204-2 Part I—The Schedule.	15.105-4 Request for cost or pricing data.
15.204-3 Part II—Contract Clauses.	15.105-5 Make-or-buy decision.
15.204-4 Part III—List of Documents, Exhibits, and Other Attachments.	15.105-6 Should-cost review.
15.204-5 Part IV—Representations and Instructions.	15.105-7 Unit prices.
15.205 Issuing solicitations.	15.106 Amending a request for proposal.
15.206 Amending the solicitation.	15.107 Submission, modification, revision, and withdrawal of proposals.
15.207 Handling proposals and information.	15.108 Receiving proposals.
15.208 Submission, modification, revision, and withdrawal of proposals.	15.109 Uniform contract format.
15.209 Solicitation provisions and contract clauses.	15.109-1 Part I—The Schedule.
15.210 Forms.	15.109-2 Part II—Contract Clauses.
Subpart 15.3—Source Selection	15.109-3 Part III—List of Documents, Exhibits, and Other Attachments.
15.300 Scope of subpart.	15.109-4 Part IV—Representations and Instructions.
15.301 [Reserved]	15.110 Solicitation provisions and contract clauses.
15.302 Source selection objective.	**Subpart 15.2—Evaluation and Award**
15.303 Responsibilities.	15.200 Scope.
15.304 Evaluation factors and significant subfactors.	15.201 Source selection responsibilities.
15.305 Proposal evaluation.	15.202 Evaluating competitive proposals.
15.306 Exchanges with offerors after receipt of proposals.	15.203 Competitive award without negotiation.
15.307 Proposal revisions.	15.204 Competitive award with negotiation.
15.308 Source selection decision.	15.204-1 Establishing a competitive range.
Subpart 15.4—Contract Pricing…	15.204-2 Competitive negotiations.

CURRENT FAR PART 15	OVERHAULED FAR PART 15
Subpart 15.5—Preaward, Award, and Postaward Notifications, Protests, and Mistakes	15.205 Source selection decision.
15.501 Definition.	15.206 Preaward notices and debriefings.
15.502 Applicability.	15.206-1 Preaward notices.
15.503 Notifications to unsuccessful offerors.	15.206-2 Preaward debriefing.
15.504 Award to successful offeror.	15.207 Award.
15.505 Preaward debriefing of offerors.	15.207-1 Award to successful offeror.
15.506 Postaward debriefing of offerors.	15.207-2 Award notice.
15.507 Protests against award.	**Subpart 15.3—Postaward**
15.508 Discovery of mistakes.	15.300 Scope.
15.509 Forms.	15.301 Postaward debriefing of offerors.
	15.301-1 Debriefing process.
	15.301-2 Opportunity for follow-up questions.
	15.302 Protests against award.
	15.303 Discovery of mistakes.
	15.304 Defective certified cost or pricing data after award.
	15.305 Estimating systems.
	Subpart 15.4—Contract Pricing…
	Subpart 15.5—Unsolicited Proposals…

—The underlying logic of both of those tables of contents appears to be procedural.

FAR Part 15 generally includes definitions, statements of policy, procedural rules, and instructions pertaining to "competitive and noncompetitive negotiated acquisitions", which, according to FAR 15.000, are procedures *other than sealed bidding*. But apart from FAR Subpart 15.4, *Contract Pricing*, most of FAR Part 15 addresses mainly competitive contractor selection and contract formation, i.e., "competitive negotiations." We think Part 15 would be better organized at the subpart and section level as follows:

ALTERNATIVE FAR PART 15
15.000 Scope of part
Subpart 15.1—Definitions
Subpart 15.2—Competitive Contractor Selection and Contract Formation
15.201 Scope
15.202 Contractor selection (formerly "Source Selection")
15.202-1 Methods of contractor selection
15.202-2 Contractor selection factors
15.202-2(a) Nonprice factors
15.202-2(b) Price factors
15.202-3 Organizing for contractor selection
15.202-4 Preparing the request for proposals
15.202-4(a) Preparing the model contract "the schedule")
15.202-4(b) Preparing the proposal preparation instructions
15.202-4(b)(1) Instructions for preparing offers
15.202-4(b)(2) Instructions for preparing information
15.202-4(b)(2)(i) Written information
15.202-4(b)(2)(ii) Oral presentations
15.202-4(b)(3) Preparing the statement of evaluation factors
15.202-5 Receiving, evaluating, and ranking offers and offerors
15.202-5(a) Evaluating nonprice factors

ALTERNATIVE FAR PART 15
15.202-5(b) Evaluating price
15.202-5(c) Ranking competitors based on evaluation findings
15.202-5(d) Using a scoring system
15.202-6 Selecting the contractor(s) without negotiating
15.203 Negotiating and soliciting proposal revisions
15.203-1 Establishing a competitive range
15.203-2 Negotiating
15.201-3 Receiving and evaluating revised proposals
15.204 Selecting the contractor(s) following negotiations
15.205 Documenting the contractor selection process
15.205-1 Documenting evaluations and rankings
15.205-2 Documenting the contractor selection(s)
15.206 Contract formation processes
15.206-1 Contract execution
15.206-2 Contract distribution
15.207 Notifications, debriefings, and protests
15.207-1 Notifications
15.207-2 Debriefings
15.207-3 Protests
Subpart 15.3—Noncompetitive Contractor Selection and Contract Formation
15.301 Sole Source
15.301-1 Preliminary communications
15.301-2 Requesting the offer and supporting information
15.301-3 Fact-finding
15.301-4 Negotiating
15.301-5 Contract formation and contract distribution
15.302 Unsolicited Proposals
Subpart 15.4—Contract Pricing…

The Overhauled Text

A regulation should be understandable by Government personnel and the affected public. It should be written in plain English and avoid the use of jargon and obscure words and phrases. Unfortunately, the overhauled text includes awkwardly bureaucratic phrases such as "back and forth negotiation" and retains jargon such as *approach* instead of process, procedure, method, or technique; *exchanges* instead of communications; and *structuring* instead of designing or preparing.

What is especially disappointing is the decision to continue using the word *proposal* as synonymous with *offer*. In practice, a proposal contains (1) an offer (promises) and (2) nonpromissory information. The distinction is important, as we have pointed so often out since 1995, see, e.g., *Postscript II: Oral Presentations*, 9 N&CR ¶ 48. But that is still not clearly understood by many in the acquisition workforce. Much of the proposal content that is evaluated in source selection as currently conducted is nonpromissory information. The overhaul is an opportunity to explain that distinction, its legal importance, and its potential for procedural innovation and better selection decisions.

Negotiations

The overhaulers replaced *discussions*, which is the word long used in the statutes and in hundreds of bid protest decisions, with the word *negotiations*. That change is problematical, because, since as far back as the 1950s, there have been questions and concerns about how to conduct *competitive* negotiations. See overhauled section 15.204-2, *Competitive negotiations*:

(a) *General.* The scope and extent of negotiations are a matter of contracting officer judgment.

(b) *Requirement*.

(1) Contracting officers must—

(i) Negotiate with each responsible offeror within the competitive range; and

(ii) Tailor the negotiation to the offeror's proposal, but at a minimum, indicate to, or negotiate with, each offeror any deficiencies or significant weaknesses in the proposal.

(2) Contracting officers may further negotiate with an offeror, if necessary. Having further negotiations with a particular offeror does not obligate contracting officers to have further negotiations with any other offerors.

(3) Contracting officers may also negotiate 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. Contracting officers are not required to negotiate every area where the proposal could be improved.

(4) When an RFP stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, contracting officers may negotiate with offerors for increased performance beyond any mandatory minimums, and 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 proposed price decreased.

(c) *Elimination from the competitive range*. A proposal must be eliminated from consideration for award when the contracting officer determines that a proposal should no longer be included in the competitive range. Written notice of this decision must be provided to unsuccessful offerors in accordance with 15.206-1(a).

(1) When a proposal is eliminated, no further revisions to the proposal can be accepted or considered.

(2) Contracting officers may eliminate a proposal from the competitive range at any time upon concluding that the offeror is unlikely to receive an award. Contracting officers are not required to have an additional negotiation with an offeror prior to taking such action.

(d) *Proposal revision*.

(1) When negotiations with an offeror are finished, and that offeror has not been eliminated from the competitive range, contracting officers must provide the offeror with—

(i) An opportunity to submit a proposal revision; and

(ii) A notice requiring the proposal revision in writing and stating that the Government intends to make award without obtaining further revisions.

(2) Each offeror with a proposal still within the competitive range must be given an equal amount of time within which to submit their proposal revision.

Generally, *negotiations* are preceded by Government factfinding, which is followed by bargaining, which continues until the parties reach agreement on terms, at which point the Contracting Officer prepares a contract document that reflects the agreement and sends it to the contractor, who reviews and then signs it if it does. They then send it back to the CO, who then signs for the Government. Done.

In traditional source selection discussions, on the other hand, the CO tells the offeror about its weaknesses and deficiencies, if any, and perhaps suggests some specific changes. The discussions do not end in agreement, but with a (more or less) mutual understanding of what might make the proposal better and more competitive, depending on what the other offerors in the competitive range do. The CO then sends the offerors off to conjure revised proposals ("best and final offers"), which, upon submission, contain who knows what. It has not been the practice during source selection discussions to try to reach a final agreement that only needed to be confirmed in final proposal revisions. We do not know how much experience most COs in the workforce have with the art and practice of true *negotiation*, and the overhauled text is not clear about what kind of *competitive* negotiations the overhaulers have in mind.

Real negotiation, *bargaining*, could also involve the possibility of requiring the CO to amend the Government's request for proposals as a prerequisite to receiving a better offer in return. But under the current rules that would require the CO to amend the solicitation for all competitors and to give all a chance to revise their proposals, thus, perhaps, depriving the initiating offeror of the benefit of its proposed bargain.

Congress first required agencies to conduct "discussions" when it enacted the Truth in Negotiations Act, Pub. L. No. 87-653, 76 Stat. 528 (1962), adding paragraph (g) to former 10 USCA § 2304:

(g) In all negotiated procurements in excess of $2,500 in which rates or prices are not fixed by law or regulation and in which time of

> delivery will permit, proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: *Provided, however*, That the requirements of this subsection with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussion.

They did that in reaction to the Department of Defense's tendency to award without discussions, which did not made sense when contracting *by negotiation*. Congress wanted agencies to bargain for better prices when adequate price competition was lacking using the cost or pricing data that the law required prospective contractors to submit and certify. In the years since then, and in reaction to Comptroller General bid protest decisions, that rule has been transformed into a requirement to disclose deficiencies and significant weaknesses, not necessarily to engage in bargaining. I was taught early in my career that during discussions we were to tell them what was wrong, but not tell them how to fix it.

Ironically, while Congress wanted agencies to bargain for better prices, the long-term result has been to discourage agencies from negotiating to agreement, despite the reforms of the FAR Part 15 Rewrite of 1997, Federal Acquisition Circular 97-02, 52 Fed. Reg. 51224 (Sept. 30, 1997). See Whiteford, *Negotiated Procurements: Squandering the Benefit of the Bargain*, 32 Pub. Cont. L.J. 509 (2003), noting that "[d]espite these reforms, zealous bargaining is uncommon":

> Thou shalt bargain! Unfortunately, in government contract negotiations, there is no such commandment. Some not associated with the procurement world might assume that, in obtaining its needs, the Government routinely engages in rigorous persuasive efforts involving sweeping give-and-take sessions with contractors, all in fervent pursuit of the best deal possible. Aggressive bargaining in government-negotiated procurements, however, is more fiction than reality. [Footnote omitted.]

See also Pachter, Shaffer & Pirrello, *The FAR Part 15 Rewrite*, 98-05 Briefing Papers 1 (Apr. 1998).

See the DOD Source Selection Procedures dated August 20, 2022, https://www.acq.osd.mil/dpap/policy/policyvault/USA000740-22-DPC.pdf:

> Discussions are tailored to each offeror's proposal and must be conducted by the [Procuring Contracting Officer] with every offeror within the competitive range. The scope and extent of discussions are a matter of PCO judgment. While the Government is not required to expound on every item that must be addressed by the offeror to improve its submission, the PCO must conduct and document meaningful discussions. At a minimum, during discussions, the [Source Selection Evaluation Board] through the PCO shall indicate to, or discuss with, each offeror in the competitive range the following: (a) any adverse past performance information to which the offeror has not yet had an opportunity to respond and (b) any deficiencies or significant weaknesses that have been identified during the evaluation. Discussions shall be documented on, and conducted via transmittal of, [Evaluation Notices] to the applicable offeror. Each EN shall clearly indicate that the type of exchange being conducted is "Discussions." ENs are prepared by the SSEB and reviewed minimally by the PCO and Legal Counsel. Any EN addressing a proposal deficiency or significant weakness shall clearly indicate that a deficiency or significant weakness exists. The PCO is encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the PCO, be altered or explained to enhance materially the proposal's potential for award, such as weaknesses, excesses, and price. However, the PCO is not required to discuss every area where the proposal could be improved as outlined at FAR 15.306(d) and (e). The PCO is responsible for documenting the disposition and evaluation of each EN.

Not much in that about bargaining. It seems to describe a one-way presentation. The overhaulers will have to say a lot more than they have if they are serious about competitive *negotiations*.

Definitions

Generally, the overhaul lacks adequate definitions. The overhauled section 15.001, *Definitions*, includes definitions of *deficiency*, *proposal modification*, *proposal revision*, and *weakness*, the same four as in the current FAR. The definition of deficiency has been tweaked to emphasize *material requirement*, but the definition of weakness still contains the ridiculous word *flaw*, which means goodness knows what in context.

One term that requires definition is "clarification," which has been the subject of many bid protests. See *Postscript X: Clarifications vs. Discussions*, 34 NCRNL ¶ 56. The overhaul addresses it as follows in 15.202 *Evaluating Competitive Proposals*, paragraph (a)(2), as follows:

(2) Clarifications.

(i) Clarifications are exchanges between the Government and offerors where offerors are given the opportunity to resolve minor or clerical errors or clarify certain aspects of their proposal. Clarifications can be used to enhance the Government's understanding of a proposal, allow reasonable interpretation of a proposal, or facilitate the Government's evaluation process.

(ii) Clarifications include, but are not limited to, addressing: ambiguities of the proposal; other concerns such as perceived deficiencies, weaknesses, errors, omissions, or mistakes; 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.

(iii) Clarifications do not permit offerors to revise their proposal and cannot be used to cure proposal deficiencies or material omissions or materially alter the technical or cost elements of the proposal. However, contracting officers may request additional information or documentation provided the cost/price or other material elements of the proposal are unchanged.

(iv) Clarifications may occur, at the contracting officers's discretion, at any time after receipt of proposals through contract award. Contracting officers are not required to conduct clarifications with an offeror. If the contracting officer conducts clarifications with one or more offerors, it is not required to conduct clarifications with any other offeror.

We would define clarification simply, as follows:

Clarification, as used in competitive negotiation, means any procedure in which the Contracting Officer seeks additional information it needs to understand (i) the meaning of a term of an offer or (ii) the meaning of proposal information. Clarification does not involve negotiation and does not allow an offeror to change any term of its offer or proposal information through either proposal revision or crafty explanation. The Contracting Officer may seek clarification at any time.

Conclusion

We could go on, but we think our readers will get the general thrust of our thinking, and we urge them to review the overhaul themselves. We cannot say that we are surprised, because, admittedly, we did not have great expectations. The good news is that we believe the overhaulers are still working on Part 15 and that the proposed rule published in the *Federal Register* may be better. In fairness, they had a lot on their menu and little time to cook. But if the proposed rule is not much better, then the result will be no better than what we got from the last Big Thing—the 1997 Rewrite.

We feel obliged to say that the overhaulers were given a massive assignment on short notice and with a tight schedule. They had to plan, organize, staff, and then move out sharply, which they have done. Our review is not meant to criticize their performance, but to critique their product. Moreover, we understand that the overhauled FAR is not to be a textbook, but a statement of rule that implement statutes, and that "practitioner albums" are to follow. A proposed rule is yet to come, and then a final rule. There is still time for improvement. *VJE*