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Competitive Negotiation Under The Revolutionary FAR Overhaul

*By Vernon J. Edwards**

One of the most interesting results of the "revolutionary" overhaul of the Federal Acquisition Regulation (FAR)[1] was the decision to delete the word *discussions* from the coverage of the source selection process in FAR Part 15, *Contracting By Negotiation*, and to replace it with the word *negotiations*. It is not clear why the overhaulers made the change. *Discussions* is the term used in the procurement statutes, 10 U.S.C.A. § 3303 and 41 U.S.C.A. § 3703, and it is the term on which a large body of bid protest case law is based. What, if anything, do the overhaulers intend the effect to be? The bid protest tribunals—the Government Accountability Office (GAO) and the U.S. Court of Federal Claims—have long used the terms discussion and negotiation interchangeably in hundreds of protest decisions. Do the overhaulers expect there to henceforth be a difference between *discussion* and *negotiation* in terms of government objectives, procedures, behaviors, and contracting outcomes? If so, what do they expect contracting officers and competing offerors to do differently? How do they expect the protest tribunals to interpret and enforce the change?

History Of The Discussions Rule 1950–1997

To understand the significance of the Revolutionary FAR Overhaul (RFO) change, if any, it is appropriate and helpful to recall the past so we can avoid having to repeat it. Thus, we begin by reviewing the regulatory history of competitive negotiation.

The 1949 Armed Services Procurement Regulation (ASPR)

When Congress passed the Armed Services Procurement Act of 1947,[2] it required the Department of Defense (DOD) to use *formal advertising* (now called *sealed bidding*) to award contracts, but it permitted procure-

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ment by *negotiation* under specified circumstances, negotiation being defined as any process that was not formal advertising.

In 1949, DOD published what would become known as the Armed Services Procurement Regulation (ASPR) in Title 32 of the Code of Federal Regulations (CFR), and included the following provisions:

> § 402.100 Scope of subpart. This subpart deals with the nature and use of negotiation as distinguished from formal advertising, and with limitations upon that use.
>
> § 402.101 Negotiation as distinguished from formal advertising. As used throughout this subchapter, negotiation means that method of procurement under which the procedures for procurement by formal advertising, as set forth in Part 401 of this subchapter, are not required. Whenever supplies or services are to be procured by negotiation, price quotations, supported by statements and analyses of estimated costs or other evidence of reasonable prices and other vital matters deemed necessary by the Contracting Officer, shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the Contracting Officer to assure full and free competition consistent with the procurement of the required supplies or services, in accordance with the basic policies set forth in Subpart C of Part 400 of this subchapter, to the end that the procurement will be made to the best advantage of the Government, price and other factors considered. Negotiation shall thereupon be conducted, by Contracting Officers and their negotiators, with due attention being given to the following and any other appropriate factors:
>
> (a) Comparison of prices quoted, and consideration of other prices for the same or similar supplies or services, with due regard to cost of transportation, cash discounts, and any other factor relating to price;
>
> (b) Comparison of the business reputations and responsibilities of the respective persons or firms who submit quotations;
>
> (c) Consideration of the quality of the supplies or services offered, or of the same or similar supplies or services previously furnished, with due regard to the satisfaction of technical requirements;
>
> (d) Consideration of delivery requirements;
>
> (e) Discriminating use of price and cost analyses;
>
> (f) Investigation of price aspects of any important subcontract;
>
> (g) Individual bargaining, by mail or by conference;
>
> (h) Consideration of cost sharing; and
>
> (i) Effective utilization in general of the most desirable type of contract, and in particular of contract provisions relating to price redetermination. [342 words][3]

Congressional Outrage Over Excessive Use Of Negotiated Procurement

In 1950, President Truman declared a national emergency at the start of the Korean War, thereby permitting the Department of Defense to procure by negotiation, which was considered more expeditious than formal advertising. But when a truce was declared in 1953 President Eisenhower did not cancel the emergency declaration, and DOD continued to procure by negotiation. Congress thought of negotiation as a noncompetitive process. So, when in the early 1950s Congress discovered that more than 90% of post-conflict DOD contract obligations were made through negotiation members were shocked and dismayed, and they demanded that DOD describe and explain its negotiation process.

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DOD defended itself by pointing out that it conducted *competitive* negotiations. Congress demanded to know how *competitive* negotiations were conducted. What followed were several years of congressional investigation and criticism of DOD's negotiated procurements. DOD said that competitive negotiations included *discussions*, but did not provide what some senators and representatives considered a coherent description. Typical of the congressional reactions was that of Senator Paul Douglas of Illinois on July 1, 1957:

> We have stated some of the information developed in specific studies within the three service departments; and we have commented upon the testimony of the Department of Defense as the policymaking agent for the military services upon its interpretation of ASPA [Armed Services Procurement Act] and regulations. From that, a number of conclusions follow:
>
> We are, at the present time, no nearer to a definition of what "negotiation" means than that there are four different views; one, in the Department of Defense; another in the Department of Navy; another in the Department of Army; and a fourth in the Department of Air Force. Among these four there are as many interpretations of the word as there are people administering the law and regulations.
>
> * * *
>
> The Department of Defense says that to negotiate means to discuss. Yet while we were being assured by the Chairman of the Armed Services Procurement Regulations Committee that the word had a simple meaning whose purposes are understandable to all, nonetheless, another form of procurement was to be adopted, to wit: The Navy practice of awarding to the favorite contractor when it is suited to the Department of Navy, section 3-805, APR [ASPR].
>
> Why are we constantly belabored with the suggestion that negotiation is the most satisfactory way of contracting?
>
> The answer has been very simply stated and restated by the Comptroller General. The most recent of his decisions is that once authority is given to negotiate, "the sky is the limit" for practice, procedures, and prices.
>
> * * *
>
> We think that a new section must be added to the [Armed Services Procurement] act. We will define what negotiation requires so that all departments and the public may know what is to be expected when negotiations are invited and permitted under the act.[4]

Congress began debating whether to make discussions statutorily mandatory. DOD argued against it, saying that competitors might pad their prices to leave room for concessions if the government committed itself to negotiations, and the government might end up paying higher prices.

The 1961 ASPR Update

Faced with the prospect of unwanted legislation, DOD tried to dissuade Congress from enacting a law by revising the ASPR. As the controversy reached a crescendo, and in an apparent attempt to stave off legislation, DOD amended its ASPR in 1961 to add the following:

> **§ 3.805-1 General.** (a) After receipt of initial proposals, *written or oral discussions* shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered . . .. [Emphasis added.]
>
> * * *
>
> . . . In any case where there is uncertainty. as to the pricing or technical aspects of any proposals, the contracting officer shall not make award without further exploration and discussion prior to award. Also, when the proposal most advantageous to the Government involves a material departure from the stated requirements, consideration shall be given to offering the other firms which submitted proposals an opportunity to submit new proposals on a technical basis which is comparable to that of the most advantageous proposal, provided that this can be done without revealing to the other firms any information which is entitled to protection under § 3.109 of this part.
>
> (b) Whenever negotiations are conducted with more than one offeror, no indication shall be made to any offeror of a price which must be met to obtain further consideration, since such practice constitutes an auction technique which must be avoided. No information regarding the number or identity of the offerors participating in the negotiations shall be made available to the public or to any one whose official duties do not require such knowledge. Whenever negotiations are being conducted with several offerors, while such negotiations may be conducted successively, all offerors participating in such negotiations shall be offered an equitable opportunity to submit such pricing, technical, or other revisions in their proposals as may result from the negotiations. All offerors shall be informed that af-

> ter the submission of final revisions, no information will be furnished to any offeror until award has been made. Modifications of proposals received after the submission of final prices shall be considered only under the circumstances set forth in § 3.804-2(b) (relating to late proposals). [307 words][5]

Thus, the phrase *written or oral discussions* entered the formal procurement lexicon.

The 1962 Truth In Negotiations Act

Nevertheless, Congress enacted the requirement to conduct discussions into law in 1962 as part of the Truth in Negotiations Act, Pub. L. No. 87-653, which provided as follows:

> (c) Section 2304 [of title 10 U.S.C.] is amended by adding a new subsection as follows:
>
> "(g) In all negotiated procurements in excess of $2,00 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 and 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 offeror of the possibility that award-may be made without discussion." (161 words.)

As a result of Pub. L. No. 87-653, language virtually identical to the ASPR text was inserted into the civilian agency Federal Procurement Regulations.[6]

The Bid Protest "Tightrope"

After the enactment of Pub. L. No. 87-653 in 1962 the conduct of discussions became fertile ground for bid protests, which affected the way contracting officers conducted or avoided conducting discussions. The General Accounting Office, now the Government Accountability Office (GAO), has rendered more than 2,000 bid protest decisions in response to industry complaints about government conduct during competitive negotiations, decisions in which that office interpreted the law and its implementing regulations, elaborated on the concept of the competitive range, specified the fundamental purpose of discussions, required that discussions be *meaningful*, *equal*, *fair*, and *not misleading*, specified what discussion behaviors were improper, such as *coaching*, *technical transfusion*, *technical leveling*, and *auctioning*, and specified procedures for letting offerors submit *best and final offers* (later called *final proposal revisions*). It is fair to say that the GAO developed the concept of discussions as it has come to be known until the RFO.

The principal issues were (1) what the contracting officer must say to offerors, (2) what the contracting officer must not say, and (3) the procedure for proposal revisions. Word-of-mouth advice was passed around by contracting officers that one way to avoid or survive protests was either to (1) award without conducting discussions or (2) limit discussions to telling offerors what is wrong with their proposals (weaknesses and deficiencies) but not telling offerors how to fix them. Very often, discussions were little more than a terse one-way communication from the government to offerors. On occasion, the government's comments were read from a memorandum, after which offerors could ask written questions and the government would caucus to prepare written answers.[7]

In 1987, the late Steven W. Feldman, a procurement attorney for the Army Corps of Engineers, wrote a lengthy and heavily annotated article for PUBLIC CONTRACT LAW JOURNAL, *Traversing the Tightrope Between Meaningful Discussions and Improper Practices in Negotiated Federal Acquisitions: Technical Transfusion, Technical Leveling, and Auction Techniques*, in which he began as follows:

> Many rules restrict federal contracting agencies in how they conduct discussions during negotiated acquisitions. For example, Federal Acquisition Regulation (FAR) 15.610(d)(2) prohibits 'technical transfusion:' 'government disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal.' In another example, FAR 15.610(d)(1) provides against 'techni-

cal leveling:' 'helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal.' In a third example, FAR 15.610(d)(3) proscribes 'auction techniques': 'indicating to an offeror a cost or price that it must meet to obtain further consideration;' 'advising an offeror of its price standing relative to another offeror . . .:' or 'otherwise furnishing information about other offerors' prices.' These regulatory prohibitions stem from 10 U.S.C. 2305(b)(4)(B) and 41 U.S.C., which the decisional law has interpreted to require 'meaningful discussions' during negotiated acquisitions.

* * *

Frequently, a fine line exists between meaningful discussions and the improper practices described in FAR 15.610(d).[8]

After analyzing the GAO's decisions, Feldman concluded as follows:

The procurement statutes, regulations, and case law require the government to engage offerors in meaningful discussions and to avoid technical transfusion, technical leveling, and auction techniques. The above rules maximize competition, avoid unfairness during negotiations, and ensure that the government obtains the most favorable contract.

This article has pointed out the following deficiencies or gaps in FAR 15.610(d) and the case law. The GAO's decisions in some respects have been inconsistent in defining the meaningful discussions requirement, and the result has been a dilution of the statutory mandate. The GAO's definition of technical transfusion in several decisions departs from the FAR, and the GAO should disapprove any of its precedents that conflict with the FAR definition of this practice. The auction decisions of the GAO provide sound analogous authority for determining the remedies for a transfusion violation. The GAO's technical leveling cases are inconsistent, and a few decisions incorrectly require a bad intent on the part of the government. The FAR is also deficient in adopting an excessively narrow definition of technical leveling that is at odds with the broad policy underlying this prohibition. As in the transfusion cases, the auction decisions of the GAO provide persuasive authority for determining an appropriate postaward technical leveling remedy. The GAO should disavow any of its pre-FAR decisions that depart from the FAR's current definition of improper auction techniques.

The government and prospective contractors have a mutual interest in seeing that acquisitions are conducted properly. In the author's view, the suggested reforms would enhance the statutory goal of full and open competition in the award of federal contracts, and would enable the contracting agencies to traverse the perilous path between meaningful discussions and the improper practices described in FAR 15.610(d).[9]

The 1984 Federal Acquisition Regulation (FAR)

When the government-wide FAR took effect on April 1, 1984, the rules about discussions were in FAR 15.610 and 15.611, as follows:

15.610 Written or oral discussion.

(a) The requirement in paragraph (b) below for written or oral discussion need not be applied in acquisitions—

(1) Of $25,000 or less;

(2) In which prices are fixed by law or regulation;

(3) In which date of delivery or performance will not permit discussion;

(4) Of the set-aside portion of a partial set-aside;

(5) Involving small business restricted advertising; or

(6) In which adequate competition or accurate prior cost experience with the product or service clearly demonstrates that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price; provided, that—

(i) The solicitation notified all offerors of the possibility that award might be made without discussion; and

(ii) The award is in fact made without any written or oral discussion with any offeror.

(b) Except as provided in paragraph (a) above, the contracting officer shall conduct written or oral discussion with all responsible offerors who submit proposals within the competitive range. The content and extent of the discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition (but see paragraphs (c) and (d) below).

(c) The contracting officer shall—

(1) Control all discussions;

(2) Advise the offeror of deficiencies in its proposal

so that the offeror is given an opportunity to satisfy the Government's requirements;

(3) Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal;

(4) Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerors' proposals or the evaluation process (see 15.607 and Part 24); and

(5) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the discussions.

(d) The contracting officer and other Government personnel involved shall not engage in—

(1) Technical leveling (i.e., helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal);

(2) Technical transfusion (i.e., Government disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal); or

(3) Auction techniques, such as—

(i) Indicating to an offeror a cost or price that it must meet to obtain further consideration;

(ii) Advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its cost or price is considered by the Government to be too high or unrealistic); and

(iii) Otherwise furnishing information about other offerors' prices.

15.611 Best and final offers.

(a) Upon completion of discussions, the contracting officer shall issue to all offerors still within the competitive range a request for best and final offers.

(b) The request shall include—

(1) Notice that discussions are concluded;

(2) Notice that this is the opportunity to submit a best and final offer;

(3) A common cutoff date and time that allows a reasonable opportunity for submission of written best and final offers; and

(4) Notice that if any modification is submitted, it must be received by the date and time specified and is subject to the Late Submissions, Modifications, and Withdrawals of Proposals or Quotations provision of the solicitation (see 15.412).

(c) After receipt of best and final offers, the contracting officer should not reopen discussions unless it is clearly in the Government's interest to do so (e.g., it is clear that information available at that time is inadequate to reasonably justify contractor selection and award based on the best and final offers received). If discussions are reopened, the contracting officer shall issue an additional request for best and final offers to all offerors still within the competitive range.

(d) Following evaluation of the best and final offers, the contracting officer (or other designated source selection authority) shall select that source whose best and final offer is most advantageous to the Government, consistent with the established evaluation factors. [652 words][10]

Those rules reflected the interpretations and decisions of the GAO.

The 1984 Competition In Contracting Act

The Competition in Contracting Act (CICA) of 1984[11] required agencies to seek full and open competition and eliminated the statutory preference for procurement by *formal advertising*, which was renamed *sealed bidding*. Agencies could thenceforth procure by negotiation at will, seeking "best value" instead of lowest price. This was a celebrated change, but it created a new problem. Agencies and companies experienced mainly in the use of sealed bidding, and with relatively little if any experience in the conduct of competitive negotiations, began to conduct "best value" FAR Part 15 source selections, and now had to cope with the complicated concepts and procedures of establishing a competitive range, conducting written or oral discussions, and seeking best and final offers. When preparing their requests for proposals they cut and pasted variations of the instructions used by DOD for preparing proposals for research and systems development, which instructed offerors to describe their "proposed approach" or "management plan" for janitorial and grounds maintenance services. They then evaluated the proposals for "understanding the problem," "understanding the requirement," and "sound-

ness of approach." The result was that after CICA the number of discussions bid protests increased significantly over comparable 22-year periods of time before and after CICA—1962 to 1984 and 1985 to 2007. It is difficult to say how much of the increase was due to problems conducting competitive negotiations rather than other causes, but CICA certainly contributed to it.

The 1997 FAR Part 15 Rewrite

In December 1995, the Office of Federal Procurement Policy announced a plan to "rewrite" FAR Part 15 by October 1996, and stating that the purpose was to "simplify, update and streamline" the rules.[12] It was to be a 10-month project, but it was not completed until September 30, 1997, when the FAR Council published a final rule in the Federal Register to implement the changes.[13] The result was the celebrated FAR Part 15 Rewrite, which replaced FAR 15.610 and 15.611 with the following.

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. 3303(a)(2) and 41 U.S.C. 3703(a)(2)).

(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 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 com-

petitive 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. 3303 and 41 U.S.C. 3703).

(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*. [Emphasis added.]

(1) Discussions are tailored to each offeror's proposal, and must 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) At a minimum, the contracting officer must, subject to paragraphs (d)(5) and (e) of this section and 15.307(a), indicate to, or 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. 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. However, the contracting officer is not required to discuss every area where the proposal could be improved. The scope and extent of discussions are a matter of contracting officer judgment.

(4) 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.

(5) 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—

(i) Unique technology.

(ii) Innovative and unique uses of commercial products or commercial services; or

(iii) 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. 2102 and 2107). When using reverse auction procedures (see subpart 17.8), it is also permissible to reveal to all offerors the offered price(s), without revealing any offeror's identity.

(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. 2102 and 2107). [1,273 words][14]

That is the regulation that has been overhauled. Note that after each rulemaking reform the word count increased. The RFO has dramatically reversed that trend.

The RFO Part 15—From Discussion To Negotiation

The scope of RFO Part 15 is described as follows:

15.000 Scope.

This part addresses policies and procedures used in competitive and noncompetitive negotiated acquisitions. These acquisition procedures provide an opportunity for *back-and-forth* negotiation between the Government and an offeror(s) upon receipt of a proposal submitted in response to a request for proposals (RFP). [Emphasis added.][15]

The new rules for competitive negotiations are in RFO 15.204, *Competitive award with negotiation*, and read in part as follows:

15.204 Competitive award with negotiation.

* * *

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*—[emphasis added]

(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. [401 words][16]

The overhaulers have declared the change in regulatory text to be "transformative"—a substantive change of intention and process. Presumably, the GAO and the Court of Federal Claims will recognize the transformation when deciding bid protests unless they find it contrary to law.

The word *discussions* has been eliminated entirely. This deletion prompts several questions:

- What *must* contracting officers do?
- What *will* contracting officers do when conducting competitive negotiations?
- What, if anything, will industry, the protest tribunals, the GAO, and the Court of Federal Claims demand and require that contracting officers do and insist that they not do? And how will the tribunals fill in what they see as gaps, as they have done in the past?

Discussions And Negotiations: Are They The Same?

The protest tribunals have never made a distinction between *discussions* and *negotiations*. But during the 65 years since the 1961 use of the term discussions in the ASPR, at least 2,371 GAO bid protest decisions have addressed, refined, and elaborated upon the concept. Neither the GAO nor the Court of Federal Claims have ever held that discussion necessarily requires bargaining in the sense of offer-counteroffer behavior.

According to the GAO, "The fundamental purpose of discussions is to afford offerors the opportunity to improve their proposals or quotations to maximize the government's ability to obtain the best value, based on the requirement and the evaluation factors set forth in the solicitation."[17] That has usually been done by disclosing significant weaknesses and deficiencies in proposals, suggesting that the offerors "take another look" at their technical proposal, and suggesting that they apply sharper pencils to their price proposals before submitting their best and final offers or final proposal revisions. The question is whether *negotiation* requires something more. The overhaulers seem to think so.

The RFO nonregulatory commentary states:

> **Overview**
>
> The model deviation for FAR part 15 provides some significant changes to practice and the art of negotiated procurements. FAR part 15 removes the term "communications" and emphasizes clarifications as exchanges that can occur anytime throughout the source selection process. It also removes the term "discussions" with a strengthened focus on "negotiations."[18]

According to the official transcript of an online briefing by two members of the overhaul staff:

> Historically, 'discussions' in practice often meant simply giving offerors a chance to correct significant weaknesses and deficiencies in their proposal. It was more about fixing problems identified during source selection than truly negotiating.
>
> But now, under the new FAR part 15, the goal is to move beyond that limited view and allow *for actual bargaining* on material elements of a proposal to get the best possible deal that meets the mission. And the competitive range itself isn't comprised of "all of the most highly rated proposals" anymore. You can select a narrower group of proposals that are "best suited for further negotiation." [Emphasis added.]
>
> * * *
>
> [T]his allows you to address not just deficiencies, but to actively bargain on terms and conditions. We're talking about things like intellectual property rights, licensing agreements, pricing, and other material aspects of the offer.
>
> * * *
>
> [*Y*]*ou no longer have to worry about deficiencies related to technical descriptions that aren't firm commitments.* This means if a company describes a plan they might use, and then changes it after award, that's not a deficiency. Second, you don't have to combine a bunch of 'significant weaknesses' into one 'deficiency' anymore. Now, you can just address those significant weaknesses directly during negotiations. [Emphasis added.][19]

That presentation seems to expect that more be done during negotiations than was required during discussions—a change in intention and procedure. The reference to "firm commitments" appears to mean that negotiations should not address informational material that is not promissory in nature, such as the nonbinding description of a plan or an "approach" to doing this or that, which the government will use only to evaluate offerors' understanding of the work. The question is whether contracting officers must henceforth bargain about promises in a process of offer-counteroffer. That would indeed be transformative.

The 1997 rewritten FAR 15.306(d), which is replaced by RFO 15.204-2, declared *discussion* to be synonymous with *negotiation*, stating:

> [N]egotiations 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.[20]

But unlike the RFO, the old FAR did not say that the contracting officers *must* negotiate.

What Is Negotiation?

The heading asks an important question: How should a contracting officer proceed when negotiating with offerors in a competitive range? It is long established in protest case law that contracting officers must inform offerors of deficiencies and significant weaknesses in their proposals and give them a chance to revise their proposals to correct them. Under the old FAR they did not have to do more than was required by FAR 15.306(d) but could do more so long as they did not violate any of the prohibited behaviors listed in FAR 15.306(e). But now they must *negotiate*. Does that mean that contracting officers must engage in *bargaining*, i.e., offer-counteroffer behavior?

The RFO does not describe *negotiation* other than to say, in RFO 15.000, *Scope*, that it is an opportunity to seek better value than initially proposed by going "back-and-forth" with the competitors.[21] It permits contracting officers to seek specific proposal betterments, but it does not explicitly require them to do so. Will it allow contracting officers to ask an offeror to propose a specific betterment seen in a competing proposal and seek a lower price than offered by the competitor? In short, must contracting officers do anything differently than they did before the RFO?

The Warfighting Acquisition University's CONTRACT PRICING REFERENCE GUIDE, Volume 5, *Negotiation Techniques*, describes negotiation as "a process of communication by which two parties, each with its own viewpoint and objectives, attempt to reach a mutually satisfactory result on a matter of common concern."[22] What does that mean? Is it a matter of craft and shrewdness, like Chester Karrass' THE NEGOTIATING GAME or like the Harvard Negotiation Project's GETTING TO YES? How is the process of competitive negotiation different from sole-source negotiation, or from the negotiation of requests for equitable adjustment and of claims?

The authors of NEGOTIATION FOR PROCUREMENT AND SUPPLY CHAIN PROFESSIONALS, 3d ed., define and explain negotiation as follows:

> Negotiation is the process by which two or more parties confer or interact to reach consensus or agreement. It is an activity with a start, middle and end; a means by which we can move from one place to another and a way for the parties to deal with their differences or reach a resolution to a problem.[23]

In THE DISCOURSE OF BUSINESS NEGOTIATION, the author states:

> Despite the multifaceted interest in "business negotiation," the concept seems somewhat vague. There is no general agreement about what counts as a negotiation and, maybe more essentially, what does not. . . . Business professionals themselves refer to many different kinds of communication as "negotiation."[24]

A search in Google Scholar for *What is negotiation as used in business?* yielded 3,460,000 results. According to AI:

> Negotiation is a strategic dialogue between parties aimed at resolving differences, reaching an agreement, or creating mutually beneficial outcomes. It involves back-and-forth communication—such as bargaining, compromising, and persuading—to reconcile conflicting interests, whether in business, legal, or personal contexts.

Of course, what matters is not what scholarly analyses and artificial intelligence say negotiation means, but what contracting officers will think it means and whether industry, the legal profession, and the bid protest tribunals will agree.

The GAO has long used the terms *discussion* and *negotiation* interchangeably in its bid protest decisions, even before the FAR Part 15 Rewrite, but neither the GAO nor the Court of Federal Claims has ever held that the contracting officer must bargain when conducting discussions, only that they could if they chose to do so. As noted above, the GAO has often stated that "[t]he fundamental purpose of discussions

is to afford offerors the opportunity to improve their proposals or quotations to maximize the government's ability to obtain the best value, based on the requirement and the evaluation factors set forth in the solicitation."[25] Affording an opportunity does not sound like bargaining. Bargaining would seem to entail something more proactive, even aggressive.[26]

The change in regulation terminology, from *discussions* to *negotiations*, is clearly intentional, but it is not clear what the FAR overhaulers mean by "transformative" and what they hope to achieve through their change—simplification or something more consequential. The key question is whether negotiation means offer-counteroffer *bargaining* or is it just another word for what used to be called discussion? Bargaining would be truly transformational.

Negotiations And Contract Formation

One of the shortcomings of both the old FAR and RFO Part 15 is that they address negotiation primarily for the purpose of source (contractor) selection but say virtually nothing about the role of discussions/negotiations in contract formation—the achievement of mutual assent, a meeting of the minds. Government requests for proposals are often lengthy, complex, poorly organized, and poorly written documents, even for the procurement of simple products and services.[27] In sole-source negotiations, the government and the prospective contractor usually communicate about technical matters before and during the preparation of the statement of work, the product or system specification, the request for proposals (RFP), and the proposal, allowing the parties to develop a mutual understanding of each other's thoughts and expectations. Many price-quality tradeoffs are made before a proposal is submitted. Price negotiation is usually preceded by fact-finding, the results of which are factored into the development of the government's prenegotiation objectives. But in competitive negotiations such one-on-one presolicitation communication with prospective offerors is usually impractical and may be improper.

Proposal preparation instructions and evaluation factors are often unspecific and vague. (What is an "approach" and what constitutes "soundness"?) Government mass briefings to offerors and written responses to written questions are not as effective as patient and detailed one-on-one face-to-face communications. Thus, as to the question whether prospective offerors understand the requirement, the answer is that they very likely do not or do not in any detail and depth, and the successful contractor likely will not fully understand the requirement until it begins to perform, if then.

Negotiations in competitive procurements should be an opportunity to achieve a true meeting of the minds through in-depth joint review and analysis of the requirement, but it seems that discussions have rarely been conducted with that purpose in mind. Instead, they appear to have generally been considered something to be gotten over with as quickly and cautiously as possible and in a way designed to minimize the risk of protest, the less said the better. And in-depth communication and bargaining would undoubtedly affect procurement lead time, one of the problems the RFO is supposed to correct. Nevertheless, in competitions for the award of a contract for a large and complex government undertaking, contracting officers should not be stingy about the time allocated for negotiation. Better instead would be to severely limit the number of offerors in the competitive range.

As the preceding historical background shows, the concept and conduct of discussions in competitive negotiations have long been problematical. The question now is whether *discussion* and *negotiation* are synonyms, as indicated in the old FAR 15.306(d), or different concepts.

To Negotiate Or Not Negotiate

Like the old FAR, the RFO gives agencies the option of either negotiating with offerors in a competitive range before awarding a contract or awarding a contract without negotiations. The RFO standard solicitation provision at 52.215-1, "Instructions To Offerors—Competitive Acquisition," states in paragraph (f)(4) that the government intends to award a contract without negotiations but reserves the right to engage in negotiations if necessary.[28] But what experienced

businessperson would enter an important and complex contract without first having, at the least, a one-on-one conversation with the prospective contractor to confirm that there is a meeting of the minds? Alternate I to RFO 52.215-1 states that the government intends to engage in negotiations before making an award decision.[29] Such a commitment may prompt some offerors to pad their prices to provide room for making concessions, something DOD officials warned Congress about before it enacted the requirement to conduct discussions into law in 1962.[30]

A key consideration when deciding whether to negotiate is the matter of terms that are open to negotiation. If the government's technical terms are specific, fixed, and non-negotiable, and if the government wants only exactly what is specified, nothing more and nothing less, then negotiations might still be fruitful as to price, assuming that the government might obtain lower prices without endangering the quality of contractor performance. The government might also want to negotiate in order to let an offeror with a correctable defect in its technical proposal, but with an enticing price, to correct the problem without increasing its price and qualify for award consideration. If the government would be interested in technical betterments and is willing to entertain technical tradeoffs, then negotiations might be fruitful and prospective offerors should be put on notice to that effect.

What To Negotiate?

Negotiations are to focus on "proposals," but commentators have pointed out that proposals contain both promises and information, and the distinction is not always clear.[31] Consider the following proposal preparation instruction taken from a government RFP:

> The Offeror shall identify and describe significant potential risks associated with performance of the contract and explain the risk management techniques that will be used to address each risk. Identified risks may be inherent to the nature of the work or specific to the Offeror's proposed approach. The Offeror shall describe the methodology used to manage each identified risk throughout contract performance. At a minimum, the proposal shall address any applicable risks in the areas of technical, schedule, cost, and security (including personnel, information technology). If a listed risk area is not applicable, the Offeror shall provide a brief explanation. For each identified risk, the proposal shall include a description of the risk, the probability of occurrence, the potential impact and severity, whether the Offeror accepts the risk or will implement mitigation strategies, and a description of the proposed mitigation approach, if applicable.

And this one:

> Contractor shall fully explain how they will develop their PMO [Program Management Office] plan (i.e. equipment verification, equipment identification, maintenance task identification, frequencies, etc.) and how their PMO Plan will be entered into GFEBS [General Fund Enterprise Business System] in accordance with PWS [Performance Work Statement], paragraph 2.2.2.2. Additionally, offerors shall provide their workflow process for how they utilize their PMO plan in GFEBS to execute all PMO workload (i.e. reports, scheduling, tracking, marking, and closing PMOs etc.).

Such instructions are commonplace in government contracting and have been referred to as instructions for essay-writing contests.[32] When an RFP includes such an instruction, it should clearly state whether the response is to be a set of promises, commitments to act or refrain from acting in a specified way. If the content of a "technical" or "management" proposal is to be just information, then it may not be worthwhile to discuss it, much less negotiate about it, unless the purpose is to confirm a meeting of the minds about the government's requirement. Such information may be important to the assessment of an offeror's capability, but it will not be a part of the contract. The RFO appears to recognize that asking offerors to describe their approach to doing this or that or their plan for doing this or that may be nothing more than essays to be used for judging an offeror's understanding of the requirement, rather than binding commitments.

It seems clear that promises, not mere information, should be the objects of negotiation. So to avoid needless wastes of time, contracting officers and other agency personnel must recognize and understand the distinction between two kinds of proposal content: *offers* (promises, i.e., commitments to act or refrain from acting in specified ways) and mere information (e.g.,

about experience, past performance, key personnel qualifications, tentative plans, etc.).

Consider the following proposal preparation instruction:

> Subfactor A – Technical Approach
>
> The Offeror shall identify and describe significant potential risks associated with performance of the contract and explain the risk management techniques that will be used to address each risk. Identified risks may be inherent to the nature of the work or specific to the Offeror's proposed approach. The Offeror shall describe the methodology used to manage each identified risk throughout contract performance. At a minimum, the proposal shall address any applicable risks in the areas of technical, schedule, cost, and security (including personnel, information technology). If a listed risk area is not applicable, the Offeror shall provide a brief explanation. For each identified risk, the proposal shall include a description of the risk, the probability of occurrence, the potential impact and severity, whether the Offeror accepts the risk or will implement mitigation strategies, and a description of the proposed mitigation approach, if applicable.

Now consider the description of the basis on which that material will be evaluated:

> A.1 Risk Identification and Management
>
> [The agency] will evaluate the Offeror's proposed risk identification and management approach, including all areas and information specified in section L.10, Subfactor A, Paragraph A.1, for effectiveness, reasonableness, and efficiency.

Is the agency asking for promises or information? It is not entirely clear. If the agency is asking for a promise or set of promises, then the offerors' responses are meant to be offers, if clearly expressed as such, and thus appropriate objects of negotiation. But if the agency intends to use the responses only to assess the offerors' understanding of the work and capability, then there is no reason to negotiate them. An offeror understands or it does not, and its capability should be assessed accordingly. The request for information was a test, and offerors either pass or fail.

Planning For Competitive Negotiations

The objective in negotiated government contacting is to obtain "best value," which can be described as the optimal combination of quality (in an offeror and in a product or service) and price. The pursuit of that goal must begin with planning and solicitation design to facilitate the improvement of value and with the possibility of negotiation to best value in mind.

If an agency plans to negotiate, or thinks it possible, then it is important to design the RFP in a way that facilitates that process. Negotiation planning and solicitation design must begin with a thorough analysis of the government's requirement. Is it, at one extreme, specific, fixed, and non-negotiable, or is it, at the other extreme, general, variable, and negotiable? If the former, then negotiations will presumably be limited to (1) notifying offerors of correctable weaknesses and deficiencies and (2) price bargaining. If the latter, then negotiations will presumably focus on potential tradeoffs among requirements and between requirements and price tradeoffs. If such tradeoffs will be permissible, then it may be worthwhile to use the solicitation provision at RFO 52.215-1 with its Alternate II, which permits offerors to submit proposals that depart from stated requirements.[33] If Alternate II is to be used agencies should identify any stated requirements from which departure is impermissible, either intendedly or consequentially. Merely saying that alternate proposals may be submitted is not enough. It should be obvious that contract line items, statements of work, and product specifications should be clear, well-organized, and broken out to identify permissible departures and tradeoff possibilities and thus avoid needless misunderstandings in that regard.

Unfortunately, RFO 15.106(e) provides as follows:

> (e) *Requirement changes*.
>
> (1) Contracting officers must amend the RFP if the Government is interested in a proposal that involves a departure from the stated requirements. The amendment should not reveal the alternate solution proposed or any other information that is entitled to protection.[34]

That rule, which is based on statute and in the old FAR, may make enterprising offerors reluctant to propose an innovative departure from a requirement and prefer to propose it after award, perhaps as a value engineering change proposal.

Conducting Negotiations

The ideal way to conduct negotiations is face-to-face in a meeting room, in which contracting officers and proposal evaluators could disclose and explain the government's evaluation findings and explore, suggest, or propose changes that could make proposals more valuable. But that is unlikely to happen in these days of online meeting sessions.

When preparing to negotiate, the contracting officer and the proposal evaluators should develop a written negotiation plan for each offeror in the competitive range. The plan should identify (1) the terms of the proposal that are to be addressed and (2) what the government will seek to achieve with respect to each such term. This plan must be prepared thoughtfully, as it may be important in the event of a protest about the conduct of the negotiations. RFO 15.408-1 requires such a plan as follows:

> **15.408-1 Prenegotiation objectives**.
>
> (a) The prenegotiation objectives establish the Government's initial negotiation position and are based on the results of the contracting officer's analysis of the offeror's proposal.
>
> (b) Contracting officers must establish prenegotiation objectives before negotiating a pricing action. The scope and depth of the analysis supporting the objectives should be directly related to the dollar value, importance, and complexity of the pricing action. When cost analysis is required, contracting officers must document the pertinent issues to be negotiated, the cost objectives, and a profit or fee objective.[35]

Although that rule appears to apply only to price negotiations, it is good professional practice with respect to non-price terms as well.

Negotiations should not be rushed. The most important objective is to communicate clearly and to understand each other. Unlike noncompetitive (sole-source) negotiation, competitive negotiation generally does not allow the parties to meet, engage in fact-finding, and discuss terms before proposal preparation and submission. Thus, the post-proposal sessions may be the first and only time the parties will meet and have an opportunity to get to know each other as prospective business relations.

The contracting officer should prepare and distribute a negotiation agenda in advance. The parties should take copious notes during the session, assigning that task to an individual on each team. It may be helpful for the parties to exchange and compare their notes after negotiation to identify possible misunderstandings. Making audio or video recordings of negotiations might stifle communication, and thus, while permissible, and even with the agreement of the parties, may not be helpful. So, detailed and well-written accounts of all negotiations are essential.

RFO 15.204-2, *Competitive negotiations*, allows contracting officers to "further negotiate" with a particular offeror "if necessary," without being obligated to conduct further negotiations with any of the other offerors.[36] So negotiations need not be completed in a single session. The reason for further negotiation should be thoughtfully documented with an explanation and justification.

It is essential that agency policymakers, contracting officers, source selection officials, and their attorney advisors discuss the RFO changes among themselves and develop their own ideas, in-house principles, processes, procedures, methods, and techniques and ensure that all acquisition personnel are provided with comprehensive in-house training.

Conclusion

The Revolutionary FAR Overhaul has severely edited FAR Subparts 15.1 through 15.3 and clearly intends for the changes to have a transformative effect on the way source selections are conducted. But what the actual effect will be depends on the way the government's acquisition workforce implements the changes and the way industry and the bid protest tribunals react and respond. As history shows, it will take time, perhaps a considerable length of time, before we see trends in (1) the way contracting officers conduct negotiations, (2) the way industry reacts and responds to those practices, and (3) the way that the bid protest tribunals interpret and apply the new rules.

It is regrettable that the Office of Management and Budget and the FAR Council have taken a self-

congratulatory, Madison Avenue-style approach to selling the overhaul and prematurely proclaiming their success. That approach has caused some anxiety among acquisition practitioners about what is going to happen, how they must adapt, and what new concepts, principles, processes, procedures, methods, and techniques they must develop and learn. A more sober, analytical, and deliberative approach might have been more productive. It is not too late.

Guidelines

These *Guidelines* are intended to assist you in understanding the impact of the "Revolutionary FAR Overhaul" on competitive negotiation. They are not, however, a substitute for professional representation in any specific situation.

For The Government

1. *During Acquisition Planning*:

- In the absence of a clear regulatory definition of negotiation, contracting officers should develop a clear conception of that process that is shared by their organizational higher-ups and attorneys. Will it include offer-counteroffer bargaining or will it be limited to informing offerors of their evaluated weaknesses and deficiencies?
- Contracting officers must prepare well-designed, well-written, and rigorously edited RFPs with comprehensive tables of contents.
- Contracting officers contemplating the conduct of negotiations should, before issuing the RFP, analyze the requirements to determine what terms are firm and nonnegotiable and what terms may be negotiated.
- If the RFP will include the solicitation provision at RFO 52.215-1, "Instructions to Offerors—Competitive Acquisition," with its Alternate II, which permits submission of proposals that depart from stated requirements, contracting officers and requiring organizations should list those that are nonnegotiable and include the list in the RFP.
- Contracting officers must understand the distinction between (a) offers—prospectively binding promises to act or refrain from acting in specified ways—and (b) qualification essays. The essays include only descriptive information, such as management plans, key personnel qualifications, and proposed technical "approaches" that will be used only to judge offerors' "understanding" of the requirement and prospects for successful performance. Nonpromissory descriptive information is not appropriate matter for negotiation. Include a statement in the RFP to that effect.
- Consider including in the RFP a checklist of prospective contract terms that must be met and all proposal preparation instructions with which offerors must comply in order for a proposal to be acceptable.

2. *During Proposal Evaluation*:

- Contracting Officers should check with evaluators regularly during proposal evaluation to determine what if any clarification (as opposed to negotiation) is needed. RFO 15.202(a)(2) explains the distinction between clarification and negotiation.[37]

3. *After Proposal Evaluation But Before Negotiations*:

- Contracting officers should review the results of the evaluation of the nonprice terms in offers with technical evaluators and ask them to identify any term of a proposal which, if promissory in nature and if altered in a specific way, would increase the proposal's value.
- If the decision is made to conduct negotiations, the contracting officer should develop a documented negotiation plan for each offeror in the competitive range that includes the terms of the current proposal and the terms and price to be sought through negotiation.
- Contracting officers should prepare a pertinent draft topical negotiation agenda for each offeror

in the competitive range and distribute the draft to each such offeror and to all prospective government participants. Allow each such offeror to recommend additional topics for inclusion.

4. *During Negotiations*:

- Conduct negotiations face-to-face and in-person if possible and if efficient given the importance and dollar value of the prospective contract.
- When seeking improvement in a term of an offeror's proposal, make a specific "good faith" request or a counteroffer.
- Remember that negotiations have two functions: (1) to obtain best value terms and (2) to achieve mutual assent ("a meeting of the minds"). Do not rush negotiations. Allow ample time to achieve both objectives, if possible. Seek agreement on each topic in order to avoid, if possible, major surprises in proposal revisions that might require reopening negotiations.
- When participating in negotiations assign one member of your team to take comprehensive notes. Promptly share those notes with the offeror and ask for confirmation of their accuracy.

For Industry

1. *After Receipt of the RFP*:

- Read the RFP thoroughly and carefully. Submit any questions, carefully written, to the contracting officer as soon as possible.
- If the RFP indicates that offerors may submit proposals that depart from the terms of the RFP and, if you decide to do so, clearly state (a) that if the Government finds your departure unacceptable you will conform to the terms of the RFP and (b) include a compliant response to the requirement as instructed by the RFP.
- Analyze the terms of your proposal to identify, if possible, any nonprice or price term that the Government might try to negotiate, such as better product or service performance, lower price or fixed fee, or more realistic estimated cost, and decide whether you would make an adjustment or concession and what the adjustment or concession might be.

2. *During Negotiations:*

- If the Government selects you for negotiations, ask for face-to-face negotiations.
- Ask what changes in your offer would make it more competitive.
- If the Government makes only vague suggestions about improvements it would like to see in your offer, such as telling you to "take another look" at your technical terms or to "sharpen your pencil" regarding your proposed price, ask for a specific "good faith" request or counteroffer. Confirm and document the Government's response.
- Assign one member of your team to take comprehensive notes during negotiations. Promptly share those notes with the Government and ask for confirmation of their accuracy.

ENDNOTES:

[1]See https://www.acquisition.gov/far-overhaul.

[2]Pub. L. No. 80-413, 62 Stat. 21 (1948).

[3]14 Fed. Reg. 522, 529 (Feb. 8, 1949).

[4]103 Cong. Rec. 10640–41 (July 1, 1957).

[5]26 Fed. Reg. 2599, 2605 (Mar. 28, 1961).

[6]24 Fed. Reg. 1933, 1961 (Mar. 17, 1959).

[7]Th author participated in that kind of discussions process while assigned to the Air Force Space & Missile Systems Organization between 1974 and 1980.

[8]Steven W. Feldman, "Traversing the Tightrope between Meaningful Discussions and Improper Practices in Negotiation Federal Acquisitions: Technical Transfusion, Technical Leveling, and Auction Techniques," 17 Pub. Cont. L.J. 211 (Sept. 1987).

[9]17 Pub. Cont. L.J. at 264.

[10]48 Fed. Reg. 42102, 42202 (Sept. 19, 1983) (effective Apr. 1, 1984).

[11]Competition in Contracting Act of 1984, Pub. L. No. 98-369, div. B, tit. VII, §§ 2701–2753, 98 Stat. 494, 1175 (1984).

[12]60 Fed. Reg. 65360 (Dec. 19, 1995).

[13]62 Fed. Reg. 51224 (Sept. 30, 1997) (effective Oct. 10, 1997).

[14]FAR 15.306.

[15] https://www.acquisition.gov/far-overhaul/far-part-deviation-guide/far-overhaul-part-15.

[16] https://www.acquisition.gov/far-overhaul/far-part-deviation-guide/far-overhaul-part-15.

[17]Cyberdata Techs., Inc., Comp. Gen. Dec. B-417084, 2019 CPD ¶ 34.

[18] https://www.acquisition.gov/sites/default/files/practitioner_albums/far-part-15-contracting-by-negotiation/content/assets/RFO-FAR-Part-15-Job-Aid.pdf.

[19] https://www.acquisition.gov/sites/default/files/practitioner_albums/far-part-15-contracting-by-negotiation/content/assets/FAR-Part-15-Video-Transcript.pdf.

[20]FAR 15.306(d).

[21] https://www.acquisition.gov/far-overhaul/far-part-deviation-guide/far-overhaul-part-15.

[22] https://www.waru.edu/sites/default/files/tools/CPRG-Volume-5.pdf.

[23]Jonathan O'Brien, Negotiation for Procurement and Supply Chain Professionals: A Proven Approach for Negotiations With Suppliers 7 (4th ed. 2025).

[24]Konrad Ehlich & Johannes Wagner (eds.), The Discourse of Business Negotiation Hardcover 9 (1995).

[25]Cyberdata Techs., Inc., Comp. Gen. Dec. B-417084, 2019 CPD ¶ 34.

[26]For an amusing portrayal of bargaining, see the famous "haggling" scene in the film *Monty Python's Life of Brian*, https://www.youtube.com/watch?v=d4hNePJwrOM.

[27]See Vernon J. Edwards, "Postscript: Simplification, Reform, Streamlining," 38 Nash & Cibinic Rep. NL ¶ 55 (Sept. 2024).

[28] https://www.acquisition.gov/far-overhaul/far-part-deviation-guide/far-overhaul-part-52#FAR_52_215_1.

[29] https://www.acquisition.gov/far-overhaul/far-part-deviation-guide/far-overhaul-part-52#FAR_52_215_1.

[30]See Amending Armed Services Procurement Act: Hearings on H.R. 5532 Before the S. Comm. on Armed Services, 87th Cong. (1962).

[31]See Vernon J. Edwards & Ralph C. Nash, "FAR Part 15 Is (Almost) Overhauled: What Will Contracting Officers Do Now?," 40 Nash & Cibinic Rep. NL ¶ 3 (Jan. 2026).

[32]See Vernon J. Edwards & Ralph C. Nash, "Streamlining Source Selection by Improving the Quality of Evaluation Factors," 8 Nash & Cibinic Report ¶ 56 (Oct. 1994).

[33] https://www.acquisition.gov/far-overhaul/far-part-deviation-guide/far-overhaul-part-52#FAR_52_215_1.

[34] https://www.acquisition.gov/far-overhaul/far-part-deviation-guide/far-overhaul-part-15.

[35] https://www.acquisition.gov/far-overhaul/far-part-deviation-guide/far-overhaul-part-15.

[36] https://www.acquisition.gov/far-overhaul/far-part-deviation-guide/far-overhaul-part-15.

[37] https://www.acquisition.gov/far-overhaul/far-part-deviation-guide/far-overhaul-part-15.

NOTES:

BRIEFING PAPERS