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¶ 26 THE FAR REFORM PROJECT: Will Past Be Prologue?

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On April 15, 2025, the President issued Executive Order No. 14275, *Restoring Common Sense to Federal Procurement*, 90 Fed. Reg. 16447 (Apr, 18, 2025), ordering the Administrator for Federal Procurement Policy, in coordination with the Federal Acquisition Regulatory Council and the heads of agencies, to—

> take appropriate actions to amend the [Federal Acquisition Regulation] 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 promote economic or national security interests.

The Executive Order also applies to agency FAR supplements.

To many this is cause for celebration. As of this writing the FAR, updated through Federal Acquisition Circular 2025-03, 90 Fed. Reg. 506 (Jan, 3, 2025), is 2,034 pages long in its pdf three-ring binder format (available on the Acquisition.Gov). Agency supplements bring the FAR System to more than 5,000 pages. The Department of Defense FAR Supplement (DFARS) alone adds 1,458 pages. The DOD *Procedures, Guidance and Instructions* (PGI) add another 610 pages. The Department of the Air Force FAR Supplement comes to 562 pages. Contracting will surely work much better without all that. Right?

The president gave the reform team 180 days to "take action." It's not clear whether that is 180 days to finish the job or just to get started. Keep in mind that it took the Office of Federal Procurement Policy six years (1978 to 1984) to produce the FAR, and it took the FAR councils 23 months (1994 to 1996) to rewrite just FAR Part 15. Still, the acting OFPP Administrator may be able to get something done in 180 days, since the President did not direct a complete rewrite, just a recission to delete those provisions not "required by statute" and "or otherwise required." But just how tough will that job be? In attempting to address that question we ask our readers' indulgence in quoting so many regulations at length in what follows, but we think it's necessary to paint a complete picture of what may lie ahead.

What Regulations Are "Required By Statute" Or Are "Otherwise Necessary?

The FAR reformers must read 2,034 pages of text and answer two questions in order to comply with the President's order: *First*, what text is required by statute? *Second*, what remaining text is required for simplicity, usability, and efficacy, or to promote the economy or national security? They must delete the excess text and then edit whatever is left to ensure continuity and readability.

Let's consider two examples: FAR 15.306, *Exchanges with offerors after receipt of proposals*, and 15.307*, Proposal revisions*, the FAR sections pertaining to competitive negotiation and the conduct of discussions with offerors within a competitive

range. They implement 10 USCA § 3303 and 41 USCA § 3703, both captioned *Competitive proposals*, which are essentially identical. 10 USCA § 3303 states:

(a) Evaluation and award.—The head of an agency shall evaluate competitive proposals in accordance with section 3301(a) of this title and may award a contract—

(1) after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offerors within the competitive range; or

(2) based on the proposals received, without discussions with the offerors (other than discussions for the purpose of minor clarification) provided that the solicitation included a statement that proposals are intended to be evaluated and award made, without discussions, unless discussions are determined necessary.

(b) Limit on Number of Proposals.—If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under subsection (a)(1) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria.

178 words, including the caption.

FAR 15.306 and 15.307 read as follows:

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 competitive range can be limited for purposes of efficiency (see 52.215-1(f)(4)), the *contracting officer may* limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals (10 U.S.C. 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.

(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).

15.307 Proposal revisions.

(a) If an *offeror*'s proposal is eliminated or otherwise removed from the competitive range, no further revisions to that *offeror*'s proposal *shall* be accepted or considered.

(b) The *contracting officer may* request or allow *proposal revisions* to clarify and document understandings reached during negotiations. At the conclusion of discussions, each *offeror* still in the competitive range *shall* be given an opportunity to submit a final *proposal revision*. The *contracting officer* is required to establish a common cut-off date only for receipt of final *proposal revisions*. Requests for final *proposal revisions shall* advise *offerors* that the final *proposal revisions shall* be *in writing* and that the Government intends to make award without obtaining further revisions. [Emphasis added.]

1,390 words. These words are products of the 1997 FAR Part 15 Rewrite, the stated purpose of which was "to infuse innovative techniques into the source selection process, simplify the process, and facilitate the acquisition of best value." FAC 97-02, 62 Fed. Reg. 51224, (Sept. 30, 1997). Which of them are required by statute or are otherwise necessary?

Where Did The Discussions Statute And Regulations Come From?

Laws and regulations are the products of experience, politics, investigation, analysis, legislation, promulgation, implementation, litigation, and administrative and judicial interpretation. The modern era of Government procurement regulation was launched by passage of the *Armed Services Procurement Act of 1947*, Pub. L. No. 80-413, 62 Stat. 21 (1948), and the *Federal Property and Administrative Services Act of 1949*, Pub. L. No. 81-152, 63 Stat. 377. Those laws prompted the development of the *Armed Services Procurement Regulation* (ASPR), later renamed the *Defense Acquisition Regulation* (DAR) and the *Federal Procurement Regulation* (FPR), two of the precursors of the FAR, and the agency supplements that followed.

The new statutes required agencies to award contracts by formal advertising (now called sealed bidding), but permitted agencies to procure by negotiation (any process that was not formal advertising) under specified circumstances. Congress expected most contract obligations to be made by sealed bidding. They did not trust negotiation to produce fair and reasonable prices, considering it subject to deception and fraud, but they bowed to the realities of the postwar world and the incipient Cold War.

In 1950, President Truman declared a national emergency in connection with the Korean crisis. National emergency was one of the circumstances in which agencies could procure by negotiation, and the Department of Defense began doing so in order to mobilize. Congress again accepted reality. Although active hostilities ended in 1953, the President did not cancel the national emergency, and the DOD continued to procure by negotiation. Shortly thereafter, Congress was shocked by the discovery that more than 90% of the DOD's annual contract obligations were the result of negotiated procurement and had fits. The DOD pointed out that it was getting competition, but Congress learned that the military services generally awarded contracts based on initial proposals, without bargaining for lower prices. So why weren't they using formal advertising?

A key practical problem with the conduct of procurement by competitive negotiation was how to negotiate with multiple offerors for a contract that would be awarded to only one. How could you do that effectively, yet fairly and ethically? It didn't seem appropriate or fair to tell offerors: *Well Offeror X is offering to do the job for this much less. Can you do it for that, or less?* or *Well, X is offering me this product feature. Can you?* Industry complained bitterly about such practices, referred to them as *auctioning*, *technical transfusion*, and *technical leveling*. Moreover, the DOD believed that offerors would not submit their best proposals initially if they knew the Government would solicit competitive proposals and then bargain for lower prices. But Congress wanted agencies to haggle. (For a discussion of this see Colson and Zweben, *An Analysis of Proposed Amendments to the Armed Services Procurement Act of 1947*, 27 Geo. Wash. L. Rev. 557, 562–563 (1958–59), and McClelland, *Negotiated Procurement and the Rule of Law: The Fiasco of Public Law 87-653*, 32 Fordham L. Rev. 411, 432–439 (1964)).

After six years of investigative subcommittee reports, committee hearings, and draft remedial legislation, Congress passed the *Truth in Negotiations Act of 1962*, Pub. L. No. 87-653, 76 Stat. 528 (1962). The text pertinent to this topic read as follows:

(c) Section [10 USCA] 2304 is amended by adding a new subsection as follows:

"(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."

175 words.

The requirement to conduct discussions had already been inserted into the Armed Services Procurement Regulation, Title 32 of the Code of Federal Regulations, *National Defense*, Chapters 1–39, likely in an unsuccessful effort to dissuade Congress from making it statutory. By 1964, the ASPR implementation of the statute, at 32 CFR 3.805-1, *General*, read as follows:

(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, except that this requirement need not necessarily be applied to:

(1) Procurements not in excess of $2,500;

(2) Procurements in which prices or rates are fixed by law or regulations;

(3) Procurements in which time of delivery will not permit such discussions;

(4) Procurements of the set-aside portion of partial set-asides or by small business restricted advertising;

(5) Procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price. Provided, however, that in such procurements, the request for proposals shall notify all offerors of the possibility that award may be made without discussion of proposals received and hence, that proposals should be submitted initially on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government. 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. After receipt of proposals, 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 conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations (see paragraph (a) of this section) shall be offered an equitable opportunity to submit such price, technical, or other revisions in their proposals as may result from the negotiations. All such offerors shall be informed of the specified date (and time if desired) of the closing of negotiations and that any revisions to their proposals must be submitted by that date. All such offerors shall be informed that any revision received after such date shall be treated as a late proposal in accordance with the "Late Proposals" provisions of the request for proposals. (In the exceptional circumstances where the Secretary concerned authorizes consideration of such a late proposal, resolicitation shall be limited to the selected offerors with whom negotiations have been conducted.) In addition, all such offerors shall also be informed that after the specified date for the closing of negotiation no information other than notice of unacceptability of proposal, if applicable (see § 3.106(a)), will be furnished to any offeror until award has been made.

552 words. (We might say that paragraph (a) implemented the statute and paragraph (b) provided what Ralph has called "guidance.")

By 1984 and the arrival of the FAR, the original discussions statute had not changed significantly, but the implementing regulations in FAR 15.609, 15.610, and 15.611, quoted below, resulted from application of Government Accountability Office case law and industry input:

15.609 Competitive Range.

(a) The contracting officer shall determine which proposals are in the competitive range for the purpose of conducting written or oral discussion (see 15.610(b)). The competitive range is determined on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award. When there is doubt as to whether a proposal is in the competitive range, the proposal should be included.

(b) If the contracting officer, after complying with 15.610(b), determines that a proposal no longer has a reasonable chance of being selected for contract award, it may no longer be considered for selection.

(c) The contracting officer shall notify in writing an unsuccessful offeror at the earliest practicable time that its proposal is no longer eligible for award (see 15.1001(b)(1)).

(d) If the contracting officer initially solicits unpriced technical proposals, they shall be evaluated to determine which are acceptable to the Government or could, after discussion, be made acceptable. After necessary discussion of these technical proposals is completed, the contracting officer shall (1) solicit price proposals for all the acceptable technical proposals which offer the greatest value to the Government in terms of performance and other factors and (2) make award to the low responsible offeror, either without or following discussion, as appropriate. Except in acquisition of architect-engineer services (see Subpart 36.6), a competitive range determination must include cost or price proposals.

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.

The Competition in Contracting Act of 1985 brought only minor additional changes to the discussions statute and the FAR implementation. Congress subsequently reorganized Titles 10 and 41 and enacted the texts cited at the beginning of this article. FAR Part 15 coverage of discussions has not changed significantly since the 1997 Rewrite.

Conclusion

It should be obvious from the text of Pub. L. No. 87-653(c), quoted above, that Congress wanted Contracting Officers to bargain for lower prices when contracting by negotiation. But the language of the statute did not plainly reflect that. Defense procurement personnel knew that in order to seek better prices they would have to discuss certain technical matters on which prices are based, and the DOD's rules reflected that. The decades of GAO bid protest decisions and "case law" interpreting the statute and regulations required disclosure to offerors of significant technical "weaknesses" and "deficiencies," which prompted further regulatory development and input from industry. In short, much of today's regulatory bloat reflects the effort to make sense of and prescribe a workable process for explaining general and vague laws to the acquisition workforce in an effort to ensure compliance, treat industry fairly, and avoid bid protests. We conclude that "required by statute" *means required to satisfy the goals of statute and prescribe a fair process* not just required by the plain words of statute.

What will be the outcome of the President's order to reform the FAR, and how will it affect the acquisition process? Some think that it will unleash the forces of innovation and improve the process. We have our doubts. Regulations do not design, create, and execute processes and make contracts. People do. The real fix to today's messy processes and unsatisfactory outcomes is to educate and train the workforce, which cannot be done in 180 days. But if past is prologue the President's FAR reform team will do *something* and then immediately declare it to be a success that saves time and money. *Hammer Awards for everyone!* The actual result? We are reminded of a verse from the Hindu *Rig Veda, "Who* verily knows and *who* can here declare it, *whence* was born and *whence* comes this creation?" *VJE*

