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¶ 3 FAR PART 15 IS (ALMOST) OVERHAULED: What Will Contracting Officers Do Now?

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Addendum by Ralph C. Nash

We think the overhaul of Federal Acquisition Regulation Part 15, *Contracting by Negotiation*, is the most interesting and potentially impactful product of the "Revolutionary FAR Overhaul" (RFO) project. See *The Revolutionary Overhaul of FAR Part 15: A Review*, 39 NCRNL ¶ 70. And the most interesting part of the overhaul of Part 15 is the emphasis on negotiations, which, in its current model-deviation pre-public notice and comment stage, available at https://www.acquisition.gov/far-overhaul, would provide 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.]

* * *

15.204-2 Competitive negotiations.

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

(b) *Requirement*.

(1) Contracting officers must—

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

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

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

(3) Contracting officers may also negotiate other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. Contracting officers are not required to negotiate every area where the proposal could be improved.

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

exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the proposed price decreased.

* * *

(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.

The RFO discards the word *discussions* entirely and replaces it with the word *negotiations,* but what does that signify? Does it mean that Contracting Officers may ignore the old procedural barnacles that have encrusted the word discussions since it made its first appearance in procurement regulations during the late 1950s and early 1960s? If so, then what will COs do?

The Legacy Of "Discussions" In Competitive Negotiation

Here is what the Armed Services Procurement Regulation (ASPR) stated about discussions in 1961, at 32 CFR 3.805-1:

(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….

(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 after 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).

Similar language appeared in the General Services Administration's and National Aeronautics and Space Administration's rules about competitive negotiation.

Congress followed up in 1962 by statutorily mandating the conduct of discussions in competitive negotiated procurements when, in 1962, it enacted the Truth in Negotiations Act, Pub. L. No. 87-653, 76 Stat. 528, which included the following commandment:

(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.

A Protest-Rich Environment

Few procedural rules have prompted more bid protests, caused more confusion, discouraged communication during source selection and contract formation, and been revised more often than the rules about discussions in competitive negotiations. See Aerospace Technical and Procurement and Finance Councils' Weapon System Development Group, A Report on the Essential Technical Steps and Related Uncertainties in DOD Weapon Systems Development, Phase IV, Final Report (Dec. 1970), in which industry representatives complained:

Neither the Armed Services Procurement Act, nor its legislative history provide any precise definition of what Congress intended to constitute written or oral discussions, competitive range, or other factors to be considered in addition to cost, as contained in paragraph (g), Public Law 87-653, 1962. Particularly troublesome is the lack of criteria as to the nature of written or oral discussions to be conducted once a competitive range has been established. Indeed, such ambiguities have caused this provision of the Act to have the unintended effect of inhibiting the use of all pertinent factors in the source selection process. To fill the void, interpretation is continually evolving through decisions rendered by the Comptroller General as a result of award protests. The Department of Defense in turn periodically revises its directives and regulations to reflect the latest interpretations. In fact, the ASPR [Armed Services Procurement Regulations] Committee has recently developed an ASPR revision because of numerous decisions on the subject of "competitive range" and submitted the draft to the General Accounting Office [now the Government Accountability Office] for its concurrence.

Because interpretation is continuously evolving, it is difficult to postulate what the Comptroller General's decision would be in any particular protest case. Such decisions do, however, significantly effect [sic] the source selection evaluation process and therefore are appropriate to review.

When the new Federal Acquisition Regulation took effect on April 1, 1984, the rules about discussions were in FAR Part 15, *Contracting by Negotiation*. The new FAR defined *negotiation* as followed in 15.101 *Definition*. "Negotiation means contracting without formal advertising. Any contract awarded without the use of formal advertising procedures is a negotiated contract (see 14.101)." The new regulation then elaborated:

15.102 General. Compared to formal advertising, negotiation is a more flexible procedure that includes the receipt of proposals from offerors, permits bargaining, and usually affords offerors an opportunity to revise their offers before award of a contract. Bargaining—in the sense of discussion, persuasion, alteration of initial assumptions and positions, and give-and-take—may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.

The rules about discussions were in FAR 15.610, *Written or Oral Discussions,* paragraphs (c) and (d) and in 15.611, *Best and Final Offers*, which instructed COs as follows:

(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…

* * *

(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….

Nothing there about bargaining, back-and-forth, or give-and-take. The *thou shalt nots* in 15.610(d) were the product of years of industry complaints about Government behavior during discussions, bid protests, and congressional expressions of concern. When, as an intern, I participated in my first source selection in 1975, for the Minuteman Instrumented Payload Delivery System, I was taught that during discussions a CO was to "tell an offeror what was wrong with its proposal, but not how to fix it."

The Impact Of CICA

Until 1984 complaints about technical transfusion, technical leveling, and auctioning arose mainly in acquisitions by agencies for research and for system development. But the complaints became more widespread after Congress passed the Competition in Contracting Act of 1984, Pub. L. No. 98-369, div. B, tit. VII, 98 Stat. 494, 1175, because that law liberalized the use of negotiated procurement and prompted agencies that had conducted relatively few "best value" source selections to adopt that method in more acquisitions, leading to an increase in the number of bid protests about the conduct of discussions. It might justifiably be argued that CICA caused more problems than it solved, in part because the agencies newly turning to "best value" source selections did so by copying the Department of Defense, asking competitors in acquisitions of various products and services to prepare "technical" and "management" proposals describing their "proposed approach" to doing this or that, and then conducting half-baked discussions.

The 1997 FAR Part 15 Rewrite

The 1997 FAR Part 15 Rewrite, Federal Acquisition Circular 97-02, 52 Fed. Reg. 51224 (Sept. 30, 1997), was a multiyear-long project launched in 1995 "to simplify, update and streamline rules related to negotiated procurements." 60 Fed. Reg. 65360 (Dec. 19, 1995). The rewrite tried to solve the problems by revising the rules about discussions to state that *discussion*s were *negotiations* and included *bargaining* and *give-and-take.* The rewritten rules read today as follows at FAR 15.306(d) and (e):

> (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 [FAR] 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 [FAR] 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 [FAR] 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 [FAR] 3.104 and 41 U.S.C. 2102 and 2107).

The FAR councils explained the changes as follows:

Discussions. The initial proposed rule contained the existing FAR guidance regarding the type and amount of information that should be exchanged during discussions.

In response to public comments, the second proposed rule requires a more robust exchange of information during discussions. The language requires the Government to identify, in addition to significant weaknesses and deficiencies, other aspects of an offeror's proposal that could be enhanced materially to improve the offeror's potential for award. This change should benefit all offerors, including small businesses, because it permits offerors to develop a better understanding of the Government's evaluation of their proposal, and permits them to optimize their potential for award.

62 Fed. Reg. at 51229. Despite paragraph (d), it appears that real negotiating has been rare. See Whiteford, *Negotiated Procurements: Squandering the Benefits of the Bargain*, 32 Pub. Cont. L.J. 509 (Spring 2003).

Sole-Source Negotiations

Most of our experience with actual give-and-take negotiation has been in connection with sole source procurements. The process generally went something like this:

1. Informal preliminary consultation with the sole source concerning the requirement (and, perhaps, funding)
2. Government specification of the requirement
3. Government preparation of a draft Request for Proposals
4. Consultation with the sole source about the non-technical terms of the solicitation
5. Preparation and review of the solicitation
6. Issuance of the solicitation and further consultation
7. Receipt of the sole source's proposal
8. Government technical and cost proposal analysis
9. CO fact-finding, mainly about price
10. Government team development of technical/price negotiation objectives
11. Higher level approval of Government team's technical/price negotiation objectives
12. CO convenes negotiations
13. Parties reach final agreement; negotiations completed

14. CO preparation of price negotiation memorandum

15. Higher level approval of the bargain

16. Contractor signature

17. CO acceptance and signature

That process might take days, weeks, or even months depending on the technical complexity, dollar value, and urgency of the requirement. Try to imagine doing anything like that with multiple offerors in a competitive negotiated acquisition. How long would it take?

How will *competitive* negotiations under the RFO Part 15 proceed? What kind(s) of processes, procedures, methods, and techniques do the overhaulers of Part 15 envision? *What will COs actually do?*

Negotiating Is More Complicated Than Merely Discussing

The Defense Acquisition University's CONTRACT PRICING REFERENCE GUIDES, *Volume 5, Negotiation Techniques*, is an 87-page treatise that provides guidance about negotiation processes and techniques. It describes negotiation as follows:

> **1.1 Description of Negotiation.** Negotiation is 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. . . . Negotiation is not one party dictating or imposing terms on another. When that happens, the outcome will rarely produce mutual satisfaction. The result can only be mutually satisfactory if both differences and common interests are considered. To obtain agreement, you must generally sacrifice or yield something in order to get something in return. In other words, you must give to get. But as long as the anticipated benefit is greater than your sacrifice, a negotiated agreement is beneficial. The limit on yielding is reached when one party believes that concessions would be more costly than the benefits of agreement.

We wonder if that is what the FAR overhaulers have in mind. To that we add the following guidance:

First, effective negotiation requires anticipation, analysis, planning, and preparation. When a requirement is simple, straightforward, and non-negotiable, there may not be much to negotiate other than price. Competition may be enough. But when a requirement is complex and contingent, the CO should, during solicitation preparation, consider (1) what nonprice tradeoffs offerors might make when developing their offers within the boundaries of the specification, and (2) what technical/price tradeoffs they might make. Those decisions will affect value. Think of each set of nonprice and nonprice/price tradeoffs as offer possibilities. Those should be the foci of the Government evaluators' offer analyses and of the setting of any objectives for negotiation with offerors within a competitive range.

Second, COs must not waste precious time planning to "negotiate" mere information. If the RFP ask offerors to submit an "approach" or a plan of some kind, but the CO does not intend to incorporate it into the contract, the RFP should instruct prospective offerors that the responses they provide will constitute a test of their understanding and capability and that the Government will not seek clarification of it, discuss the Government's evaluation of it, disclose weaknesses and deficiencies in it, or let them revise it, but will consider it when establishing a competitive range and selecting the successful offeror. The RFPs should tell offerors that the Government will discuss and negotiate only prospectively binding promises. RFPs should distinguish between mere information and the promises that constitute the offer, and COs must make sure that proposal preparation instructions state that mere information and promises must be distinguished within their proposal package.

Third, if in a complex acquisition a CO expects to negotiate with offerors in the competitive range, then the solicitation should state that the Government will limit the competitive range to no more than three competitors. (See RFO 15.204-1, *Establishing a competitive range*, paragraph (b).) Real negotiation takes time, for both preparation and execution. Negotiating, rather than merely discussing, with more than three offerors would challenge even the best COs and source selection teams. And if COs are thinking of spending no more than an hour or two or half a day in negotiations with each offeror in any but the simplest of acquisitions, then they are probably going to waste their time.

Fourth, the first step in negotiating is to make sure that the offeror and the Government share a common understanding the

requirement. The negotiation session may be the only chance the parties will have to make sure they have a meeting of the minds. COs must make sure both parties are negotiating from the same standpoint. The parties must take the time to review the specification document and non-standard contract clauses together. If they discover differences in their understandings, they should take the time to sort them out and to adjust negotiation objectives as necessary.

Fifth, COs must keep in mind that price is never really "fixed" under a Government contract, not even under a firm-fixed-price contract. Price is the most obvious thing to negotiate about, but there are many contingencies, circumstances, and situations that may result in one of the parties being entitled to a price adjustment. Experienced companies know that and plan for it. COs should keep that in mind when bargaining for price concessions. They should be wary of driving too hard a bargain on price.

Sixth, before COs close negotiations with offerors, they should try to reach a tentative agreement as to what changes they expect the offerors to address or make in their revised proposals. If the parties negotiated effectively, then the revised proposal should not be a complete surprise. Far better for it to be a confirmation of negotiations.

Conclusion

What will COs do after the overhaul finally replaces the current rules? We suspect that few COs have much experience negotiating complex contract terms, and the RFO FAR Companion and the *practice guides* are, in their present state, practically useless. Will COs conduct competitive negotiations competently? If so, how will they do it? We do not know, but if history is any guide, the RFO will be followed by lengthy period of uncertainty, confusion, and bid protest litigation. How will the protest tribunals respond? We think the Government Accountability Office might be cautious and lenient, but the U.S. Court of Federal Claims might be more rigorous and unforgiving. Only time will tell.

It is worth noting that much of the difficulty in competitive negotiation is the product of the statutory requirement to conduct discussions (negotiate) with all offerors within a competitive range. 10 USCA § 3303(a)(1); 41 USCA § 3703(a)(1). Why not eliminate that requirement? Why not simply accept the outcome of the initial submission and evaluation of competitive offers, which is that one offeror will usually be a better value than all the others, and task COs with negotiating for a better deal with that offeror if they see the potential for one? That way COs would have a free hand to bargain without so many ethical concerns and procedural complications. Let the Procurement Integrity Act address disclosures of the content of the other offers. If it works when selecting architect-engineer contractors, why not let it work in Part 15 source selections? And if give-and-take leads to a better deal through a change of the Government's requirements, then let it be done without amendment of the RFP and without giving the other offerors a chance to respond if the change is within the scope of the original requirement? Let COs negotiate with more than one offeror at their discretion but eliminate the regulatory mandate. However, that fix would require congressional action and is beyond the mandate of the president's FAR overhaul executive order. See Executive Order No. 14275, *Restoring Common Sense to Federal Procurement* (Apr. 15, 2025), 90 Fed. Reg. 16447 (Apr. 18, 2025).

Will anything be better after the FAR overhaul takes final effect? Who knows? How well have acquisition reforms worked out in the past? *It depends on the workforce, not the rules. VJE*

ADDENDUM

I have a simple addition to Vern's suggestions that might make life easier. If the FAR were to require the solicitation to clearly state the difference between an offer (promises) and mere information, it should state that clarification pertains solely and entirely to information and negotiation pertains solely and entirely to promises. That matches Vern's suggestion about negotiation but also allows COs the latitude to probe information to reach a firm conclusion as to an offeror's capability.

This would require the CO to decide up front whether technical and/or management approaches are to be treated as capability-assessment information or as binding promises. COs should also be given the latitude to negotiate for such approaches to be made promises. *RCN*

